



Neutral Citation Number: [2019] EWHC 2512 (Ch)

Case No: DOOHD107

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN LEEDS
CHANCERY APPEALS (ChD)

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

Date: 27th September 2019

Before :

SIR GERALD BARLING
(sitting as a Judge of the High Court)

Between :

Kensington Mortgage Company Limited

Claimant
and
Respondent

- and -

(1) Mr Cyril Eugene Mallon

First Defendant

(2) Mr Ghulam Mustafa Zaman & Mrs Jamila Zaman

Second Defendants
and Appellants

- and -

Louise Brittain
(Trustee in bankruptcy of 1st Defendant)

Defendant to
Second
Defendants'
Part 20 claim

Mr Clifford Payton (instructed by **TLT Solicitors**) for the **Claimant and Respondent**
Mr Paul Lakin (instructed by **Handslaw Solicitors**) for the **Second Defendants and Appellants**

Hearing dates: 10 April 2019, 18 June 2019 and 2 July 2019

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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 as handed down may be treated as authentic.

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SIR GERALD BARLING:

Introduction

1. This application for permission to appeal is subject to an order I made on 23 November 2018 for a “rolled up” hearing, to the effect that if permission was granted the appeal would follow immediately. As is usual in such cases, I have heard full argument on the grounds of appeal rather than dealing separately with the issue of permission.
2. Also before me is an application for permission to amend the grounds of appeal to add a further ground, Ground 5, relating to proprietary estoppel.
3. The appeal is against an order for possession and related orders made by His Honour Judge Davey QC (“the Judge”) on 31 May 2018 following his judgment on 27 April 2018. The possession order is in respect of the Appellants’ family home, a terraced house in Dewsbury (“the House”).
4. The Appellants, Mr and Mrs Zaman, were the joint Second Defendants in the proceedings in the court below. They are represented in the appeal by Mr Lakin of counsel, who did not appear below. The Respondent to the appeal (the Claimant in the court below) is Kensington Mortgage Company Limited, who was represented in the appeal and below by Mr Payton of counsel.
5. There were two additional parties in the underlying claim: the First Defendant, Mr Cyril Mallon, and Ms Louise Brittain, who is Mr Mallon’s trustee in bankruptcy. Ms Brittain is the Part 20 Defendant to a counterclaim by the Second Defendants. Neither Mr Mallon nor Ms Brittain have played any part in the appeal.

The facts

6. The facts are not in dispute. Their source is in large measure the evidence provided to the Judge by Mr and Mrs Zaman and Mr Zaman’s school friend, Mr Mohammed Fadia who, with his wife, originally owned the House. Mr Mallon did not give evidence or take part in the trial below. The following summary of the facts is mainly drawn from the clear and succinct account set out in the Judgment.
7. In about 2000 Mr and Mrs Zaman, who lived in Dewsbury, wished to move to a bigger property as their family was growing. The Zamans agreed with Mr and Mrs Fadia that they would buy the House for £55,000. The Zamans raised and paid £33,000. It was agreed that the balance would be paid at £1,000 per month, and that in the meantime the Zamans could move into the House which would be transferred to them once the balance of the purchase price was paid. The agreement was put into writing but no copy was available at the trial.
8. The Judge found as a fact that the Zamans had moved into the House by the autumn of 2002, having regard to correspondence addressed to them there from their bank and local authority in relation to council tax. It is common ground that the Zaman family have lived in the House since then.

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9. Mr Zaman ran a wholesale meat business. In the course of that business, in 1997, he met Mr Mallon, who lived in Northern Ireland where he carried on business supplying meat. Mr Mallon's business, called Carna Meats, supplied its products to Mr Zaman. By 2002 Carna Meats was Mr Zaman's sole meat supplier and the two men had become good friends, visiting each other's homes.
10. The meat was bought by Mr Zaman mainly on credit, and re-sold also on credit on a wholesale basis to his retailer customers. Mr Zaman began to suffer cash flow problems, and by 2002 he owed Carna Meats about £32,000. Mr Mallon threatened to stop supplies of meat unless the debt was paid in full. A discussion between the two men took place at Mr Zaman's commercial premises in Batley. Mr Zaman indicated that the debt would be paid in full, but if supplies were stopped the business would have to close down. Mr Mallon said he would consider the matter. There were further meetings to discuss how the debt would be paid. At a final meeting at the House, Mr Zaman mentioned that he had now paid for that property and that it was to be transferred into his and Mrs Zaman's names. During this meeting Mr Mallon suggested that the House be transferred into his name as security until the debt was cleared. Mr Zaman agreed to this, and that he would pay £300 per week in addition to paying for new meat supplies as they arose. On this basis Mr Zaman calculated that the debt to Carna Meats would be paid off in just over 2 years. The agreement was purely oral.
11. Mrs Zaman was aware of this agreement. Mr Zaman also informed Mr Fadia who, with his wife, was the vendor. Mr Zaman said that the Mr Fadia was "cautious" about transferring the House to Mr Mallon. Mr Fadia said that he had told Mr Zaman that he should not do it, but that the latter had told him to go ahead, despite Mr Zaman acknowledging the risk. Mr Fadia rang Mr Zaman from his solicitor's office when he was about to sign the transfer, and asked whether Mr Zaman was sure he wanted this to be done. Mr Zaman assured him that he did and that it was only until the debt owed to Carna Meats was paid off. Accordingly, Mr Fadia instructed his solicitor to transfer the House into Mr Mallon's name.
12. A TR1 was completed by Mr and Mrs Fadia dated 23 July 2003, recording the transfer of the House by them to Mr Mallon for a consideration of £55,000. On the form this sum was declared to have been received by Mr and Mrs Fadia from Mr Mallon. The TR1 was received by the Land Registry on 18 August 2003 and the Proprietorship Register was duly updated on that day, stating under the heading "Title Absolute: 18 August 2003, proprietor: Cyril Eugene Mallon".
13. The Judge found that the transfer had been made "in accordance with the clear intentions and the clear instructions of all three men".
14. On 8 December 2003 Mr Mallon applied to a finance company called igroup Limited for a buy-to-let mortgage based on a valuation of the House at £130,000. The application was accepted, and Mr Mallon borrowed £103,999 to be repaid in monthly instalments over 30 years. The mortgage ("the First Mortgage") was created on 9 January 2004 and registered at the Land Registry on 13 January 2004. In 2005 Mr Mallon took out a second mortgage on the House with a different mortgage provider ("the Second Mortgage").

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15. Mr Mallon's buy-to-let mortgage application to igroup Limited was supported by what purported to be shorthold tenancy agreement dated 1 December 2003 in respect of the House between Mr Mallon as landlord and Mr Zaman as tenant at a calendar monthly rent of £700. The agreement provides for a six month term beginning on that date. It purports to be signed by Mr Zaman.
16. Mr Zaman's evidence, accepted by the Judge (who stated that both Mr Zaman and Mr Fadia were honest witnesses), was that he knew nothing of this tenancy agreement, had paid no rent and had signed no such document; therefore, his apparent signature was a forgery. He also said that he knew nothing of any mortgage or any arrears until 2016, when a formal notice concerning one of the mortgages was sent to the House.
17. The Judge accepted that igroup Limited had made all the enquiries of Mr Mallon they could reasonably be expected to have made, and had received satisfactory answers, including as to his actual address (which was in Northern Ireland). He noted that their valuer, a Mr Jones, had recorded in his report that at the time of his valuation inspection the occupants of the House were "the applicants" (presumably a reference to Mr Mallon) and that in the section headed "Person Present at Survey" he had noted "Mr Mallon and family". The Judge commented that these matters would hardly have been recorded without some inquiry being made.
18. Mr Mallon paid the monthly instalments on the First Mortgage until about the end of 2014, from which time arrears began to accumulate. The same appears to have occurred with the Second Mortgage.
19. The Respondent is the successor to igroup Limited. The Respondent's proprietorship of the legal charge constituted by the First Mortgage was registered at the Land Registry on 9 June 2016.
20. In the meantime, by about the beginning of 2006 Mr Zaman had cleared the debt of £32,000 owed to Carna Meats. From this time Mr Zaman, who was still buying meat from Carna Meats, regularly raised with Mr Mallon the fact that he should now transfer the House into Mr and Mrs Zaman's names. Mr Mallon reassured Mr Zaman that he would sort the matter out soon. However, he did not effect the transfer, and in 2016 he was made bankrupt. Ms Brittain was appointed his trustee in bankruptcy.

The proceedings

21. In February 2017 the Respondent, as registered proprietor of a legal charge over the House, issued a claim for possession of the property and for mortgage arrears and costs against Mr Mallon. In June 2017 Mr and Mrs Zaman were joined as joint Second Defendants to the claim. In August 2017 they served an Amended Defence and Counterclaim, which included counterclaims against both the Respondent and against Mr Mallon and Ms Brittain (as the latter's trustee in bankruptcy). The pleading alleged *inter alia* that the agreement between Mr Mallon and the Zamans created a mortgage by assignment in favour of Mr Mallon and/or an equity of redemption in favour of the Zamans; that pursuant to section 51 of the Land Registration Act 2002 this took effect as a charge by deed by legal mortgage; that the registration of Mr Mallon as proprietor as distinct from charge holder was a mistake, which entitled the Zamans to alteration and/or rectification of the Register; that further or alternatively the Zamans were entitled "to redeem" the House; that further

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or in the further alternative, any interest in the House of the Respondent was subject to the Zamans' rights under a proprietary estoppel which prevented Mr Mallon denying that they were entitled to a transfer of the House on payment of the debt of £32,000.

22. No defences were filed by Mr Mallon or (in respect of the Part 20 claim) Ms Brittain. The Respondent filed an Amended Reply and Defence to Counterclaim. The Part 20 claim against Ms Brittain was stayed with liberty to any party to that claim to apply.
23. An application by the Respondent to strike out the Zamans' pleading failed in August 2017, and the matter came on for trial before the Judge in February 2018.

The hearing and judgment below

The trust argument

24. On the morning the trial began, counsel (not Mr Lakin) for Mr and Mrs Zaman sought to raise a further issue, either on the basis of the existing pleading or by amendment. This was that a constructive or resulting trust of the House existed in favour of the Zamans. Mr Payton, on behalf of the Respondent, objected on the basis that a trust point had not been pleaded. The Judge noted that in a skeleton argument prepared for the strike out hearing in August 2017 mention had been made of the possibility of reliance on a constructive trust. The Judge also noted that no application appeared to have been made on that occasion to include such a point in the amended pleading which Mr and Mrs Zaman were given permission to serve, and which they did serve on 22 August 2017; nor was any attempt made thereafter to re-amend the pleading to include a trust point of any kind.
25. The Judge rejected Mr and Mrs Zaman's argument that no amendment was required as the necessary facts had already been pleaded. He held that CPR 16.2(1) required the claim form to contain a concise statement of the nature of the claim. Further, under Practice Direction 16PD.8.2(4), details of any breach of trust must be set out in the particulars of claim. The whole point of pleadings was to ensure that the essential elements of each party's case were known to the other side, and to prevent situations such as that confronting the court, where on the day before the trial began a new point was raised in a skeleton argument. It was incumbent on the Zamans to plead the specific kind of constructive trust they proposed to rely upon, and the factual basis for it. The same applied to any resulting trust contended for. He therefore held that it was not open to Mr and Mrs Zaman to run any kind of trust case. He refused the application to amend by addition to the Zamans' pleading of the words "the above gives rise to a constructive and/or resulting trust in favour of the second defendants".
26. However, the Judge also expressed the view that even if pleaded he would not have accepted the trust point, as it was clear that no trust existed. The agreement was that the House would be transferred to Mr Mallon, and that it would thereafter be transferred by him to the Zamans if, but only if, Mr Zaman paid the debt owed to Carna Meats. Further, even if there had been a trust Mr Mallon had power to charge the House and did so in the mortgage deed with a full title guarantee. In those circumstances, by virtue of subsection 3(1) of the Law of Property (Miscellaneous Provisions) Act 1994, there was a covenant that the disposition was free of all charges and incumbrances and all other rights exercisable by third parties other than any

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which the person making the disposition could not reasonably be expected to know about.

Mistake/rectification

27. The Judge rejected the Zamans' contention that there had been a mistake in registering Mr Mallon as a proprietor rather than as a chargee, which entitled them to rectification of the Register under Schedule 4 of the Land Registration Act 2002 ("the 2002 Act"). Relying on the judgment of Kitchin LJ (as he then was) in *NRAM Limited v Evans & Another (Chief Land Registrar intervening)* [2017] EWCA Civ 1013, he declined to accept the argument that had the Registrar known the true facts at the time he registered the transfer, he would not have registered it. He held that the true facts were that the transfer was precisely what was intended by all concerned. It was neither void nor voidable. The legal title was vested absolutely in Mr Mallon with all powers of disposition, and not simply by way of a charge. He referred to the Zamans' pleading, which asserted that Mr Zaman had "caused Mr Mallon to be registered at the Land Registry as proprietor of the property." He held there was, therefore, no mistake, and the question of rectification did not arise.

Proprietary estoppel

28. It is uncontroversial that the Zamans' agreement with Mr Mallon was an oral one, and in so far as it was an agreement for the disposition of an interest in land (viz, the transfer of title to the House by Mr Mallon to the Zamans if and when the meat debt was discharged) that agreement was void and unenforceable by virtue of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act"), which required such an agreement to be in writing. The argument under this head was that section 2 does not affect a proprietary estoppel, just as, by virtue of the express exclusion in subsection 2(5) of the 1989 Act, it does not affect "the creation or operation of resulting, implied or resulting trusts."
29. The Judge did not accept this argument, preferring the *obiter* view expressed by Lord Scott of Foscote in *Cobbe v Yeoman's Row Management Limited* [2008] 1 WLR 1752, at paragraph 29, to the effect that proprietary estoppel did not have the benefit of the express exception for trusts in subsection 2(5), and could not render enforceable an agreement which statute has declared to be void.

Other points

30. The Judge dealt finally with the argument that the Zamans had an equity of redemption and/or were entitled "to redeem" the House. He interpreted this as an assertion that they were entitled to redeem a mortgage. He rejected this on the basis that, in the light of his conclusions, there was no mortgage for the Zamans to redeem.

The Judge's overall conclusion

31. The Judge concluded that the Zamans at no time had any legal or equitable interest in the House, and that there was no defence to the claim for possession.

The appeal

The grounds

32. Mr and Mrs Zaman issued their Appellant's Notice with Grounds of Appeal on 1 June 2018.
33. Grounds 1 and 2 of the appeal concern the Judge's rejection of the argument that on a proper analysis of the pleading the trust point was already sufficiently pleaded and was correct, and the Judge's refusal of the Zamans' application to amend their pleading to include the trust point.
34. Ground 3 challenges the Judge's rejection of the Zamans' claim to be entitled to rectification of the Register by reason of mistake.
35. Ground 4 relates to the Judge's costs order. This is challenged purely on the basis that his conclusions on the substance were wrong in law.
36. Ground 5: On 19 December 2018 I made an order for the Zamans to file and serve a perfected skeleton argument by 7 January 2019. On 18 February 2019, 2 days before the appeal was then due to be heard, an application was issued for permission to amend the Grounds of Appeal by adding a Ground 5: viz, that the Judge was wrong in law to dismiss the Zamans' claim in proprietary estoppel. A skeleton argument on the point was provided the day before the appeal hearing was originally listed. In fact, that date was vacated. The matter did not come on for hearing until 10 April 2019, and was not completed until July 2019. In these circumstances, although Mr Payton formally objected on the basis of the unexplained lateness of the application to amend the Grounds, no specific prejudice was suffered by the Respondent, and Ground 5 has been fully argued. I therefore grant the amendment application in respect of that Ground. I should also say that if and in so far as arguments relating to this issue have been raised before me which were not argued or not argued as fully before the Judge, neither side has sought to object to or exclude such points.

The case law relating to the trust and proprietary estoppel issues

37. Several of the cases to which I was referred in the course of submissions discuss both the concept of a constructive trust and that of proprietary estoppel. It is therefore convenient at this stage to highlight some of the passages in those cases which touch upon the matters raised in this appeal.
38. In *Yaxley v Gotts* [2000] Ch 162 there was an oral agreement whereby the purchaser of a house promised to grant a builder an interest in the property in exchange for work and materials supplied. On the facts which he found, the county court judge had held that a proprietary estoppel arose which, despite the absence of a reference to estoppel as an exception in subsection 2(5) of the 1989 Act, entitled the builder to a long lease of part of the property. The Court of Appeal (Robert Walker, Clarke and Beldam LJ) dismissed the appeal, holding that on the facts found by the judge a constructive trust also arose, which justified the relief granted.
39. In the course of his judgment, Robert Walker LJ (as he then was) said:

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“I have no hesitation in agreeing with what I take to be the views of Peter Gibson, Neill, and Morritt LJ, that the doctrine of estoppel may operate to modify (and sometimes perhaps even counteract) the effect of s.2 of the 1989 Act. The circumstances in which s.2 has to be complied with are so various, and the scope of the doctrine of estoppel is so flexible, that any general assertion of s. 2 as a 'no go area' for estoppel would be unsustainable. Nevertheless the impact of the public policy principle to which Sir John Balcombe drew attention in *Godden* does call for serious consideration. It is not concerned with illegality (some confusion may have arisen from the inadequate report or note shown to this court in *Bankers Trust v Namdar*) but with what Viscount Radcliffe in *Kok Hoong* (at page 1016) called a principle of general social policy -

"to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise."

In this case that principle must of course be applied consistently with the terms in which s.2 of the 1989 Act has been enacted, including the saving at the end of s. 2(5)...

At a high level of generality, there is much common ground between the doctrines of proprietary estoppel and the constructive trust, just as there is between proprietary estoppel and part performance. All are concerned with equity's intervention to provide relief against unconscionable conduct, whether as between neighbouring landowners, or vendor and purchaser, or relatives who make informal arrangements for sharing a home, or a fiduciary and the beneficiary or client to whom he owes a fiduciary obligation. The overlap between estoppel and part performance has been thoroughly examined in the appellants' written submissions...

The overlap between estoppel and the constructive trust was less fully covered in counsel's submissions but seems to me to be of central importance to the determination of this appeal. Plainly there are large areas where the two concepts do not overlap: when a landowner stands by while his neighbour mistakenly builds on the former's land the situation is far removed (except for the element of unconscionable conduct) from that of a fiduciary who derives an improper advantage from his client. But in the area of a joint enterprise for the acquisition of land (which may be, but is not necessarily, the matrimonial home) the two concepts coincide. Lord Diplock's very well-known statement in *Gissing v Gissing* [1971] AC 886, 905 brings this out,

"A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

Similarly, Lord Bridge said in *Lloyds Bank v Rosset* [1991] 1 AC 107, 132,

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting the claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel."

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It is unnecessary to trace the vicissitudes in the development of the constructive trust between these two landmark authorities, except to note the important observations made by Sir Nicolas Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch 638, 656, where he said,

"I suggest that in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v Gissing* [1971] AC 886. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions."

In this case the Judge did not make any finding as to the existence of a constructive trust. He was not asked to do so, because it was not then seen as an issue in the case. But on the findings of fact which the Judge did make it was not disputed that a proprietary estoppel arose, and that the appropriate remedy was the grant to Mr Yaxley, in satisfaction of his equitable entitlement, of a long leasehold interest, rent free, of the ground floor of the property. Those findings do in my judgment equally provide the basis for the conclusion that Mr Yaxley was entitled to such an interest under a constructive trust. The oral bargain which the Judge found to have been made between Mr Yaxley and Mr Brownie Gotts, and to have been adopted by Mr Alan Gotts, was definite enough to meet the test stated by Lord Bridge in *Lloyds Bank v Rosset*."

40. Beldam LJ made the following comments:

"In the present case the policy behind the Commission's proposals was as clearly stated as its intention that the proposal should not affect the power of the court to give effect in equity to the principles of proprietary estoppel and constructive trusts. Even if the use to be made of the Commission's Report is to be confined to identifying the defect in the law which the proposals were intended to correct, in a case such as the present it is unrealistic to divorce the defect in the law from the policy adopted to correct it. The Commission's Report makes it clear that in proposing legislation to exclude the uncertainty and complexities introduced into unregistered conveyancing by the doctrine of part performance, it did not intend to affect the availability of the equitable remedies to which it referred.

The general principle that a party cannot rely on an estoppel in the face of a statute depends upon the nature of the enactment, the purpose of the provision and the social policy behind it. This was not a provision aimed at prohibiting or outlawing agreements of a specific kind, though it had the effect of making agreements which did not comply with the required formalities void. This by itself is insufficient to raise such a significant public interest that an estoppel would be excluded. The closing words of Section 2(5) "... nothing in this section affects the creation or operation of resulting, implied or constructive trusts" are not to be read as if they merely qualified the terms of Section 2(1). The effect of Section 2(1) is that no contract for the sale or other disposition of land can come into existence if the parties fail to put it into writing; but the provision is not to prevent the creation or operation of equitable interests under resulting implied or constructive trusts, if the circumstances would give rise to them.

Quite apart from the views expressed by the Commission, it was well recognised that circumstances in which equity is prepared to draw the inference that a party is entitled to a beneficial interest in land held by another may frequently also give rise to a proprietary estoppel....

There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property. In such a case it could not be said that to give effect to a proprietary estoppel was contrary to the policy of Section 2(1) of the 1989 Act. Yet it would be a strange policy which denied similar relief to a claimant who had acted on a clear promise or representation that he should have an interest in the property. Moreover claims based on proprietary estoppel are more likely to arise where the claimant has acted after an informal promise has been made to him....

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For my part I cannot see that there is any reason to qualify the plain words of Section 2(5). They were included to preserve the equitable remedies to which the Commission had referred. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or equitable fraud should be allowed to prevail.

In my view the provision that nothing in Section 2 of the 1989 Act is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel.

That, to my mind, is the case here.”

41. In relation to constructive trust, Clarke LJ said:

“I entirely agree with Robert Walker LJ's analysis under this head. I also agree that it follows from the findings of fact made by the judge that the plaintiff was entitled to a long leasehold interest under a constructive trust. I also agree with his construction of section 2(5) of the 1989 Act. Since section 2(5) expressly provides that nothing in section 2 affects the creation or operation of a constructive trust, it follows that nothing in section 2(1) prevents the plaintiff from relying upon the constructive trust created by the facts which have been summarised by both Robert Walker and Beldam LJJ. I agree that the appeal should be dismissed on this basis.”

42. Under the heading “Proprietary estoppel and the Law Commission” he said:

“It seems to me that in considering whether a particular estoppel relied upon would offend the public policy behind a statute it is necessary to consider the mischief at which the statute is directed. Where a statute has been enacted as a result of the recommendations of the Law Commission, it is, as I see it, both appropriate and permissible for the court to consider those recommendations in order to help to identify both the mischief which the Act is designed to cure and the public policy underlying it. Indeed, although I agree with Robert Walker LJ that they cannot be conclusive as to how a particular provision should be construed, I entirely agree with Beldam LJ that the policy behind section 2 of the 1989 Act can clearly be seen from the Law Commission Report to which he refers. In my opinion the contents of that report will be of the greatest assistance in deciding whether or not the principles of particular types of estoppel should be held to be contrary to the public policy underlying the Act. In this regard it seems to me that the answer is likely to depend upon the facts of the particular case.”

43. What emerges from this decision is that there are cases in which an interest in land could be claimed under both constructive trust and proprietary estoppel principles ie where the two principles apply equally to the facts of a particular case. In such cases any effect of section 2 of the 1989 Act on a potential proprietary estoppel is in practice academic, as relief will be available under a constructive trust by virtue of the exception in subsection 2(5).

44. In *Cobbe v Yeomans* [2008] 1 WLR 1752 HL, *Yaxley* was cited to the House of Lords, but it was not referred to in their lordships' speeches. Mr Cobbe, an experienced property developer, reached an oral understanding with the defendant in relation to a block of flats owned by the defendant. The substance of the oral agreement was that (i) Mr Cobbe, at his own expense, would apply for planning permission to demolish the flats and build a terrace of six houses, (ii) upon the grant of planning permission the property would be sold to Mr Cobbe for an up-front payment to the defendant of £12 million, (iii) Mr Cobbe would develop the property in accordance with the planning permission, and (iv) he would pay to the defendant 50 per cent of the amount, if any, by which the gross proceeds of sale of the houses exceeded £24 million. The oral agreement in principle did not cover everything that would have been expected to be dealt with in due course in a formal written contract. Such matters were for future discussion, and the outcome of those negotiations would have been

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inherently uncertain. Planning permission was granted but the defendant then demanded an up-front price of £20 million and suggested that the overage payment should be 40 per cent of the excess over £40m rather than 50% of the excess over £24m. Agreement could not be reached, and proceedings ensued.

45. Etherton J (as he then was) held that the conditions for proprietary estoppel were satisfied and that the minimum equity to do justice to Mr Cobbe required that he be awarded one-half of the increase in value of the property brought about by the grant of planning permission. The judge also held that Mr Cobbe would have been entitled to relief on his constructive trust claim but that relief on the basis of proprietary estoppel was the more satisfactory way of satisfying the equity to which the facts of the case entitled him. The Court of Appeal, too, regarded the relief granted as justified on the basis of proprietary estoppel. The House of Lords unanimously allowed the defendant's appeal, holding that no proprietary estoppel had arisen and that Mr Cobbe had no proprietary interest and was only entitled to a *quantum meruit*. The substantive speeches were by Lord Scott and Lord Walker. The other three members (Lords Hoffman, Brown and Mance) expressed agreement with the reasoning and conclusion of Lord Scott. Lord Brown also agreed with the speech of Lord Walker.
46. On the nature of proprietary estoppel Lord Scott said (at paragraphs 14, 16-17, and 28-29):

"An "estoppel" bars the object of it from asserting some fact or facts, or, sometimes, something that is a mixture of fact and law, that stands in the way of some right claimed by the person entitled to the benefit of the estoppel. The estoppel becomes a "proprietary" estoppel - a sub-species of a "promissory" estoppel - if the right claimed is a proprietary right, usually a right to or over land but, in principle, equally available in relation to chattels or choses in action... Etherton J concluded...that the facts of the case "gave rise to a proprietary estoppel in favour of Mr Cobbe", but nowhere identified the content of the estoppel. Mummery LJ agreed ... but he, too, did not address the content of the estoppel. Both Etherton J and Mummery LJ regarded the proprietary estoppel conclusion as justified by the unconscionability of Mrs Lisle-Mainwaring's conduct. My Lords, unconscionability of conduct may well lead to a remedy but, in my opinion, proprietary estoppel cannot be the route to it unless the ingredients for a proprietary estoppel are present. These ingredients should include, in principle, a proprietary claim made by a claimant and an answer to that claim based on some fact, or some point of mixed fact and law, that the person against whom the claim is made can be estopped from asserting. To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion.

Deane J, in *Muschinski v Dodds* (1985) 160 CLR 583, in a judgment concurred in by Mason J, drew attention to the nature and function of constructive trusts in the common law. His remarks, at 612 to 616 repay careful reading but I would respectfully draw particular attention to a passage at 615 relevant not only to constructive trusts but equally, in my opinion, to proprietary estoppel. He said this:

"The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, starting from the conceptual foundations of such principles ... Under the law of this country - as, I venture to think under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party 'ought to win' ... and the 'formless void' of individual moral opinion ..."

A finding of proprietary estoppel, based on the unconscionability of the behaviour of the person against whom the finding was made but without any coherent formulation of the content of the estoppel or of

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the proprietary interest that the estoppel was designed to protect invites, in my opinion, criticism of the sort directed by Deane J in the passage cited....

Proprietary estoppel requires...clarity as to what it is that the object of the estoppel is to be estopped from denying, or asserting, and clarity as to the interest in the property in question that that denial, or assertion, would otherwise defeat. If these requirements are not recognised, proprietary estoppel will lose contact with its roots and risk becoming unprincipled and therefore unpredictable, if it has not already become so...

There is one further point regarding proprietary estoppel to which I should refer. Section 2 of the 1989 Act declares to be void any agreement for the acquisition of an interest in land that does not comply with the requisite formalities prescribed by the section. Subsection (5) expressly makes an exception for resulting, implied or constructive trusts. These may validly come into existence without compliance with the prescribed formalities. Proprietary estoppel does not have the benefit of this exception. The question arises, therefore, whether a complete agreement for the acquisition of an interest in land that does not comply with the section 2 prescribed formalities, but would be specifically enforceable if it did, can become enforceable via the route of proprietary estoppel. It is not necessary in the present case to answer this question, for the second agreement was not a complete agreement and, for that reason, would not have been specifically enforceable so long as it remained incomplete. My present view, however, is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute. As I have said, however, statute provides an express exception for constructive trusts.”

47. Lord Scott’s remarks about section 2 of the 1989 Act were, of course *obiter*, as the oral agreement in that case was not complete and therefore would not have been specifically enforceable even if it had been in writing. His comments led to the view that proprietary estoppel was a dead letter. However, rumours of its death appear exaggerated, as subsequent cases have shown.

48. On the subject of a constructive trust, Lord Scott said at paragraph 30:

“It is impossible to prescribe exhaustively the circumstances sufficient to create a constructive trust but it is possible to recognise particular factual circumstances that will do so and also to recognise other factual circumstances that will not. A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed and cannot agree about what is to be done with the land, the land would have to be re-sold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers.”

49. Having reviewed the case law on proprietary estoppel, Lord Walker at paragraph 81, said:

“In my opinion none of these cases casts any doubt on the general principle laid down by this House in *Ramsden v Dyson*, that conscious reliance on honour alone will not give rise to an estoppel. Nor do they cast doubt on the general principle that the court should be very slow to introduce uncertainty into commercial transactions by over-ready use of equitable concepts such as fiduciary obligations and equitable estoppel. That applies to commercial negotiations whether or not they are expressly stated to be subject to contract.”

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50. In her lead judgment in the Court of Appeal in *Herbert v Doyle and another* [2010] EWCA Civ 1095, Lady Justice Arden (as she then was) commented on the distinction between constructive trust and proprietary estoppel:

“54. Until recently little distinction has been drawn between constructive trust and proprietary estoppel. [Lady Justice Arden then referred to the dicta of Walker LJ in *Yaxley v Gotts* which I have quoted at paragraph 39 above]

55. However, as the judge noted, more recently Lord Walker has drawn attention to need to keep the two doctrines separate. In *Stack v. Dowden* [2007] 2 AC 432, he held:

"37.... I have to say that I am now rather less enthusiastic about the notion that proprietary estoppel and 'common interest' constructive trusts can or should be completely assimilated. Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice (*Crabb v Arun District Council* [1976] Ch 179, 198), which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

56. The distinction between proprietary estoppel and constructive trust must therefore be kept in mind, but it appears from *Cobbe* that, in some situations at least, both doctrines have a requirement for completeness of agreement with respect to an interest in property. Certainty as to that interest in those situations is a common component. A relevant situation would be where the transaction is commercial in nature. In my judgment, the transaction in the present case should be treated as commercial in nature since the parties were dealing at arm's length, and they had ready access to the services of lawyers had they wished to use them.

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

58. This interpretation of *Cobbe* is consistent with the observations of Lord Neuberger in *Thorner v Major* [2009] UKHL 18, which was decided after judgment (3). In that case, Lord Neuberger observed:

"[93] In the context of a case such as *Cobbe*, it is readily understandable why Lord Scott considered the question of certainty to be so significant. The parties had intentionally not entered into any legally binding arrangement while Mr Cobbe sought to obtain planning permission: they had left matters on a speculative basis, each knowing full well that neither was legally bound: see [27]. There was not even an agreement to agree (which would have been unenforceable), but, as Lord Scott pointed out, merely an expectation that there would be negotiations. Moreover, as he said in [18], an "expectation dependent upon the conclusion of a successful negotiation is not an expectation of an interest having [sufficient] certainty"."

51. The case of *Thorner v Major* to which Lady Justice Arden referred, concerned the claimant's claim to an interest in the defendant's (his cousin's) farm on the latter's death. The claimant had worked full time on the farm for many years without remuneration until the defendant died. The defendant had encouraged the claimant to believe that he would inherit the farm and the claimant acted in reliance on that assurance. The defendant died intestate, and the claimant claimed that the defendant's estate was estopped from denying that he had acquired the beneficial interest in the farm. The claimant succeeded at first instance but lost in the Court of Appeal. The

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House of Lords (Lords Hoffman, Scott, Rodger, Walker and Neuberger) unanimously allowed the claimant's appeal on the basis of a proprietary estoppel. Only Lord Scott mentioned a constructive trust. He considered the vehicle of a remedial constructive trust to be preferable in that case, but was content for relief to be given *via* proprietary estoppel.

52. At paragraph 14 Lord Scott said:

"One of the features of the type of cases of which the present case is an example is the extent to which proprietary estoppel and constructive trust have been treated as providing alternative and overlapping remedies and, while in no way disagreeing with my noble and learned friends' conclusion that David can establish his equity in Steart Farm via proprietary estoppel, I find it easier and more comfortable to regard David's equity as established via a remedial constructive trust. I will return to this later.

53. He returned to this point at paragraphs 19-21:

"19. The second "certainty" problem about a representation that David would inherit Steart Farm, a problem inherent in every case in which a representation about inheritance prospects is the basis of a proprietary estoppel claim, is that the expected fruits of the representation lie in the future, on the death of the representor, and, in the meantime, the circumstances of the representor or of his or her relationship with the representee, or both, may change and bring about a change of intentions on the part of the representor...

20. These reflections invite some thought about the relationship between proprietary estoppel and constructive trust and their respective roles in providing remedies where representations about future property interests have been made and relied on. There are many cases in which the representations relied on relate to the acquisition by the representee of an immediate, or more or less immediate, interest in the property in question. In these cases a proprietary estoppel is the obvious remedy. The representor is estopped from denying that the representee has the proprietary interest that was promised by the representation in question. *Crabb v Arun District Council* (supra) seems to me a clear example of such a case. The Council had represented that Mr Crabb would be entitled to have access to the private road at gateway B and had confirmed that representation by erecting gateposts and a gate across the gateway. Once Mr Crabb, in reliance on that representation, had acted to his detriment in selling off a portion of his land so that his only means of access to and egress from his retained land was via gateway B, it was too late for the Council to change its mind. The Council was estopped from denying that Mr Crabb had the necessary access rights. *Ramsden v Dyson* (1866) LR 1 HL 129 is another case, straightforward if viewed through the spectacles of the jurisprudence that has emerged since, of proprietary estoppel. In cases where the owner of land stands by and allows a neighbour to build over the mutual boundary, representing either expressly or impliedly that the building owner is entitled to do so, the owner may be estopped from subsequently asserting his title to the encroached upon land. This, too, seems to me straightforward proprietary estoppel. There are many other examples of decided cases where representations acted on by the representee have led to the representor being estopped from denying that the representee had the proprietary interest in the representor's land that the representation had suggested. Constructive trust, in my opinion, has nothing to offer to cases of this sort. But cases where the relevant representation has related to inheritance prospects seem to me difficult, for the reasons I have given, to square with the principles of proprietary estoppel established by the *Ramsden v Dyson* and *Crabb v Arun District Council* line of cases and, for my part, I find them made easier to understand as constructive trust cases. The possibility of a remedial constructive trust over property, created by the common intention or understanding of the parties regarding the property on the basis of which the claimant has acted to his detriment, has been recognised at least since *Gissing v Gissing* [1971] AC 886 (see particularly Lord Diplock, at p 905). The "inheritance" cases, of which *Gillett v Holt* [2001] Ch.210, *In re Basham* [1986] 1 WLR 1498 and *Walton v Walton* (1994 C.A. unreported) and, of course, the present case are good examples, are, to my mind, more comfortably viewed as constructive trust cases. Indeed I think Mr Edward Nugee QC, sitting as a High Court judge in *In re Basham*, was of the same opinion. After stating the proprietary estoppel principle (at p 1503) he went on (at p 1504)

"But in my judgment, at all events where the belief is that A is going to be given a right in the future, it is properly to be regarded as giving rise to a species of constructive trust, which is the concept

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employed by a court of equity to prevent a person from relying on his legal rights where it would be unconscionable for him to do so."

And at p 1505E he referred to the detriment "that the plaintiff must prove in order to raise a constructive trust in a case of proprietary estoppel". For my part I would prefer to keep proprietary estoppel and constructive trust as distinct and separate remedies, to confine proprietary estoppel to cases where the representation, whether express or implied, on which the claimant has acted is unconditional and to address the cases where the representations are of future benefits, and subject to qualification on account of unforeseen future events, via the principles of remedial constructive trusts."

54. In the course of his speech, Lord Walker returned to the relationship between proprietary estoppel and section 2 of the 1989 Act. At paragraphs 29 and 31 he said:

"29. This appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007) p101) has recently commented:

"There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)."

Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance (see Megarry & Wade, *Law of Real Property*, 7th edition (2008) para 16-001; Gray & Gray, *Elements of Land Law*, 5th edition (2009) para 9.2.8; *Snell's Equity*, 31st edition (2005) paras 10-16 to 10-19; Gardner, *An Introduction to Land Law* (2007) para 7.1.1)...

31. I should say at once that the respondents to the appeal did not contend that this House's decision in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 ("*Cobbe*") has severely curtailed, or even virtually extinguished, the doctrine of proprietary estoppel (a rather apocalyptic view that has been suggested by some commentators: see for instance Ben McFarlane and Professor Andrew Robertson, "Death of Proprietary Estoppel" [2008] LMCLQ 449 and Sir Terence Etherton's extrajudicial observations to the Chancery Bar Association 2009 Conference, paras 27ff.) But *Cobbe* is certainly relevant to the second issue. The respondents' case is that in *Cobbe* this House reaffirmed the need for certainty of interest which has, it is argued, been part of the law since *Ramsden v Dyson* (1866) LR 1 HL 129."

55. Lord Neuberger distinguished *Cobbe* on the facts, commenting as follows:

"96. Secondly, the analysis of the law in *Cobbe* ... was against the background of very different facts. The relationship between the parties in that case was entirely arm's length and commercial, and the person raising the estoppel was a highly experienced businessman. The circumstances were such that the parties could well have been expected to enter into a contract, however, although they discussed contractual terms, they had consciously chosen not to do so. They had intentionally left their legal relationship to be negotiated, and each of them knew that neither of them was legally bound. What Mr Cobbe then relied on was "an unformulated estoppel ... asserted in order to protect [his] interest under an oral agreement for the purchase of land that lacked both the requisite statutory formalities ... and was, in a contractual sense, incomplete" - [2008] 1 WLR 1752, para 18.

97. In this case, by contrast, the relationship between Peter and David was familial and personal, and neither of them, least of all David, had much commercial experience. Further, at no time had either of them even started to contemplate entering into a formal contract as to the ownership of the farm after Peter's death. Nor could such a contract have been reasonably expected even to be discussed between them. On the Deputy Judge's findings, it was a relatively straightforward case: Peter made what were, in the circumstances, clear and unambiguous assurances that he would leave his farm to David, and David reasonably relied on, and reasonably acted to his detriment on the basis of, those assurances, over a long period.

98. In these circumstances, I see nothing in the reasoning of Lord Scott in *Cobbe* ... which assists the respondents in this case. It would represent a regrettable and substantial emasculating of the beneficial

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principle of proprietary estoppel if it were artificially fettered so as to require the precise extent of the property the subject of the alleged estoppel to be strictly defined in every case. Concentrating on the perceived morality of the parties' behaviour can lead to an unacceptable degree of uncertainty of outcome, and hence I welcome the decision in *Cobbe*... However, it is equally true that focussing on technicalities can lead to a degree of strictness inconsistent with the fundamental aims of equity.

99. The notion that much of the reasoning in *Cobbe* ... was directed to the unusual facts of that case is supported by the discussion at para 29 relating to section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2 may have presented Mr Cobbe with a problem, as he was seeking to invoke an estoppel to protect a right which was, in a sense, contractual in nature (see the passage quoted at the end of para 96 above), and section 2 lays down formalities which are required for a valid "agreement" relating to land. However, at least as at present advised, I do not consider that section 2 has any impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection. It was no doubt for that reason that the respondents, rightly in my view, eschewed any argument based on section 2.

100. For the same reason (namely the very different nature of the cases), it appears to me unlikely in the extreme that Lord Scott was intending impliedly to disapprove any aspect of the reasoning or decision of the Court of Appeal in *Gillett* [2001] Ch 210. Indeed, Lord Walker, at [2008] 1 WLR 1752, para 66, referred to *Gillett*... with implied approval, and, at para 68, emphasised the distinction between "the commercial context" and "the domestic or family context" (and it is to be noted that, at para 94, Lord Brown of Eaton-under-Heywood agreed with both Lord Scott and Lord Walker). In *Gillett* ... Robert Walker LJ, having observed that the equity arising in that case from assurances continued "down to the time when those assurances were repudiated", said that this was "a long period and a broad approach is necessary". The facts were far more complex than in this case, because there were many different properties acquired at different times, and because the assurances had been repudiated.

101. As Hoffmann LJ memorably said in *Walton v Walton* (unreported, 14 April 1994), para 21, "equitable estoppel [by contrast with contract]... does not look forward into the future [; it] looks backwards from the moment when the promise falls due to be performed and asks whether, in the circumstances which have actually happened, it would be unconscionable for the promise not to be kept". Accordingly, the notion that, where the promise relates to "the farm", which is a readily recognisable entity at any one time, there is no reason why it should not apply to that entity as it exists at the date "the promise falls due to be performed", i.e. as at Peter's death."

56. I was also taken to a number of Court of Appeal decisions in this area. *Ely v Robson* [2016] EWCA Civ 774, in which Kitchen LJ (as he then was) gave the lead judgment, concerned a dispute after the breakdown of a domestic relationship between the parties. There were legal proceedings which the trial judge held had been compromised by an oral agreement the terms of which were set out in a solicitors' letter, and which determined the parties' respective beneficial interests in a number of properties. A dispute later arose as to the effect, if any, of the oral agreement, which the claimant alleged was determinative of those interests. In upholding the judge's declaration in the claimant's favour, Kitchen LJ pointed out that the transaction was not commercial, that its terms were sufficiently clear to be binding, and that the judge had been entitled to find that the parties intended the agreement to be binding. He continued at paragraph 43:

"In my judgment it follows that, from the time they met in Poole Park, Ms Robson and Mr Ely had a common understanding as to the extent of their respective interests in 6 Torbay Road and thereafter Mr Ely acted to his detriment in reliance upon that understanding. Accordingly, whatever Ms Robson's interest in 6 Torbay Road may have been prior to that meeting, I am satisfied that thereafter Mr Ely held the property on constructive trust for them both and that Ms Robson's interest was limited to the interest defined in the declaration that the judge made. Put another way, it would in my judgment be unconscionable for Ms Robson to assert to the contrary and she is estopped from so doing."

57. *Farrar v Miller* [2018] EWCA Civ 172, was an appeal and cross appeal against permission to amend particulars of claim to include an allegation of a so-called *Pallant v. Morgan* constructive trust and proprietary estoppel, and refusal of permission to amend to include breach of fiduciary duty. There is no need to set out the facts, which are complex. In the course of his judgment with which Patten and Floyd LJ agreed, Kitchin LJ, referring to statements by Chadwick LJ in *Banner Homes Group plc v Luff Developments Ltd* [2000] Ch 372, said:

“Chadwick LJ continued (at 397-399) that it was important to identify the features which would give rise to a *Pallant v Morgan* equity and define its scope whilst keeping in mind that it was undesirable to attempt anything in the nature of an exhaustive classification and further, that equity must never be deterred by the absence of a precise analogy provided that the principle invoked is sound. He then advanced five propositions. For the purposes of this appeal, the material aspects of those propositions are these.

First, a *Pallant v. Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that "equity looks on that as done which ought to be done"; or an equity may arise under the principles developed in the proprietary estoppel cases.

Secondly, it is not necessary that the arrangement or understanding should be contractually enforceable. In particular, it is no bar to a *Pallant v Morgan* equity that the pre-acquisition arrangement is too uncertain to be enforced as a contract, nor that it is plainly not intended to have contractual effect.

Thirdly, it is necessary that the pre-acquisition arrangement or understanding should contemplate that one party will take steps to acquire the property, and that if he does so, the other party will acquire some interest in it. It is also necessary that, whatever private reservations the acquiring party may have, he has not informed the non-acquiring party before the acquisition (or before it is too late for the parties to be restored to a position of non-advantage or detriment) that he no longer intends to honour the arrangement or understanding.

Fourthly, it is also necessary that in reliance upon the arrangement or understanding the non-acquiring party should do something, or omit to do something, which confers an advantage on the acquiring party in relation to the acquisition of the property, or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms.

Fifthly, it is not necessary for the advantage or detriment to take the form of the non-acquiring party keeping out of the market. Nor is the existence of both advantage and detriment essential; either will do. It is, however, essential that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted.”

58. As regards proprietary estoppel and section 2 of the 1989 Act, Kitchin LJ did not attempt to resolve the question whether Lord Scott’s *obiter* view in paragraph 29 of *Cobbe*¹ was correct. At paragraphs 55-63 he said:

“Mr Cohen contends that older authorities suggesting otherwise should now be put to rest, including *Yaxley v Gotts* [2000] Ch 162. Further, it would be wrong to suggest that the inclusion of constructive trust in s.2(5) catches a proprietary estoppel, for although a proprietary estoppel may have similarities with a common intention constructive trust, the two are different both in terms of their jurisprudential basis and in their effects. In this connection he fairly points to the observations of Lord Walker in *Stack*

¹ See paragraph 46 of this Judgment.

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v Dowden [2007] AC 432 at [37] that he was rather less enthusiastic about the notion that proprietary estoppel and common interest constructive trusts could or should be completely assimilated. As Lord Walker proceeded to explain, proprietary estoppel typically consists of asserting an equitable claim against the conscience of the owner and as such is a "mere equity" to be satisfied by the minimum award necessary to do justice. A common intention constructive trust, on the other hand, identifies the true beneficial owner and the size of his beneficial interest. So, Mr Cohen submits, the claim based upon proprietary estoppel is barred by the 1989 Act.

These are powerful submissions but I am not persuaded that they are necessarily correct. In my judgment this ground of appeal raises a difficult question which may depend upon the facts and which is better determined at trial in light of the evidence and full argument. In these circumstances it is neither necessary nor appropriate to attempt a full exposition of all of the relevant authorities, textbooks and academic commentaries. I will, however, explain, as briefly as I can, the reasons for the conclusion to which I have come.

There are in my view strong arguments for saying that s.2 of the 1989 Act is concerned only with the requirements of a valid contract for the sale or other disposition of an interest in land. Section 2(1) says:

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

As Mr Sibbel submits, these words, on their face, refer only to the circumstances in which arrangements between the parties over the sale or disposition of land will give rise to a valid contract. They say nothing to prevent those arrangements giving rise to another cause of action. I recognise that s.2(5) says that the general rule does not affect the creation or operation of resulting, implied or constructive trusts and that no mention is made of proprietary estoppel, but the fact remains that s.2(1) is, on its wording, concerned only with contracts.

Does a free standing action based upon proprietary estoppel nevertheless frustrate the policy behind s.2? A number of matters point to the conclusion it does not. First, as Beldam LJ explained in *Yaxley* [2000] Ch 162 at 188 to 191, the 1989 Act was intended to implement three reports of the Law Commission, including, of particular importance to this appeal, Report No. 164, "Transfer of Land: Formalities for Contracts for Sale etc of Land", 29 June 1987. This makes it clear at, especially, 4.13-4.15 and 5.1-5.5, that the policy behind s.2 was to increase certainty in contracts and to exclude the uncertainty and complexities in unregistered conveyancing caused by the doctrine of part performance. The Law Commission did not intend to exclude the application in appropriate cases of equitable remedies, including proprietary estoppel.

Secondly, it cannot be contended that s.2 has any application to certain non-proprietary remedies despite the fact that no mention of them is made in s.2(5). In *Cobbe*, Lord Scott had no difficulty with the notion that Mr Cobbe was at least in principle entitled to pursue claims for unjust enrichment, a quantum meruit and a restitutionary remedy based upon a total failure of consideration.

Thirdly, it has never been suggested that it is necessary for there to have been an agreement for a proprietary estoppel to arise. For example, it may arise where there has never been any agreement of any kind between the parties but where one party, the owner of the land, has stood by and allowed the other party to act to his detriment knowing that he mistakenly believes that he has or will obtain an interest in or right over the land. It has not been contended that s.2 of the 1989 Act would preclude a finding of proprietary estoppel in such a case.

Fourthly, and while an argument might be developed, based on the foregoing point, that s.2 would only preclude a finding of proprietary estoppel in a case where there was some sort of contractual connection, for example where the agreement was complete but for the necessary formalities, it is hard to see how such an argument could be justified, despite Lord Neuberger's observations in *Thorner* at [99]. As Lord Neuberger later pointed out extra-judicially in "The stuffing of Minerva's owl? Taxonomy and taxidermy in equity" CLJ, 2009, 68(3), 537-549, it would mean that the more clear and the more precise the defendant's indication or promise, and therefore the stronger the claimant's case in principle, the more likely it would be that s.2 would defeat a proprietary estoppel claim.

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Finally, if and in so far as it may become necessary to consider in any case whether the claim would or would not frustrate the policy of the 1989 Act, it seems to me that Mr Farrar has a real prospect of establishing that his claim falls into the latter category for, although the agreement was never reduced to writing, it was an agreement which, at least in its essential respects, was complete and which Mr Farrar believed would be honoured. The facts of this case, as alleged by Mr Farrar, are far removed from those of *Cobbe* where the terms of the agreement had not been finalised and the agreement itself was not intended to be legally binding. It seems to me therefore that a judge at trial might well conclude both that the parties did reach an agreement, at least in principle, and that Mr Farrar had a reasonable expectation that the agreement would be honoured and that he would have a right in relation to Long Stratton and, following its sale, in the proceeds of that sale. Put another way, there is in my view a real prospect that the trial judge will conclude that Mr Miller represented and Mr Farrar reasonably assumed that Mr Miller would ensure that Mr Farrar would secure an interest in Long Stratton through the joint venture and that, despite their failure to satisfy the formality rules, it would be unconscionable for Mr Miller to contend otherwise.”

59. My attention was also drawn to *Davies v Davies* [2016] EWCA Civ 463, an appeal relating to the quantification of a successful claimant’s equity based on a proprietary estoppel arising out of her unremunerated work on her parents’ farm for substantial periods. In the course of his judgment, with which Patten and Underhill LJ agreed, Lewison LJ provided the following summary of the exercise a court carries out in such a case:

“Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:

i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorne v Major* [2009] UKHL 18, [2009] 1 WLR 776 at [57] and [101].

ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorne v Major* at [29].

iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: *Gillett v Holt* [2001] Ch 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All ER 988 at [37].

iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232; *Henry v Henry* at [38].

v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.

vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P & CR 8 at [56].

vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].

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viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].

ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a "portable palm tree": *Taylor v Dickens* [1998] 1 FLR 806 (a decision criticised for other reasons in *Gillett v Holt*.)”

60. I was also taken by Mr Lakin to a judgment of Dillon J in *Lysus and Anr. v Prowsa Developments Limited and others* [1982] 1 WLR 1044. That case concerned a very different situation from the present. The developer of a building plot had contracted to transfer it to the claimant once a house had been built on it. The vendor went into liquidation before the house was built, and a bank which held a legal charge over the plot, which was granted prior to the contract for sale, repossessed the land and sold it to X expressly subject to the claimant’s contract. That company re-sold it to Y subject to a similar condition. The judge held that in the light of those stipulations the land was held by X and then by Y subject to a constructive trust in favour of the claimant, entitling him to a transfer of the land by Y.
61. Mr Lakin emphasised that there the claimant succeeded in establishing the existence of a constructive trust although he was not in occupation (unlike the present case) and although the bank’s charge was granted prior to the vendor’s contract with the claimant. The case does not in my view throw much light on the present issue. The purchasers in each transfer took with full knowledge of the claimant’s contract. The constructive trust arose because the respective transfers by the bank and by X were made expressly subject to the claimant’s contract; Dillon J stated that the bank could have sold without that stipulation, and if it had done so the claimant would have had no claim against the purchaser.
62. *Mortgage Express v Lambert* [2017] Ch. 9, a decision of the Court of Appeal in which Lewison LJ gave the judgment with which Gloster LJ and Cobb J agreed, is perhaps of more interest. In that case, the defendant was unable to keep up with payments on a loan secured on her leasehold flat. She agreed to sell her lease to two buyers at a price which her solicitors advised was a significant undervalue. The buyers agreed that she could continue to live there indefinitely for a rent. The sale and rent back agreement was not disclosed in the sale documents, which provided for a full title guarantee and vacant possession on completion. On completion the buyers paid off the defendant’s loan with the aid of a mortgage valuing the flat at 4 times the purchase price. The buyers were registered as proprietors of the lease and the charge in favour of the mortgagee was duly registered at the same time. The defendant remained in occupation. The buyers failed to keep up the mortgage payments and the mortgagee appointed receivers. Meanwhile the defendant fell into rent arrears and the receivers began possession proceedings against her. She contended that the sale to the buyers should be set aside as an unconscionable bargain, which gave rise to an equity which was an overriding interest within paragraph 2 of Schedule 3 to the 2002 Act binding the mortgagee. The mortgagee was therefore joined as a party. The judge held that the sale was liable to be set aside as against the buyers but that that entitlement did not

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bind the mortgagee as a *bona fide* purchaser for value without notice of any equitable right. He made a possession order.

63. The Court of Appeal dismissed the appeal, holding that the right to set aside the unconscionable bargain was an equity which was capable of being an overriding interest under section 116 of the 2002 Act and was therefore proprietary in nature. However, once the TR1 was completed the buyers were entitled to be registered as proprietors, and to exercise owner's powers, including the power to charge the estate at law with the payment of money, by virtue of subsections 23(1)(b) and 24(b) of the 2002 Act.

64. Lewison LJ continued:

“Section 26 of the Land Registration Act 2002 provides:

"(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.

(2) Subsection (1) does not apply to a limitation—

(a) reflected by an entry in the register, or

(b) imposed by, or under, this Act.

(3) This section has effect only for the purpose of preventing the title of a disponee being questioned (and so does not affect the lawfulness of a disposition)."

There was no limitation in the register at the time of the mortgage; nor was there a limitation on the validity of the disposition imposed by the Act itself. If there were an overriding interest that interest would not affect the validity of the disposition consisting of the grant of the mortgage. The mortgage would take effect subject to it. But as s. 26 (3) makes clear, the purpose of the section is to prevent the disponee's title from being called into question. Miss Sandells submits on behalf of Mortgage Express that in effect this means that if a right is asserted as an overriding interest, and that right is a right to impugn the title acquired by the disponee, then section 26 defeats that right. How this section was intended to operate was illustrated by the joint Report of the Law Commission and HM Land Registry at the time of the bill which became the Land Registration Act 2002. Paragraph 4.10 of that report read:

"First, the protection given to the disponee's title is complete and cannot be called into question. For example, if –

(1) W and X held land on a bare trust as nominee for Y, on terms that they could not make any disposition of the land without Y's written consent;

(2) Y, who was in actual occupation of the land held in trust did not protect her interest by the entry of a restriction; and

(3) W and X fraudulently charged the land to Z without Y's consent in breach of trust;

Z's charge would be valid and could not be called into question by Y. The fact that Y was in actual occupation at the time of the charge would not change this, because W and X's right to exercise owner's powers is taken to be free of limitation. It follows that Y could not claim that her beneficial interest under the trust as an overriding interest because her prior consent to the charge had not been obtained."

Paragraph 4.11 of the report also made it clear that the consequences of unlawfulness can be pursued "so long as these do not call into question the validity of the disponee's title." This, in my judgment, provides strong support for Miss Sandells' submission that Ms Lambert is not able to call into question the title acquired by Mortgage Express."

65. With that survey of the main authorities to which I was referred, I turn to the grounds of appeal.

Grounds 1 and 2

66. Ground 1 of the appeal relates, first, to whether the trust argument was sufficiently pleaded and, second, to whether in any event the argument is correct. Ground 2 concerns the Judge’s refusal of the oral amendment application made at trial.
67. It is convenient to deal first with the “sufficiency of pleading” point in Ground 1, and then with the Judge’s refusal of the application to amend, before turning to the substantive merits of the trust claim.

Sufficiency of the pleading

68. The Appellants’ case, as formulated by Mr Lakin in his helpful oral submissions, is that once they had paid over the £55,000 to the Fadias, the latter became trustees, holding the legal title on a resulting trust for the Appellants. Then, when the Fadias passed the legal title to Mr Mallon and he was registered as proprietor pursuant to the 2002 Act, the first trust came to an end. Mr Lakin acknowledged that, by virtue of subsections 2(1) and 27(1) of the Law of Property Act 1925, any such trust would have been “overreached” by the Fadias’ transfer to Mr Mallon. This appears to be common ground. However, he submitted that on that transfer to Mr Mallon a second trust arose in favour of the Appellants, this time with Mr Mallon as sole trustee. Mr Lakin also submitted that Mr Mallon held, in effect, a charge.
69. This second trust is said by Mr Lakin to be independent of the money owed by Mr Zaman to Carna Meats. It was common ground that the Zamans were in occupation of the House at all material times, and it is submitted by the Zamans that their beneficial interest under the second trust was therefore protected as an “overriding interest” taking priority over (because it arose earlier than) the Respondent’s legal charge, by virtue of subsection 29(2)(a)(ii) of the 2002 Act, together with paragraph 2 of Schedule 3 thereto.
70. In Mr Lakin’s submission these matters were adequately pleaded in the Appellants’ Amended Defence and Counterclaim. In this respect he relied upon CPR 16.4 (1), which stipulates that particulars of claim must include “a concise statement of the facts on which the claimant relies”. He contended that it was not necessary to include the word “trust” in the pleading in order to comply with the rules, and it was sufficient for the Appellants to have pleaded such facts as were set out at paragraphs 4 to 11 of their pleading. Although those facts were pleaded in support of different grounds for relief, including in particular proprietary estoppel, Mr Lakin submitted that if one is in the territory of proprietary estoppel, which includes a promise, reliance on it, and unconscionable conduct on the part of the counterparty in reneging on the promise, one is also in the territory of a constructive trust. In this regard he relied upon the *dicta* of the Court of Appeal in *Yaxley v Gotts*.²
71. As mentioned already, the Judge rejected these arguments on the basis that CPR 16.2(1) required the claim form to contain a concise statement of the nature of the

² See paragraphs 39-42 of this judgment.

claim, and that the whole point of pleadings was to ensure that the essential elements of each party's case were known to the other side and to the court at the appropriate time, which was not on the day before the trial began.

72. I do not see how the Judge's conclusion can be faulted. As the passages from judgments in *Yaxley*, *Herbert v Doyle*, *Thorner v Major*, and *Farrer v Miller* at, respectively, paragraphs 39, 50, 53 and 57 above make clear, a constructive trust is not to be assimilated in all respects with a proprietary estoppel. Although there are cases where the same factual situation may support both concepts, there are others where one will be present but not the other. There are (in the words of Robert Walker LJ) "large areas where the two concepts do not overlap"³ and they are (as per Lord Scott) "distinct and separate remedies".⁴ Similarly, as Kitchen LJ said, although a proprietary estoppel may have similarities with a common intention constructive trust, "the two are different both in terms of their jurisprudential basis and in their effects."⁵ For example, the relief available is not the same: a successful proprietary estoppel claim gives rise to relief which is within the discretion of the court, which will determine the minimum necessary to satisfy the equity. On the other hand, where a constructive trust is found to exist the court determines the extent of the actual beneficial interests under the trust.
73. In my view, if facts are pleaded expressly in support of an allegation of proprietary estoppel, that cannot reasonably be taken to indicate to the other side that an allegation of a constructive or resulting trust is also being made. A trust allegation must be specifically pleaded, as it is quite likely to provoke specific responses of fact and law from the other side. In order properly to meet such an allegation it will be necessary to know not just the identity of the trust property, the trustee and the beneficiary, but also the type of trust alleged, its terms (including whether there was power to mortgage the property), and how and when the trust came into being. The paragraphs of the Appellants' pleading relied upon are silent on most of these matters.
74. Mr Payton submits that had a constructive or resulting trust been pleaded, he would have sought further and better particulars of all such matters. In my view that would have been justified. The argument conducted at the hearing before me, in which Mr Lakin has sought to indicate (more or less on the hoof) how the constructive or resulting trust arose, the nature of its relationship with the earlier resulting trust involving the Fadias and with the Zamans' obligation to pay the meat debt, demonstrates why a precise pleading was required. Mr Payton also submits that in all probability his client would have wished to serve an amended pleading itself. Again, this is far from fanciful.
75. In *Credit Suisse AG v Arabian Aircraft and Equipment Leasing Co* [2013] EWCA Civ 1169, the claimants pleaded a breach of clause 18.3 of a lease, and at a summary judgment hearing sought to rely on a breach of clause 18.4. That clause was not referred to in the pleading, although in a letter terminating the lease the claimant had referred to it. The Court of Appeal held that the claimant was not entitled to put

³ See paragraph 39 of this judgment.

⁴ See paragraph 53 of this judgment.

⁵ See paragraph 58 of this judgment.

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forward a claim under clause 18.4, either on the application for summary judgment or at trial. It was necessary for the claimant to seek permission to amend if it wished to include such a claim. In the absence of such an amendment the judge should not have allowed that claim to be pursued. The principle to be applied was clearly put by Moore-Bick LJ (with whom Lloyd and Mummery LJ agreed) at paragraph 17:

“Particulars of claim are intended to define the claim being made. They are a formal document prepared for the purposes of legal proceedings and can be expected to identify with care and precision the case the claimant is putting forward. They must set out the essential allegations of fact on which the claimant relies and which he will seek to prove at trial, but they should also state the nature of the case that is to be made in order to inform the defendant and the court of the basis on which it is said that the facts give rise to a right to the remedy being claimed.”

76. In the present case the Zamans did not in their amended pleading set out the nature of a constructive or resulting trust case at all, let alone with care and precision. The Judge was entitled so to hold, and the challenge to his judgment in this regard fails.

Refusal of the oral amendment application

77. Ground 2 of the appeal relates to the Judge’s refusal of the oral application to amend the Zamans’ pleading. As I said, the application was made on the first day of the trial. The proposed amendment was the addition of the words “the above gives rise to a constructive and/or resulting trust in favour of the second defendants”. The Judge refused the application on the ground that it was too late.
78. Mr Lakin argues that the amendment should have been permitted, as it was purely formal, and in any event no prejudice was caused to the Respondent .
79. As to the content of the proposed amendment, for the reasons I have given I do not consider that this addition to the pleading would have been compliant with the rules. It would not have provided the other side or the court with the requisite information about the nature of the Zamans’ trust case.
80. On the question of prejudice, Mr Lakin relies, as he did below, on the history of the proceedings. The following is common ground: in a skeleton argument prepared for the strike out hearing in August 2017 there was mention by the Zamans’ then counsel of the possibility of reliance on a constructive trust; at the strike out hearing the Zamans were given permission to serve (and did on 22 August 2017 serve) an amended pleading; no application was made at that hearing, or on any other occasion before the trial, to amend to include an allegation of a constructive (or any type of) trust; no intimation of an intention to allege a trust was given to the Respondent until service of the Zamans’ skeleton argument 2 days before the trial began; and in the Respondent’s skeleton argument at trial, and in its counsel’s closing submissions, the trust argument was referred to.
81. Mr Lakin submits that in the light of the August 2017 reference to a possible trust point, and the Respondent’s reference to that possible issue in its own skeleton argument for trial, there was no prejudice to the Respondent, and the Judge erred in deciding the case purely on the lateness of the application. In that connection he drew attention to the principles set out in the judgment of Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), at paragraphs 37-38:

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“37.... the relevant principles applying to very late applications to amend are well known. I have been referred to a number of authorities: [details omitted]...”

38. Drawing these authorities together, the relevant principles can be stated simply as follows:

a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;

b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;

c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;

d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done;

e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;

f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;

g) a much stricter view is taken nowadays of non-compliance with the Civil Procedure Rules and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so.”

82. In the present case the oral application to amend was made at trial. The draft of the proposed amendment was, for the reasons I have stated, inadequate. Had the Judge not taken the view he did, the Respondent would have been entitled to make an application to adjourn the hearing. Absent an adjournment to allow a draft re-amended pleading to be presented by the Appellants and responded to by the Respondent, there would have been an obvious risk of prejudice to the Respondent. An adjournment itself would also have prejudiced the Respondent. The fact that the Respondent’s counsel made brief submissions on the trust point, does not affect that conclusion. The Zamans had had ample time to apply to amend without causing the trial to be vacated. In those circumstances, it is unsurprising that the Judge exercised his discretion as he did. That discretion was a wide one, in what was archetypically a matter of case management. Unless the decision of the Judge was plainly wrong, an appeal court should not interfere with it. I consider it was one which the Judge was clearly entitled to take.

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The merits of the trust case

83. My conclusions so far are sufficient to dispose of the proposed appeal on Grounds 1 and 2. However, the Judge expressed his view on the merits of the trust point, indicating that he would have found against the Zamans on the point even if the issue had been pleaded. Under Ground 1 the Appellants argue that his conclusion was in error. I have heard argument on the trust question, and therefore I will state my views, albeit on the basis that they must be taken as indicative only, given that had the matter been pleaded out at the appropriate time before trial, the factual and legal background may have been different.
84. As I have said, it is the Appellants' case that when the Fadias passed the legal title to the House to Mr Mallon on the Zamans' instructions, and he was registered as proprietor pursuant to the 2002 Act in mid-August 2003, any resulting trust in favour of the Zamans under which the Fadias were trustees came to an end, and a new constructive (or possibly resulting) trust came into being, under which Mr Mallon was trustee for the Zamans. It is contended that as the Zamans' beneficial interest under that trust arose before January 2004 when the Respondent's mortgage was granted, and as they were in actual occupation of the House at all material times, their interest under the trust was protected as an "overriding interest" which took priority over the Respondent's mortgage, by virtue of subsection 29(2)(a)(ii) of the 2002 Act, together with paragraph 2 of Schedule 3 thereto.
85. Those provisions state as follows (so far as relevant):

Subsection 29(2)(a)(ii)

"(1) If a registrable disposition of a registered estate is made for valuable consideration, completion of the disposition by registration has the effect of postponing to the interest under the disposition any interest affecting the estate immediately before the disposition whose priority is not protected at the time of registration.

(2) For the purposes of subsection (1), the priority of an interest is protected—

(a) in any case, if the interest—

(i) ...,

(ii) falls within any of the paragraphs of Schedule 3"

Paragraph 2 of Schedule 3

"Interests of persons in actual occupation

2 An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—

(a) ...;

(b) an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;

(c) an interest—

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(i) which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and

(ii) of which the person to whom the disposition is made does not have actual knowledge at that time;

(d)..."

Mr Lakin submitted that none of the exceptions in paragraph 2 applied, and that none were in fact relied upon by the Respondent.

86. The Respondent contends that no constructive or resulting trust came into being; that there was simply a commercial agreement which was unenforceable through lack of the formalities required by section 2 of the 1989 Act. Alternatively, if there was a trust then, by virtue of sections 23-26 of the 2002 Act, the Respondent's legal charge was not affected by the Zamans' beneficial interest.

87. As the cases described earlier make clear, several types of constructive trust have been identified. The Appellants referred, in particular, to *Gissing v Gissing* [1971] AC 886 and *Lloyds Bank v Rosset* [1991] 1 AC 107. The type of constructive trust discussed in those cases occurs where there is a joint venture for the acquisition of property, often the matrimonial home (or equivalent). In *Gissing*, at p.905, Lord Diplock said:

"A resulting, implied or constructive trust...is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

88. In *Lloyds Bank v Rosset* Lord Bridge stated, at p.132:

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially..."

Once a finding to this effect is made it will only be necessary for the partner asserting the claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel."

89. A similar category of case, which may well apply outside the familial area, has been termed a *Pallant v Morgan* equity. As Kitchin LJ explained in *Farrar v Miller*,⁶ this trust may arise where there has been an arrangement or understanding between the parties prior to the acquisition of the land by one of them. It is that arrangement which leads to the acquirer being treated as a trustee if unconscionably he seeks to act inconsistently with it. It is not necessary that the arrangement or understanding should be contractually enforceable, nor that it is not intended to have contractual effect. What is required is that the pre-acquisition arrangement or understanding should contemplate that one party will acquire the land, and that if he does so, the other party will acquire some interest in it. In addition, the latter must do something, or omit to do

⁶ See the quotation at paragraph 57 of this judgment.

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something, in reliance on the arrangement or understanding, which confers an advantage on the acquiring party in relation to the acquisition of the land, or is detrimental to the ability of the non-acquiring party to acquire it on equal terms. Finally, the circumstances must make it inequitable for the acquirer to retain the property for himself in a manner inconsistent with the arrangement or understanding in reliance upon which the other party has acted.

90. Although very little was said by Mr Lakin in his oral submissions about a possible resulting trust (as distinct from a constructive trust), with Mr Mallon as trustee and the Zamans as beneficiaries, the Appellants' skeleton argument for the appeal makes that submission. It is made on the ground that the Zamans paid the purchase price to the Fadias but the property was transferred to Mr Mallon. In those circumstances, reliance is placed on the presumption of a resulting trust. The Appellants contend that none of the exceptions on the basis of which the presumption could have rebutted apply. In particular, Mr Mallon was not intended to benefit so that the purchase price paid by the Zamans was, in effect, a gift or a loan to Mr Mallon: Megarry & Wade: *The Law of Real Property*, 8th ed, paragraph 11-016.

Discussion of the trust issue

91. Mr Lakin submitted that the trust arose immediately on the transfer of the House to Mr Mallon and was independent of the money owed by Mr Zaman to Carna Meats. If the trust was independent and came into being immediately, as submitted, it is not clear what would have prevented the Zamans from demanding that the House be transferred to them regardless of whether the debt had been paid. That would render the whole arrangement pointless. On the other hand, had the agreement been in writing and fulfilled the formal requirements of section 2 of the 1989 Act, then once Mr Zaman had paid the debt to Carna Meats, the Appellants would have been entitled to seek specific performance of the agreement if Mr Mallon had refused or failed to effect the agreed transfer. It is probable that *at that stage* the Zamans would have become owners in equity, on the basis that equity treats that as being done which ought to be done. It therefore appears that the way the trust argument is framed would put the Zamans in a better position than if the agreement which they made with Mr Mallon had been enforceable.
92. This is not to say that because the parties intended their agreement to be contractually binding – as appears to be the case here – there cannot be a trust. Similarly, as we have seen, constructive trusts are not confined to familial situations, and can occur in a commercial situation which, in my view, was the context of the present case.
93. Under the agreement Mr Mallon was to have the House transferred to him and to retain registered proprietorship until the debt was paid in full. The purpose of the transfer was to provide him with security for the debt. Although it was envisaged that discharge of the debt would take about 2 years to complete, no specific date was set for the transfer to the Zamans. That was dependent on when (and presumably whether) the debt was in fact paid. As I have said, an immediate trust independent of the payment of the debt would have been inconsistent with this arrangement, and pointless. In my view, any constructive trust would not have arisen immediately, but at best only when the debt had been paid and all other prerequisites giving rise to such

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a constructive trust had been satisfied,⁷ including a refusal or failure by Mr Mallon to effect the transfer to the Zamans in circumstances which rendered such conduct unconscionable. It is common ground that the debt was not paid until sometime in 2006 which, being after the Respondent's mortgage had been granted, presents a problem for the Appellants even if a trust came into being.

94. Was there a trust? I can deal swiftly with the argument that a resulting trust (with Mr Mallon as sole trustee) arose by virtue of the Zamans' payment of the purchase price to the Fadias. In my view the presumption of a resulting trust would not apply in the present case, in that it would likely be rebutted by the terms of the oral agreement. These indicate that the transfer to Mr Mallon was intended by the Zamans to benefit him (by providing security for his firm's debt), in circumstances where he provided consideration for the transfer (forbearance in respect of that debt and/or the continued supply of meat to Mr Zaman) and was not a mere volunteer. In these circumstances, the issue is better discussed in the context of a constructive trust.
95. Was there a constructive trust? The agreement between Mr Mallon and the Zamans, which preceded the transfer to Mr Mallon by the Fadias, clearly contemplated that Mr Mallon would become the registered proprietor of the House and that the Zamans would at some point in the future acquire an interest in the House. In reliance upon the agreement they caused Mr Mallon to be named as transferee and thereby to become the registered proprietor. In so doing they both conferred an advantage on Mr Mallon (security for the debt) and acted to their detriment given that they had paid to the Fadias the whole purchase price of £55,000 for the House, which was their family home. The debt of £35,000 owed to Carna Meats was paid off at some point in the course of 2006. Despite requests from Mr Zaman, Mr Mallon had not made the agreed transfer by the time he was made bankrupt in 2016. We do not know why Mr Mallon failed to effect the transfer. On the basis of the facts before the Judge, I consider that once the debt to Carna Meats had been paid, it was inconsistent with the agreement, in reliance upon which the Zamans had acted, and it was unconscionable in all the circumstances, for Mr Mallon to retain the title to the property and to fail to transfer it to the Zamans within a reasonable time.
96. On this basis, but with the caveat recorded at paragraph 83 above, I would have been minded to find that a constructive trust, akin to a *Pallant v Morgan* equity discussed earlier, was established in favour of the Zamans.
97. However, that would not be the end of the matter.
98. As stated earlier, Mr Lakin's argument is that the Zamans' beneficial interest under a constructive trust was an "overriding interest" which took priority over the Respondent's mortgage, by virtue of subsection 29(2)(a)(ii) of the 2002 Act, together with paragraph 2 of Schedule 3 thereto.⁸ In response, Mr Payton submitted that even if there was an immediate trust in favour of the Zamans, then by virtue of sections 23-26 of the 2002 Act the Respondent's legal charge was not affected by that beneficial interest.

⁷ *Westdeutsche Landesbank Girozentrale v Islington L.B.C.* [1996] A.C. 669, per Lord Browne-Wilkinson at p.714G-H.

⁸ Those provisions are set out at paragraph 85 above.

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99. Sections 23, 24 and 26 provide (so far as relevant):

Section 23

“(1) Owner's powers in relation to a registered estate consist of-

(a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description..., and

(b) power to charge the estate at law with the payment of money

...”

Section 24

“A person is entitled to exercise owner's powers in relation to a registered estate or charge if he is-

(a) the registered proprietor

...”

Section 26

“(1) Subject to subsection (2), a person's right to exercise owner's powers in relation to a registered estate or charge is to be taken to be free from any limitation affecting the validity of a disposition.

(2) Subsection (1) does not apply to a limitation- (a) reflected by an entry in the register, or (b) imposed by, or under, this Act.

(3) This section has effect only for the purpose of preventing the title of a donee being questioned (and so does not affect the lawfulness of a disposition).”

100. There is no dispute that at the time he granted the mortgage to the Respondent in January 2004 Mr Mallon was the proprietor of the legal estate in the House. The title was registered in his name without any limitation. In particular, there was never any restriction entered, whether in Form A or any other form, in respect of any interest of the Zamans.

101. In these circumstances Mr Payton submits that by virtue of sections 23 and 24 Mr Mallon had the power to grant the mortgage to the Respondent, and that by virtue of section 26 the Respondent's title as donee under the mortgage cannot be questioned, without prejudice to any argument that the Zamans might have as against Mr Mallon in relation to the lawfulness of the disposition.

102. Mr Payton submits that this result is entirely consistent with the underlying purpose of the legislation, which is to enable those who deal with property to be able to rely on the Land Register as disclosing title to, and any restrictions on the ability to deal with, registered land. He also prays in aid subsection 6(1) of the Trusts of Land and Appointment of Trustees Act 1996, which provides:

“(1) For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner.”

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103. He points out that the powers of an absolute owner include the power to sell or make a disposition with full title guarantee, which the legal charge granted to the Respondent contained.
104. Further, in the present case there was an agreement for the *future* transfer of the House to the Zamans. It is submitted by the Respondent that no restriction on the power to raise a mortgage would be implied in those circumstances. When a house is to be the subject of a disposition it is quite likely that there will be a mortgage on it. The obligation on the vendor is to dispose of a good marketable title at the date of completion of the conveyance. The same would apply to Mr Mallon, whose duty would be to transfer the House to the Zamans free of the charge *at the time of the transfer*. Why, Mr Payton asks rhetorically, should any trust in favour of the Zamans impose more restrictions on Mr Mallon than the terms of the agreement they had reached with him?
105. Mr Payton also relied on section 17 of the Trustee Act, 1925 as reinforcing his submissions:
- “No purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof.”
106. Mr Payton submitted that any tension between section 26 and the provisions in section 29 and Schedule 3 to the 2002 Act relating to “overriding interests” should, wherever possible, be reconciled consistently with the underlying purpose of the legislation, which is to enable reliance to be placed on the Land Register. Overriding interests and section 29 are exceptions to that principle, and their scope should be strictly circumscribed. That is the approach adopted in the case of overreaching pursuant to sections 2 and 27 of the Law of Property Act 1925.
107. In support of these submissions, and in particular with respect to the effect of section 26 of the 2002 Act, Mr Payton relied upon the decision of the Court of Appeal in *Mortgage Express v Lambert*, which I have already described at paragraphs 62-64 above.
108. In that case the Court of Appeal stated that the defendant’s right to set aside the sale as an unconscionable bargain was an equity capable of constituting an overriding interest, and was therefore proprietary in nature. Nevertheless, the registration of the buyers as proprietors entitled them to exercise owner’s powers, including the power to charge the estate at law with the payment of money, by virtue of subsections 23(1)(b) and 24(b) of the 2002 Act. In relation to section 26, Lewison LJ pointed out that there was no limitation in the register at the time of the mortgage, nor any limitation on the validity of the disposition imposed by the Act itself. He stated (in a passage relied upon by Mr Lakin):
- “If there were an overriding interest that interest would not affect the validity of the disposition consisting of the grant of the mortgage. The mortgage would take effect subject to it.”
109. Mr Lakin submits that the overriding interest claimed by the Zamans is not defeated by section 26 because that provision is referring to something which impugns the validity of the disposition rather than simply having priority over it. Therefore, he argues, it does not matter that the limitation was not reflected in an entry of the

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Zamans' interest in the register. If the Zamans' trust has priority over the mortgage, then the mortgage, in Lewison LJ's words, "takes effect subject to" the trust. Yet in that event the mortgage would in practice be rendered valueless; there would be no real difference between that situation and one where the mortgagee's title was said to be invalid. Why would the former situation not amount to "questioning the title" of the Respondent? The protection provided by section 26 would be somewhat random and arbitrary if it did not defeat such an interest but did defeat one such as the equity in *Mortgage Express* itself.

110. It is to be noted that Lewison LJ continued:⁹

"But as s. 26 (3) makes clear, the purpose of the section is to prevent the donee's title from being called into question. Miss Sandells submits on behalf of Mortgage Express that in effect this means that if a right is asserted as an overriding interest, and that right is a right to impugn the title acquired by the donee, then section 26 defeats that right.

111. He then referred to the Law Commission Report which led to the 2002 Act. The passage he quoted explains how section 26 is intended to operate, by reference to an example where bare trustees, W and X, hold land as nominee for Y, on terms that they could not make any disposition of the land without Y's written consent. Y is in actual occupation of the land held in trust but does not protect her interest by the entry of a restriction on the register. In breach of trust the trustees charge the land to Z without Y's consent. The charge would not be invalid and it could not be called into question by Y. The fact that Y was in actual occupation at the time of the charge would not change this, because W and X's right to exercise owner's powers is taken to be free of a limitation not reflected by an entry in the register. In those circumstances Y could not claim that her beneficial interest under the trust was an overriding interest notwithstanding that her prior consent to the charge had not been obtained. Lewison LJ stated that this example provided "strong support" for counsel's argument that by virtue of section 26 the defendant in *Mortgage Express* was not able to use the equity call into question the title of the mortgagee.

112. Mr Lakin submitted that the example given in the Law Commission report was simply a case of overreaching, but I do not consider that can be correct. In the next part of his judgment, beginning with the words "In addition..." Lewison LJ goes on to consider as a separate issue the question of overreaching pursuant to sections 2 and 27 of the Law of Property Act 1925. It is true that in the event he decided that the defendant did not have an overriding interest, and that if she did it was overreached. Nevertheless, the judgment provides support, albeit *obiter*, for the Respondent's argument in the present case that, in the absence of any relevant limitation reflected in an entry in the register or imposed by the 2002 Act, any trust in favour of the Zamans would be defeated by section 26, provided that their interest under the constructive trust could be said to question the title of the Respondent. In the light of the Law Commission's example, Lewison LJ considered it strongly arguable that an equity of a proprietary nature such as a claim to set aside a sale as an unconscionable bargain, was defeated by section 26. If that is so, then I see no principled reason why an interest as beneficiary under a constructive trust was not.

113. I recognise the tension between section 29 (which is dealing with priority) and section 26. I would be inclined to apply a purposive interpretation in considering whether an

⁹ See paragraph 64 of this judgment.

unregistered proprietary interest under a constructive trust is such as to be defeated by section 26. In a case such as the present, the purpose of the legislation in providing certainty by reference to that which is registered would clearly be frustrated if the Respondent were not entitled to rely upon the register.

114. However, it is unnecessary for me to decide the point, for two reasons. First, as already noted, the Judge was entitled to decide as he did on the Zamans' application to run a trust argument by amendment or otherwise. Second, and in any event, in the light of the view I have reached on timing,¹⁰ any constructive trust in favour of the Zamans would have come into being some two years *after* the Respondent's legal charge was registered in January 2004. This is also an answer to Mr Lakin's section 29 argument, which relies on the constructive trust having priority over the mortgage.

Ground 3

115. This ground alleges as follows: the Judge should have concluded that the Registrar registered the TR1 as a result of a mistake; the transfer of the House to Mr Mallon was to provide him with a security for the meat debt; had the Registrar known this he would have declined to register the TR1 and would instead have registered the Zamans as proprietors in fee simple and Mr Mallon as a charge holder; it was a mistake by the Registrar to register the transfer to Mr Mallon in the proprietorship register rather than the charges register; the Registrar was provided with false information as to the nature of the disposition, viz that it was a transfer rather than a mortgage; had the Judge not failed to appreciate this mistake, he would have ordered the register to be rectified to show the Zamans as registered proprietors of the fee simple, and to show a charge in favour of Mr Mallon; then he would have ordered that charge to be removed in the light of payment of the meat debt.
116. Mr Lakin elaborated on this argument. He drew attention to *Emmet & Farrand on Title* at paragraph 25.007, which states:

"A transaction which is in substance a grant of security will take effect as a mortgage even if it is in the form of an outright transfer...Since 1925, mortgages of legal estates can only be "effected in law" by demise of a long lease or "by a charge by deed expressed to be way of legal mortgage": s.85(1) LPA 1925....These provisions in the LPA 1925 originally applied to both registered and unregistered land, but the [2002 Act] disappplied them as far as registered titles are concerned (necessarily, because under the 2002 Act mortgages by demise and sub-demise can no longer be created over a registered estate...There is nothing in the 2002 Act to say what the effect is of a transfer of a registered title by way of security. However, the fact that it could not take effect at law to create a legal mortgage does not mean that it would be illegal and void. It simply means that it would, instead, be a valid and effective equitable mortgage by assignment with the mortgagor's rights including an equity of redemption...But this position would only stand until registration. Then s.51 of the [2002 Act] should apply to convert the mortgage into a "charge by deed by way of legal mortgage...If the Land Registry nonetheless registers the mortgagee/lender as proprietor of the land, when there has been a mortgage transfer or assignment, this would be a mistake calling for correction of the register within the statutory provisions relating to Rectification/Alteration of the register..."

117. Section 51 of the 2002 Act provides:

"On completion of the relevant registration requirements, a charge created by means of a registrable disposition of a registered estate has effect, if it would not otherwise do so, as a charge by deed by way of legal mortgage."

¹⁰ See paragraph 93 of this judgment.

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118. Thus, in Mr Lakin’s submission, when the TR1 transferring the House to Mr Mallon was registered, it had effect by virtue of section 51 “as a charge by deed by way of legal mortgage”. As a result, the Zamans were entitled to rectification of the register in the light of the Registrar’s mistaken registration of Mr Mallon as proprietor rather than as mortgagee. Further, had the correct entry in the register been made at the time, Mr Mallon would not have been able to mortgage the House. Therefore, Mr Lakin submits, the Judge should also have ordered the charge in favour of the Respondent to be removed, as it would not have been registered in the first place but for the initial mistake in registering Mr Mallon as proprietor.
119. Ingenious though these points are, I do not accept them. The fundamental problem is the one identified by the Judge: there was a properly executed TR1 containing nothing to suggest an intention on anyone’s part to create a mortgage or charge; there was no indication of such an intention from any other source; on the contrary, all three parties involved (the Zamans, the Fadias and Mr Mallon) were quite clear about what was being done – indeed, the Fadias and/or their solicitor specifically asked Mr Zaman if he was sure that he wanted the transfer to be made to Mr Mallon, and Mr Zaman confirmed that he did. Thus, as the Judge found, the true position was that the transfer embodied in the TR1 was precisely what was intended by all concerned. The TR1 was not a forgery. It was not void. The Fadias made no mistake in executing it and the Registrar made no mistake in registering it, and was bound to do so.
120. Nor, in my view, does section 51 of the 2002 Act or the passage from *Emmet & Farrand* quoted above have any bearing on the present case. Quite simply, the transfer to Mr Mallon was not “a charge created by means of a registrable disposition of a registered estate.” It was not a charge at all, nor did it purport to be such. It was precisely what the TR1 pronounced it to be. There was no inconsistency in the Judge’s acceptance of the evidence that the reason or motivation for the transfer was to provide Mr Mallon with security for the meat debt. The reason why the Appellants wanted the transfer to be made to Mr Mallon is nothing to the point. Neither is the fact that the arrangement was extremely risky from the Zamans’ point of view (as was pointed out to Mr Zaman at the time), or that what they were seeking to achieve could have been achieved with much less risk by adopting a different approach.
121. Mr Lakin’s argument suggests that had he known the background facts the Registrar should have treated the TR1 executed by the Fadias as if it was a TR1 naming the Zamans as transferees and Mr Mallon as a chargee. This would imply that the Fadias were somehow mortgaging the property to Mr Mallon. However, they were doing nothing of the kind, and had no authority to do so. The simple fact is that Mr Mallon’s title as owner, and the Respondent’s title as mortgagee are shown on the office copies of the Land Register. By virtue of section 58 of the 2002 Act that is conclusive of the titles recorded. As we have seen, sections 23 and 24 of that Act gave Mr Mallon the power as owner to charge the estate at law with the payment of money.
122. Mr Lakin relied upon a decision of the Court of Appeal in *Baxter v Mannion* [2011] EWCA Civ 120, [2011] 1 WLR 1594. There the occupier of a field applied to be registered as proprietor, claiming to have been in adverse possession for 10 years. Correct notice was served on the owner, who failed to serve a counter notice within the prescribed time. Accordingly, the occupier was registered as proprietor under paragraph 4 of Schedule 6 to the 2002 Act. The original owner later applied for rectification to the register, so as to restore himself as proprietor. The Court

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(Mummery, Jacob and Tomlinson LJJ) held that having been in occupation for less than the required 10 years, the occupier was not entitled to apply to be registered as proprietor. The registration was therefore a mistake which could be corrected under paragraphs 1 and 5(a) of Schedule 4 to the 2002 Act by restoring the registration of the original proprietor.

123. Mr Lakin sought to draw an analogy with the present case, by arguing that in the same way Mr Mallon was not entitled to be registered as proprietor but only as a charge holder; the Registrar had therefore been given false information, and so the registration of Mr Mallon as proprietor was a mistake which the court could order to be rectified.
124. I do not consider that this authority assists the Appellants. In *Baxter* the occupier was not entitled to be registered – he had not satisfied the criteria for adverse possession. Had this been clear at the time he applied, he would not have been registered. In the present case, by contrast, the information provided to the Registrar was not false. The Fadias/the Zamans were perfectly entitled to cause Mr Mallon to be registered as proprietor, which is what they all intended should happen. There was no mistake of any kind.
125. Both Mr Lakin and Mr Payton referred to the decision of the Court of Appeal in *NRAM v Evans* [2017] EWCA Civ 1013, [2018] 1 WLR 639 CA. In that case, NRAM executed an e-DS1 removing a charge in its favour from the Land Register in the erroneous belief that the charge had been redeemed. It later sought to have the charge reinstated. The judge at first instance had reinstated the charge with effect from the time of its removal. The Court of Appeal held that the e-DS1 was not void, as would be the case e.g. for forgery, *non est factum*, or where the land was not owned by the transferor, but rather voidable. Therefore, no mistake had been made in the registration, and the judge had not been entitled to restore the charge as from the time it had been removed. However, the court could and should alter the register so as to bring it up to date but not with retrospective effect. Kitchen LJ (with whom David Richards and Henderson LJJ agreed), made the following comments at paragraphs 47 - 52 of his judgment:

“In addressing all of these submissions it seems to me that the correct starting point is to consider whether, in the circumstances of this case, the alteration of the register that the judge was invited to order is properly classified as having been made for the purpose of bringing the register up to date within the meaning of paragraph 2(1)(b) of Schedule 4 or as having been made for the purpose of correcting a mistake within the meaning of paragraph 2(1)(a) of that schedule.

The term "mistake" is not defined in Schedule 4 although paragraph 11 of Schedule 8 provides that, for the purposes of that schedule, it includes mistaken omissions. It is therefore of no surprise that the term is generally understood to have a broad if somewhat uncertain scope and to encompass a wide range of circumstances, including, for example, the accidental registration of particular land in two different titles. I also recognise that, in cases where the correction of a mistake will prejudicially affect the title of a registered proprietor, the LRA 2002 makes provision, in Schedule 8, for an indemnity by the registrar in the circumstances there set out. This mechanism for imposing the risk associated with the validity of a transaction on the registrar may be of great value to a disponee but it necessarily follows that, if the alteration does not amount to a mistake, it will not be available.

Despite the scope and largely undefined nature of the term "mistake" in this context, the Law Commission noted in its 2016 Consultation Paper No. 227 entitled "Updating the Land Registration Act 2002" at 13.79 to 13.80 that a degree of consensus appeared to be emerging as to its boundaries. In

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that regard the Law Commission referred to Megarry & Wade, *The Law of Real Property* 8th ed. whose editors observe at 7-133 that:

"What constitutes a mistake is widely interpreted and is not confined to any particular kind of mistake. It is suggested therefore that there will be a mistake whenever the registrar would have done something different had he known the true facts at the time at which he made or deleted the relevant entry in the register, as by:

(i) making an entry in the register that he would not have made or would not have made in the form in which it was made;

(ii) deleting an entry which he would not have deleted; or

(iii) failing to make an entry in the register which he would otherwise have made."
(footnotes omitted)

The editors of Megarry & Wade, *The Law of Real Property* go on to provide various examples of mistakes, the first of which is the case where a person has been registered as proprietor pursuant to a void disposition, such as a forged transfer, or where the transfer was of land which the seller had already sold. Interestingly, the editors note that there is no mistake where the registrar registers a transfer that is voidable but has not been avoided at the date of registration.

The Law Commission also referred to Ruoff & Roper, *Registered Conveyancing looseleaf* ed. The authors of this work adopt, at 46.009, very much the same formulation as that of the editors of Megarry & Wade, *The Law of Real Property*:

"'Mistake' is not itself specifically defined in the 2002 Act, but it is suggested that there will be a mistake whenever the Registrar (i) makes an entry in the register that he would not have made; (ii) makes an entry in the register that he would not have made in the form in which it was made; (iii) fails to make an entry in the register which he would otherwise have made; or (iv) deletes an entry which he would not have deleted; had he known the true state of affairs at the time of the entry or deletion. The mistake may consist of a mistaken entry in the register or the mistaken omission of an entry which should have been made. Whether an entry in the register is mistaken depends upon its effect at the time of registration.... "

It will be noted that both of these formulations focus on the position at the point in time that the entry or deletion is made. That, so it seems to me, must be right. If a change in the register is correct at the time it is made it is very hard to see how it can be called a mistake."

126. Later in the judgment, at paragraph 59, he concluded:

"In my judgment, the registration of a voidable disposition such as that with which we are concerned before it is rescinded is not a mistake for the purposes of Schedule 4 to the LRA 2002. Such a voidable disposition is valid until it is rescinded and the entry in the register of such a disposition before it is rescinded cannot properly be characterised as a mistake. It may be the case that the disposition was made by mistake but that does not render its entry on the register a mistake, and it is entries on the register with which Schedule 4 is concerned. Nor, so it seems to me, can such an entry become a mistake if the disposition is at some later date avoided. Were it otherwise, the policy of the LRA 2002 that the register should be a complete and accurate statement of the position at any given time would be undermined."

127. I cannot find any comfort for the Appellants in this decision. It is no doubt true to say that the Zamans bitterly regret the transfer to Mr Mallon, and quite understandably regard that disposition as a mistake. But, as Kitchin LJ explained, that does not render the entry on the register a mistake. As I have said, it clearly was not. The entry was correct.

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128. Further elucidation was provided by Asplin LJ (with whom Peter Jackson and Longmore LJ agreed) in *Antoine v Barclays Bank* [2018] EWCA Civ 2846. At paragraph 42 of her judgment she said:

“In the passages quoted in Megarry & Wade at 7.133 and Ruoff & Roper at 46.009, set out at [49] and [51] of Kitchin LJ's judgment in *NRAM v Evans* respectively, and in [53] of the judgment itself, emphasis is placed upon the knowledge of the Registrar at the time an entry is made or deleted. It seems to me that the reference to knowledge may easily be misunderstood. The suggestion that there will be a mistake whenever the Registrar would have done something different had he known the true facts at the time at which he made or deleted the relevant entry in the Register, or made the omission complained of, might suggest that the question of whether there is a mistake turns upon the subjective knowledge of the Registrar or the extent of his ability to make enquiries or to obtain relevant documents. It seems to me that that was neither the intention of the textbook writers nor the ratio of Kitchin LJ's judgment. It is not being suggested that the Registrar has some duty to investigate or that the state of his knowledge about an underlying disposition is relevant. As a result of the provisions and structure of the 2002 Act and the Rules, if the relevant requirements are met (and subject to limited powers to raise requisitions) the Registrar is required to register a disposition (in this case, by operation of law) and does so as an administrative act.”

129. In my view the Judge was correct in holding that the disposition represented by the TR1 in the present case was neither void nor voidable, and that it embodied precisely what all concerned intended, namely to transfer title to Mr Mallon, as the Appellants' pleading itself states. It follows that in my view the Judge was right to decide that there was no mistake in registering Mr Mallon as proprietor, and there was no ground for ordering the register to be rectified or altered.
130. In these circumstances it is unnecessary to express any view on whether, if a case for rectification were established, it should be retrospective.

Ground 5

131. This ground concerns the proprietary estoppel argument. I have already explained why the Judge rejected this argument,¹¹ and why I have granted permission to amend the Grounds of Appeal to include a challenge to the Judge's conclusion.¹² At paragraphs 37-65 above, I describe the main authorities relating to the point.
132. Mr Lakin submitted that, in looking at the question whether and to what extent proprietary estoppel has survived section 2 of the 1989 Act, the high water mark of the argument that it has not survived is represented by the *obiter dicta* of Lord Scott in *Cobbe*;¹³ he argued that since then the case law has retreated to a more nuanced position in which the question is treated as fact-sensitive, it being clear that section 2 is not a bar to all proprietary estoppel claims. He submitted that the Judge was wrong, in that he regarded Lord Scott's *dicta* as the beginning and end of the question, and erred in holding that no proprietary estoppel arose on the facts of this case.
133. In support of these submissions Mr Lakin referred in detail to the case law which I have described at paragraphs 37-65 above. He relied, in particular, on the passages in the judgments of Robert Walker, Beldam and Clarke LJ in *Yaxley* quoted at paragraphs 39-42.

¹¹ See paragraphs 28-29 of this judgment.

¹² See paragraph 36 of this judgment.

¹³ See paragraph 46 of this judgment.

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134. Mr Lakin also pointed out that in *Thorner*¹⁴ the House of Lords confirmed that *Cobbe* had not signalled the end of proprietary estoppel, and that all the members of the court had agreed that the claim for proprietary estoppel should succeed in that case, although Lord Scott would have preferred to use a constructive trust as the remedy. Lord Neuberger stated that section 2 of the 1989 Act had no “impact on a claim such as the present, which is a straightforward estoppel claim without any contractual connection,” and that much of the reasoning in *Cobbe* had been directed to the special facts of the claim in that case, which was contractual in nature.
135. Mr Lakin submitted that the present case was not a contractual case, and that the context was not commercial, concerning as it did the Zamans’ family home. It was, he argued, conceptually the same as *Thorner*, where the assurance given to the party relying on estoppel was “If you carry out unpaid work on the farm, the farm will eventually be yours”. Here the assurance was “If you pay off the meat debt, I will transfer the House to you”. In his submission, the failure to fulfil the assurance was clearly unconscionable conduct by Mr Mallon.
136. In Mr Lakin’s submission, the result was a proprietary estoppel constituting a “mere equity”, the scope of which was for the court to determine as the minimum equity required to do justice to the party who has acted to his or her detriment in reliance on the assurance. Here the minimum equity to do justice was to order the transfer of the House to the Zamans, free of the Respondent’s mortgage.
137. Mr Lakin accepted that the decision of the Court of Appeal in *Mortgage Express*¹⁵ was relevant in determining whether the equity had priority as an overriding interest over the mortgage in favour of the Respondent. He referred to section 116 of the 2002 Act which provides:
- "It is hereby declared for the avoidance of doubt that, in relation to registered land, each of the following—
- (a) an equity by estoppel, and
- (b) a mere equity,
- has effect from the time the equity arises as an interest capable of binding successors in title (subject to the rules about the effect of dispositions on priority)."
138. He also referred to paragraphs 27 and 28 of the judgment of Lewison LJ in that case,¹⁶ and submitted that here the equity resulting from the proprietary estoppel arose immediately the House was transferred to Mr Mallon and, therefore, well before the mortgage was granted to the Respondent. As the Zamans were also in actual occupation before the mortgage, the equity was an overriding interest under section 116, which took effect free of the mortgage.
139. In response, Mr Payton submitted that the present case was not familial but commercial, and he pointed to Lord Walker’s observation¹⁷ in *Cobbe* that the courts should be slow to introduce uncertainty into commercial transactions by “over ready”

¹⁴ See paragraphs 51-55 of this judgment.

¹⁵ See paragraphs 62-64 of this judgment.

¹⁶ See paragraph 64 of this judgment.

¹⁷ See the quotation from Lord Walker’s speech at paragraph 49 of this judgment.

use of equitable concepts such as estoppel. He also drew attention to Lord Walker's statement in the same case¹⁸ that the concept should be "applied in a "disciplined and principled way." In Mr Payton's submission, the appropriate principles in the present case were those pertaining to contract. If section 2 were not applied so as to exclude proprietary estoppel in such a case as this, then the section would be rendered otiose. Further, had the contract been in writing and enforceable, the Zamans would have been able to apply for specific performance once the meat debt had been paid off. Mr Mallon would then have been required to redeem the mortgage as part of specific performance. If he had been unable to do so, the Zamans would have obtained specific performance subject to the Respondent's mortgage and/or would have been left to remedies at common law, including proving in Mr Mallon's bankruptcy. Therefore, the estoppel claim is for relief the Zamans would not have been able to obtain if the agreement with Mr Mallon had been in writing and enforceable. Proprietary estoppel could not put the Zamans in a better position than if the agreement had been enforceable by specific performance. Under the terms of the agreement Mr Mallon would still have been entitled to mortgage the property.

140. Mr Payton also submitted that, even if there was a proprietary estoppel, it did not come into existence until the time when Mr Mallon reneged on his assurance, viz, at some point in 2006; therefore it would have come into being only *after* the Respondent's mortgage, and could not affect the conscience of the Respondent or take priority over the latter's mortgage. He submitted that this timing point was a complete answer to Ground 5.

Discussion of estoppel point

141. I should first record that I do not accept Mr Lakin's submission that the present case is conceptually the same as *Thorner*. The present case is not, as *Thorner* was, "a straightforward estoppel claim without any contractual connection." In the present case there was an oral agreement which, so far as one can tell from the Appellants' own pleading and from the facts found by the Judge, was intended to be honoured by the parties. That agreement admittedly fell foul of section 2 of the 1989 Act and was unenforceable. Further, I do not agree with Mr Lakin's suggestion that the context was not commercial. It clearly was. The agreement arose because Mr Mallon was only prepared to accept payment of the debt by instalments and to continue to supply meat to Mr Zaman if the House was transferred into his name as owner pending payment.
142. The present case is not wholly dissimilar from *Yaxley*, where, in what also appears to have been a commercial and contractual context, the Court of Appeal surmounted the problem of section 2 by finding that the facts supported a constructive trust, whether or not a proprietary estoppel would have offended the purpose of section 2.
143. The criteria for a proprietary estoppel are helpfully expressed by Lewison LJ in *Davies v Davies*.¹⁹ As there explained, the required ingredients are: an assurance of sufficient clarity, reliance by the claimant on that assurance, and detriment to the claimant in consequence of reasonable reliance. The court then looks backwards from when the assurance should have been performed, in order to see whether, in the

¹⁸ See paragraph 46 of his speech in *Cobbe*.

¹⁹ See paragraph 59 of this judgment.

circumstances which have actually happened, it would be unconscionable for the promise not to be kept. The stated criteria may well influence each other, in the sense that, for example, the quality of the assurance may have an effect on the issue of reliance, and reliance and detriment may be intertwined. Detriment need not be quantifiable financial detriment, so long as it is something substantial. There must be a causal link between the assurance relied on and the detriment asserted. The issue of detriment falls to be assessed when the person who has given the assurance seeks to go back on it. All these factors form part of a broad inquiry as to whether repudiation of the assurance is unconscionable in all the circumstances and whether (and if so to what extent) it would be inequitable to allow the person who has given the assurance to go back on it.

144. I have already expressed the view that, (subject to whatever issues and evidence might have arisen had the trust issue been pleaded out, as it should have been), I would have been inclined to find a constructive trust on the basis of the material I have seen. For much the same reasons, and subject to the effect of section 2, I would also be inclined to the view that, applying the principles set out in the previous paragraph, the facts of the present case would support a finding of proprietary estoppel, despite the commercial and contractual context. The assurance given by Mr Mallon, the reasonable reliance upon it by the Zamans, the detriment to them and the causal link between that reliance and detriment, all appear to be sufficiently established. Equally, it is difficult to see how Mr Mallon's failure to honour his assurance over a period of about 10 years would not be regarded as unconscionable, so that it would be inequitable to allow him to renege on it.
145. However, even if that is correct, there remains the question of the effect, if any, of section 2 of the 1989 Act, and also the question whether the ostensible equity defeats or has priority over the Respondent's mortgage. I will deal with the latter question first, as in my view the position there is clear.
146. As Lewison LJ explained in *Davies v Davies*,²⁰ identifying a proprietary estoppel is a retrospective exercise, looking back from the point when the party against whom the estoppel is claimed has reneged on his or her assurance. Even though there may at some earlier stage be an inchoate equity, an estoppel will not be established unless and until, in the light of the actual events up to that point, it would be unconscionable for the assurance not to be honoured, and inequitable to allow that party to go back on it. (See also paragraph 101 of the speech of Lord Neuberger in *Thorner v Major* quoted at paragraph 55 above.) Even then, the court has what is sometimes termed a remedial discretion to determine how the equity should be satisfied. Where the court determines that the minimum remedy to satisfy the equity is to grant a proprietary interest, the court's discretion extends to deciding from what point in time that interest should be treated as having existed.
147. In my view Mr Payton is correct in submitting that the timing here is fatal for the Appellants. It is clear that any equity based on a proprietary estoppel could not have come into existence until, at the earliest, 2006 when the evidence indicates that Mr Mallon ought to have transferred ownership of the House to the Zamans, as at which point his conduct in failing to do so would appear unconscionable. In the present circumstances, it is inconceivable that a court would grant relief such as to render

²⁰ See the quotation at paragraph 59 of this judgment.

retrospective any proprietary interest which the court thought fit to grant to the Zamans, so that it would have priority over the Respondent's mortgage, which came into effect in 2004, about two years prior to the earliest time at which an equity based on proprietary estoppel could have come into existence. The Zamans, having been advised of the risks involved in what they were proposing to do, nevertheless went ahead and required the Fadias to transfer title to Mr Mallon. Having done that, they failed at any time to cause a restriction to be entered on the register. Thus, there was nothing to give the Respondent notice that the Zamans had any interest whatsoever in the House. The Judge found that the Respondent had made all such inquiries as were reasonable.

148. That is sufficient to deal with this ground of appeal. It is therefore unnecessary to decide whether in any event any equity of the Zamans would be defeated by sections 23-26 of the 2002 Act. The parties' respective arguments in this regard appear essentially the same as in the case of a constructive trust. There is no obvious reason why the Appellants should be in a stronger position in relation to proprietary estoppel than in relation to a constructive trust, and my tentative conclusion at paragraph 113 above applies here *mutatis mutandis*.
149. It is also unnecessary to decide whether, as the Judge held, section 2 of the 1989 Act precludes a proprietary estoppel in this case. There appear to be indications that the case law has moved on beyond Lord Scott's *obiter dicta* in *Cobbe*, as Mr Lakin submits. The counter arguments to Lord Scott's view, also *obiter*, expressed by Kitchin LJ in *Farrer v Miller*,²¹ have considerable force. The case law shows that there are "straightforward" cases of proprietary estoppel which have no contractual connection, and are therefore clearly unaffected by section 2. Further, even in a contractual context, the fact that the contract is rendered void and unenforceable by section 2 does not mean that a differently constituted cause of action is necessarily affected. It may have stricter or different criteria. Breach of contract does not require unconscionability, whereas proprietary estoppel does. Nor are reliance and detriment prerequisites of a cause of action in contract. By the same token, it is not in every case where section 2 renders an agreement unenforceable *qua* contract that a finding of a proprietary estoppel would frustrate the statutory provision. The current case law seems, as Mr Lakin submits, to postulate a case by case, fact-sensitive, approach.
150. If it had been necessary to decide the point, I would have been inclined to the view that, in the present case, a finding that an equity had arisen preventing Mr Mallon from disputing the Zaman's interest would not have frustrated the purpose of section 2. This is in the light of (1) the clear and complete terms of the oral agreement, (2) the fact that it was apparently intended by the parties to be honoured (3) the nature of the interrelated reliance by and detriment to the Zamans in causing Mr Mallon to be registered as legal owner notwithstanding that they had paid the whole purchase price, and (4) the fact that Mr Mallon's conscience was affected, so that it was unconscionable for him to renege on his assurance. However, for the reasons I have given, such a conclusion would not have assisted the Appellants.

²¹ See the quotation at paragraph 58 of this judgment.

Approved Judgment

Conclusion

151. For these reasons, although I grant permission to appeal on each of the grounds, the appeal must be dismissed in its entirety.
152. I invite the parties to agree an order reflecting this judgment and to send it to me for approval.