



Neutral Citation Number: [2022] EWHC 950 (Ch)

Case No: BL-2020-000136

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

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

Date: 22 April 2022

Before:

DEPUTY MASTER HANSEN

Between:

WILLIAM SIMON FATTAL

Claimant

- and -

ELIAS SIMON FATTAL

Defendant

MR DAVID HOLLAND QC AND MS EVIE BARDEN (instructed by JMW Solicitors LLP) for the
Claimant

MR MATTHEW WINN-SMITH (instructed by Trethowans LLP) for the **Defendant**

Hearing date: 8-11 March 2022

APPROVED JUDGMENT

DEPUTY MASTER HANSEN:

Introduction

1. This is a dispute between two brothers about the ownership of a very valuable flat known as 106 Nottingham Terrace, London NW1 (“the Property”). The Property is a 4-bedroomed penthouse apartment opposite Regent’s Park. The claim was commenced by Part 7 Claim Form on 22 January 2020. It was tried before me over 4 days from 8 to 11 March 2022.
2. The Property is registered at HM Land Registry under title number NGL217917 in the sole name of the Defendant and has been so registered since 29 January 2014. It was acquired by the Claimant in his sole name in 1972 but was transferred to the Defendant by a transfer dated 24 January 2014 (“the 2014 Transfer”). Panel 8 of the 2014 Transfer, under the heading “*Consideration*”, recorded that “*the transfer is not for money or anything that has a monetary value*”. However, it is no part of either party’s case that the Property was a gift from the Claimant to the Defendant and there is no plea by the Defendant of estoppel by deed in the Re-Amended Defence. Both parties agree that the transfer was intended to be for value.
3. The Claimant’s case is that he was the sole owner in equity of the Property from the date of acquisition but that there came a time, in or about 1990, when he orally agreed to transfer the Property to his brother for £400,000. His case is that he transferred the Property to the Defendant in 2014 in the mistaken belief that the Defendant had paid him the agreed figure of £400,000 and he seeks relief from the consequences of his mistake in equity and other relief.
4. The Defendant’s pleaded case is that the brothers were beneficial tenants in common in equal shares from the outset, despite the conveyance into the sole name of the Claimant, pursuant to a common intention constructive trust, and that he was therefore buying out the Claimant’s 50% interest. Further, his pleaded case is to the effect that whilst he does not recall the specifics of the arrangement or the agreed price, “*the Claimant will have allocated a sum in one of the accounts of the many jointly owned companies, a director’s loan account, a trust account or similar device so as to account for the movement of a sum of money from the Defendant to the Claimant to reflect the transfer of the Claimant’s beneficial interest in the Property to the Defendant*”. How, it might be asked, could the Claimant have mistakenly believed that he had been paid for the Property (if in fact he had not been paid) and how, it might be asked, could the Defendant have thought that he had paid without being able to identify precisely how and by what means he paid? There are a number of improbable features about both party’s cases

but I repeat: no one alleges that the transfer was a gift. Ultimately, the Claimant has brought this case, and founds his claim on the central allegation that he mistakenly believed his brother had paid him for the Property when in fact he had not. In those circumstances, the burden is on the Claimant to prove the alleged mistake and the fact of non-payment. The other important issue concerns the alleged common intention constructive trust. There are, of course, other issues, but these are the central issues.

5. The Claimant is now 82 years old. His brother, the Defendant, is 79 years old. For the sake of convenience, but without intending any disrespect, I shall henceforth use the first names of the relevant parties and refer to them as William and Elias respectively. They are both very wealthy and successful businessmen and previously enjoyed a very strong relationship based on mutual trust. Sadly, that relationship has fallen apart and I was told that they are now engaged in litigation on multiple fronts of which this is just one.

Factual Background: 1971-1989

6. In setting out the factual background, I propose, at this stage, to recite the facts that are either agreed or uncontroversial and/or incontrovertible in the light of the evidence given at trial and/or the contemporaneous documents. That said, there are, as one might expect, significant disputes between the parties, in particular as to (i) the issue of common intention and/or the inferences that should be drawn as to what the parties' common intention was in relation to the ownership of the Property (ii) what the terms of any agreement were in relation to the subsequent transfer of the Property from the Claimant to the Defendant (iii) whether the Defendant ever paid for the Property and if so how and if not (iv) whether the Claimant nonetheless mistakenly believed that he had been paid. I shall of course have to resolve those conflicts and make appropriate findings of fact, but for the moment I propose to set out the core background facts so as to provide the context for the later discussion and resolution of the key issues.
7. William started his first business in 1962. Over the years he and his brother have been involved in numerous businesses. A schedule of directorships identified, as at February 1990, more than two dozen limited companies of which they were or had previously been directors. The pattern has generally been the same. The businesses have been owned on a 50:50 basis with both brothers acting as directors and drawing a salary. William has always been the dominant partner, making most of the important business decisions. However, this is not to diminish the role of Elias who, as William acknowledged, has been involved primarily on the operational

side of the businesses. Both brothers were given a good start in life by their father who, together with his brothers, had been a very successful textile merchant and had provided his sons with the seed capital to get started in business.

8. For present purposes, the story begins in late 1971 or early 1972 when the brothers viewed 57 Buttermere Court, London NW8 (“Buttermere”), a three-bedroomed flat. At that time both brothers had been living at home with their parents and were keen to strike out on their own. William was 32 and Elias was 29.
9. At or about the same time or shortly thereafter William viewed the Property and decided to purchase it. In or about Easter 1972, a deposit of £5,950 was paid for the Property by William with the benefit of a loan from a company called Invicta Estates Ltd (“IEL”). This was one of the property investment companies owned and operated by William and Elias. The loan is shown in the ledger of IEL as having been taken out on 28 March 1972.
10. On 31 May 1972 a deposit of £1,575 was paid for Buttermere by IEL. Elias maintained in his evidence that this was him *“getting on the property ladder, despite the use of company money”*. He accepted that by this date William had put down a deposit on the Property.
11. On 1 September 1972 Elias purchased Buttermere for £31,500 and took a lease of Buttermere in his sole name.
12. On 15 September 1972 William repaid the loan of £5,950 by debiting this sum from his directors loan account (“DLA”) with IEL.
13. On 30 November 1972 £3,500 was debited from Elias’s DLA with IEL and credited to William’s DLA with IEL. Elias relied heavily on this payment and I will need to make findings in due course as to its significance (if any).
14. On 18 December 1972 William completed his purchase of the Property for £59,500 and took a lease of the Property in his sole name. He was registered at HM Land Registry as the sole proprietor on 9 January 1973.
15. To fund the acquisition William obtained a mortgage in his sole name from National Westminster Bank plc in the sum of £68,000. William says he also paid the stamp duty and other transaction costs in respect of the Property. Elias cannot dispute either of those facts but his case is that *“the ultimate source of the funds to purchase the Property was the joint business*

ventures” (§12, Re-Amended Defence). I shall have to make findings in due course as to what exactly this means and whether it can be shown that Elias made any financial contribution to the costs of acquisition.

16. The Property had been constructed to a shell finish and as a result refurbishment work was undertaken at the Property during the course of 1973. William says he paid for the refurbishment works. Elias claims that he was closely involved in the fitting out work, instructing the designer and joiner, and in his Re-Amended Defence at §14 the Defendant puts the Claimant to proof that the cost of refurbishment came from William’s personal funds and contended that “*any monies additional to the mortgage sum would have been provided directly or indirectly from joint business accounts*”. I shall have to make findings in due course as to what exactly this means and as to the extent of Elias’s involvement in the refurbishment and whether it can be shown that Elias made any financial contribution to the costs of refurbishment.
17. On 27 June 1973 Elias sold Buttermere for the sum of £40,000. He maintains that he would not have done so, had he not been a co-owner in equity of the Property.
18. A schedule of freehold property held by IEL as at 30 November 1973 set out a list of properties owned or previously owned by IEL and it showed Buttermere as an asset of IEL that had been sold at a profit during the course of 1973. It referred to a number of other properties, including 107 Park Road which had been bought during the course of 1973, but it did not refer to the Property.
19. It is Elias’s case that the ultimate treatment of Buttermere as a company asset is significant and reflects the fact that, whatever the original intention, the brothers had agreed that Buttermere was too small and would henceforth be treated as one of IEL’s investment properties and that the Property was to be a “*joint enterprise*” and a home for both of them. Mr Winn-Smith emphasised that the acquisition of the Property has to be viewed in the context of two brothers who were “*doing everything on a 50:50 basis right from the beginning*” and that it was “*inconceivable*” that Elias would not have kept Buttermere as his own but for a common intention to share the Property beneficially. I shall have to make findings in due course on the alleged common intention, including what if anything was discussed and/or agreed, and what (if any) inferences should be drawn from the whole course of dealing between the parties in relation to the Property.
20. However, I note at this stage that William denies any such common intention or any discussions at all (§14, Witness statement), a denial he maintained under cross-examination, whilst Elias

maintains that the brothers agreed that the Property was *“too big for one person to live in on their own, so we agreed we would buy it and both live there and I would not move into 57 Buttermere Court as previously planned”* (§22, Witness statement). He went on to say that *“there was no big discussion between us”* and that he could not remember *“the specifics of the purchase”* but says that he *“understood that 106 had been bought by both of us for both of us”* (§24, Witness statement).

21. In 1974 William and Elias moved into the Property and they lived there together until 1990 when William got married and moved out to a property in York Terrace West.
22. There is a dispute about who paid the day to day expenses associated with the Property. William says he paid most of them, including the mortgage repayments. Elias says he cannot recall *“who paid which outgoings”* but that it was *“most probably company money”*. He says: *“We had lots of different outgoings, a maid, food, service charges, and I cannot now remember who paid for what, and we did not argue about that, it was just paid”* (§33, Witness statement).
23. During this time Elias was primarily engaged in running a new company called Roboserve Limited, a company he jointly owned with William.
24. In or about April 1977 William took a lease of two car parking spaces in the underground car park forming part of the building containing the Property.
25. It is clear from the documentary evidence that William redeemed the mortgage in April 1983. His private account at NatWest shows that he made two payments as follows: £7,000 on 5 April 1983 and £61,000 on 11 April 1983. It will be recalled that the original loan from NatWest was in the sum of £68,000 and the records of NatWest confirm that the mortgage was redeemed in April 1983. William says he did so with the benefit of funds obtained from the sale of some of his shares in Roboserve. Elias maintains that *“William redeemed the mortgage with funds which most likely represented pooled joint company funds”*. I shall have to make findings in due course as to what exactly this means and whether it can be shown that Elias made any financial contribution to the mortgage or the redemption of the mortgage.
26. In 1987 Roboserve Limited was sold for £18m.
27. In May 1989 Elias got married. The marriage was subsequently annulled in or about November 1989. William appeared to make much of this in his evidence as somehow significant but I am not persuaded that the detail of this short-lived marriage is of any real relevance to this dispute.

I am, however, prepared to accept that the shock of this ill-fated marriage had an adverse effect on Elias and marked the beginning of what William described as “*a very low period for him*”. In December 1989 the brothers’ father died.

1990-2014

28. In 1990 William married and he and his wife moved into temporary, rented accommodation at 26 York Terrace West whilst looking for a family home. Elias remained living at the Property. William’s evidence is that he “*permitted the Defendant to continue to live at the Property by himself, owing to the Defendant’s personal circumstances*” (§23, Amended PoC), which I take to be a reference to the events described in paragraph 27 above.
29. In late 1990 or early 1991 there was a discussion between the brothers about the Property. William’s pleaded case is that “*In or about late 1990/early 1991 the Claimant made the following proposal to the Defendant: if the Defendant wished he could buy the Property from the Claimant at a price of around £400,000 (‘the Proposal’). The price was reflective of the estimated market value of the Property*” (§24, Amended PoC). The Proposal appears to have been motivated in part by tax considerations, a point that I will return to in due course. In his Re-Amended Defence Elias maintained that he could not now recall “*either a proposal or him accepting any such proposal*” (§27, Re-Amended Defence) but he accepted that “*a proposal at about this time may have happened but if so then it must have related to the Claimant’s 50% beneficial interest in the Property*” (§25, Re-Amended Defence).
30. However, in his evidence given under cross-examination, Elias was far less uncertain about the Proposal. He said: “*William told me that he would transfer 106 to me because he was moving out. He would get a valuation from Derek Hudson ... I was grateful and thankful and left it at that*”. When asked about the figure of £400,000, he said: “*I don’t remember the figure of £400,000 but I remember William saying that he would transfer the property to me and obtain a valuation from Derek Hudson*”. He said he recalled everything apart from the figure of £400,000 although he accepted that William had “*never said he was gifting it to me*” and the actual figure does not appear to have been a particular concern of Elias at the time as his evidence was that “*this wasn’t something we were going to argue about*”.
31. From this I take it now to be agreed, and for the avoidance of doubt I find, that there was a proposal or offer by William to sell the Property to Elias in or about late 1990 or early 1991. This fits with the background facts when one recalls that William had moved out of the Property in 1990 and was looking for a family home with his wife. Elias cannot remember the figure of

£400,000 but in the light of his evidence there must have been a figure, given his concession that it was never meant to be a gift, and I am satisfied that the figure of £400,000 was communicated to Elias, having been provided by Derek Hudson, an accountant with the firm Wilding Hudson and Co (“WHC”), the firm that dealt with the companies’ tax affairs, and indeed Elias’s personal tax affairs.

32. However, the Proposal never hardened into a binding agreement for sale. Nothing was ever written down or signed and nothing appears to have been done to effectuate the agreement until much later. However, it is Elias’s pleaded case that he believed from about 1990 / early 1991 that William had transferred his 50% beneficial interest in the Property to him and that from that date onwards he was the sole beneficial owner (§28, Re-Amended Defence). Given his acceptance that it was not a gift, Elias has to explain how he paid William for the Property and his pleaded case is as follows: “... *on the balance of probability, the Claimant will have allocated a sum in one of the accounts of their many jointly owned companies, a director’s loan account, a trust account or similar device so as to account for the movement of a sum of money from the Defendant to the Claimant to reflect the transfer of the Claimant’s beneficial interest in the Property to the Defendant*” (§27, Re-Amended Defence). I shall have to return to this topic in due course and make findings as to whether Elias paid and if so when and by what means, although I would also note at this stage that Elias’s alternative case is that the burden is on William to prove non-payment and that he cannot do so and that I should, if necessary, resolve this issue against William by recourse to the burden of proof.
33. In 1992 Elias bought 72/73 Nottingham Terrace (“72/73”), another (larger) flat in the same building as the Property, for £600,000. Later in 1992 or early 1993 William and his wife purchased 81 Hamilton Terrace in St John’s Wood. However, it needed a considerable amount of work doing to it and so in 1993 William and his wife moved out of York Terrace West and into 72/73. It is William’s evidence that he and his wife spent in excess of £100,000 modernising 72/73. William and his wife lived at 72/73 until May 1997.
34. In the meantime, Elias had met and married his wife, Ilana, and they had had two children by the time that William moved out of 72/73.
35. In or about the beginning of 1996 the accountants, WHC, and tax adviser, Mr Buzzoni of Taylor Wessing, began discussing the brothers’ various property interests. A note, which is date-stamped as received on 3 January 1996 and believed to have been written by Derek Hudson, begins as follows: “*106 Nottingham Terrace is in the names of William and Elias Fattal jointly. William moved out of the property in 1990 and the property was then valued at approximately*

£400,000 ...” Pausing there, it will be recalled that the Property has never been in the parties’ joint names. The note then continues:

“I understand that the current idea is that both 106 Nottingham Terrace and 72 Nottingham Terrace will be sold to Cedardrive Ltd (financed by Citylink Group Ltd) who will then hold the properties for re-sale but will let them until such time as the property market improves.

In my view William should have disposed of his share in 106 Nottingham Terrace to Elias when he moved out in 1990. On reflection 72 Nottingham Terrace should have been purchased by William and we need to consider whether we can establish that Elias was acting as a nominee for William”.

36. The note then goes on to consider at some length the possible capital gains tax liabilities of the brothers in various different scenarios and how the principal private residence exemption might be deployed to reduce their tax burden.
37. This note marks the beginning of a long and often confused course of correspondence involving the brothers and their accountants and tax advisers where the recurrent focus is on saving tax. The focus is not on questions of title and whether the equitable ownership is different from the legal ownership. It is on tax and how to save tax and it is to be recalled that throughout the course of this correspondence the brothers were still very close and implicitly trusted one another.
38. This note, like many others that follow on from this on the same subject, is not consistent with either party’s case and is demonstrably wrong in some important respects. Both parties, but particularly Elias, can point to passages in this course of correspondence which support their case and might be construed as an admission against interest. Thus it is clear that, as from about November 1996 at the latest, William was conducting himself on the basis that Elias owned the Property, as is apparent from a facsimile transmission dated 21 November 1996 which William sent to a solicitor, Julian Holy, and which reads as follows:

“You will recall that Derek Hudson wrote to you on 5 January 1996 with a view to regularising the confusion that has arisen in the way that Elias’ and my name are registered on properties occupied by us. [...]

We now need to take steps to regularise the position. Currently I am the registered owner of the flat in which Elias lives and which we agreed belongs to him and vice versa.

The correction should have been made some time ago but as if often the case, one tends to overlook one's personal affairs in attending to business affairs".

39. Elias was at this time still living at the Property and therefore understandably relies on that document but to my mind, it begs a number of questions, in particular as to what William meant when he wrote "*and vice versa*". Further, the document can also be viewed as consistent with William's case on the basis that the brothers' various property interests were mired in "*confusion*" and that as a result of this confusion William came to believe that Elias had indeed paid him for the Property and become the owner, at least in equity, of the Property.

40. Returning to the factual narrative, William and his wife moved out of 72/73 and into 81 Hamilton Terrace in May 1997. Elias and his family moved into 72/73 in or about February 1999 and thereafter the Property was rented out, primarily through Cedardrive Limited (one of the brothers' companies), with the rental income being retained by the Defendant. The rental income was substantial, as one might expect, and is the subject of a claim by William for an account.

41. On 15 January 1999 there was a meeting between William, Elias, Derek Hudson and Mr Buzzoni. The initial focus of the discussion, judging from the note of it that survives, appears to have been various family trusts in Jersey and Guernsey, but in due course the discussion turned to the Property (Item (G) at paragraph 19 of 21) and the relevant part of the note reads as follows:

"ESF had acquired WSF's interest in that property after WSF had moved out and the property was held by WSF and ESF on behalf of ESF alone. ESF had himself recently moved out. Agreeing that the property might be sold before 31 March 2000 to a company within the Cedardrive Group. A valuation would be required and WSF would deal with this. Stamp duty would be payable and the approximate value was £800,000".

42. The correspondence and discussion around the Property and tax appears to have petered out in or about February 2001 (see e.g. note of telephone conversation dated 23 February 2001) but the matter was clearly resurrected in the latter part of 2009 / early 2010. On 26 January 2010 Elias emailed Derek Hudson as follows:

“Dear Derek

Flat 106 is in my name and I will be receiving a heavy tax bill in respect of the rental income for the year ending 5th April 2009. Is there any way this can be altered for both that year and the following year ending April 2010. Could you please advise.”

43. Mr Hudson’s first response was to suggest that Elias transfer the flat to his wife “*whose tax rate is below yours*”. However, Elias responded as follows: “*Derek – could you please think of other alternatives...*” The conversations then began again, with William again to the fore, and I note that the subject heading of much of the subsequent correspondence in 2010 was “*Possible Tax Planning*”. In particular, it appears to have been William who came up with the idea of a bank loan, secured against the Property, on the basis that the interest cost would be tax deductible. This appears from an exchange of emails on 24 September 2010 and this appears to have been the scheme that eventually found favour with Elias and William, albeit after a further period of delay, and it was a scheme that clearly required the Property to be in Elias’s name if he was to borrow money using the Property as security.

44. The correspondence then began again in or about March 2012 and again the focus was on how Elias, in particular, could save tax. However, the correspondence only reveals so much, both for the reasons already given but also because there were clearly conversations taking place at the same time, the contents of which are not always clear from the correspondence. Thus on 29 March 2012 Kathryn Middleton on behalf of Mr Buzzoni emailed William as follows:

“Dear William

Further to my previous email and our conversation I can confirm that if Elias bought the property for £750,000 with no borrowings, and it has been let out since it was acquired, borrowings that are now secured against the property will attract tax relief on interest up to £750,000 but not on any larger amount”.

45. William replied on 30 March 2012 as follows:

“As best I recall, I would have sold the flat to Elias in or around 1993”.

46. By July 2012 a draft transfer of the Property had been prepared by solicitors, Collyer Bristow. I shall return to the terms of this transfer and indeed the eventually completed transfer in due course, but it is relevant to note at this point that solicitors were simultaneously instructed to arrange a transfer of 71 Nottingham Terrace (“71”) to Elias from Mr Michael Zelouf, the

brothers' nephew, who held the legal title to 71 as nominee for Elias. That explains the other transfer referred to in the email correspondence at this time.

47. Thus on 20 July 2012 Rory Macpherson, a solicitor at Collyer Bristow, emailed William attaching draft transfers for 71 and the Property. The email dealt first with the transfer of 71 where, it is common ground, Elias had provided the funds but the property had been acquired in Mr Zelouf's name. Thus, in commenting on the draft transfer, Mr Macpherson said this in relation to Panel 11, Additional Provisions: *"clauses 11.1 and 11.2 record the property was acquired with funds provided by Elias and the transfer is made in consideration of this fact"*. He then dealt with the draft transfer of the Property and said this: *"Panel 11 Additional Provisions – I have replicated the wording in the transfer of 71 Nottingham Terrace"*.

48. On 23 July 2012 Rory Macpherson emailed William as follows:

"You mentioned in relation to 106 Nottingham Terrace that you consider Elias is the beneficial owner and this is reflected by entries in your respective accounts. This suggests the property is held by you on constructive trust for Elias. I have therefore drafted two forms of transfer for 106 Nottingham Terrace, one for use where you transfer the property to Elias and a second if the property is transferred to a third party".

49. On 23 November 2012 Mr Buzzoni sent an email to Elias, copying in William, with a subject heading *"IHT Planning"*, in which he said this:

"The big problem I have is the accrued capital gain in the property. My note of the meeting says that you bought the property from William for £1.4m and that it is now worth anything between £2.5-£4m. [...]. In the first instance can you confirm the above and let me know when you bought the property from William? If you are not sure, I will ask John Wilding because Derek would almost certainly have reported the transaction for tax purposes".

50. It is not clear what meeting or meeting note he is referring to in the second sentence and it is no part of anyone's case that Elias bought the Property from William for £1.4m or that there was any proposal to this effect. The third sentence is also worthy of note and I have not been shown any response from Elias to that email. There appears to have then been a further pause until July 2013 when William apparently confirmed that he wished to progress the transfer of the Property and signed the TR1.

51. At about the same time, on 22 July 2013 Credit Suisse (UK) Limited (“Credit Suisse”) obtained a valuation report in relation to the Property as they were proposing to lend against the security of the Property. The Property was valued at that time at £2.4m.
52. On 24 January 2014 the transfer of the Property from William as transferor to Elias as transferee was completed and on 29 January 2014 Elias was registered as the proprietor of the Property. For present purposes the two provisions of the 2014 Transfer that are important are as follows:

“8. *Consideration*

The transfer is not for money or anything that has a monetary value

11. *Additional Provisions*

11.1 *the transferee having provided the consideration for the original transfer of the Property to the transferor is beneficially entitled to the whole of the Property*

11.2 *this transfer is made in consideration of the above ...”*

53. On 26 August 2014 Elias signed a witness statement in the Reedbase litigation, a service charge dispute with the freeholder, in which he said this at §2:

“In 1972 my brother, William Fattal, purchased the leasehold interest to 106 Nottingham Terrace (“Flat 106”) for both of us to live in. [...]. I bought Flat 106 from him] in or around 1990”.

54. Credit Suisse issued a facility letter on 19 May 2015 indicating an agreement to lend up to the lesser of £1,137,500 or 50% of the value of the Property. The lending from Credit Suisse was then completed on or about 4 June 2015 and a charge in favour Credit Suisse was registered against the title to the Property on 14 July 2015. Until the present dispute arose, this appeared to mark the end of the story in relation to the Property and it is therefore appropriate for me to set out my overall impression of this course of correspondence, and what (if any) conclusions can be drawn from it.

55. In a case like the present, like so many others, the natural tendency is to place great store by the contemporaneous documents, untainted as they are by the exigencies of litigation. However, having reflected carefully on the course of correspondence that began in 1996 and culminated in the transfer of the Property from William to Elias in 2014, I have concluded that it is of limited value in resolving the central issues in this case. It does not contain any clear admission by William to the effect that he had been paid by Elias for his interest in the Property, still less any indication of how and when he had been paid, or that Elias was a co-owner in equity of the Property and if so, on what basis. It supports the contention that William *thought* that the Property now belonged to Elias but that is consistent with William's case, based as it is on his alleged mistake in believing that he had been paid by Elias.
56. The accountants and tax advisers, and their clients William and Elias, were primarily concerned at this time with saving tax. I emphasise that I have seen nothing to indicate that the parties were engaged in anything other than legitimate tax avoidance. However, it is quite clear that that was the predominant focus of this lengthy course of correspondence. I have had careful regard to the totality of this correspondence but have decided that the correspondence alone is not as helpful as it might appear at first blush in helping me to resolve the conflicts of evidence that arise. All the participants seem to have been confused to some extent as to the underlying facts and it seems that the parties themselves were prepared to sanction almost any arrangement in relation to their property interests that ended up saving tax. It is therefore important not to take one piece of documentary evidence in isolation and give it undue weight. The documentary evidence needs to be considered alongside the other evidence, in particular the oral and written evidence of the protagonists in order to reach any reliable conclusions. Further, it is wrong to focus unduly on one particular period of time or one letter in isolation; one swallow does not make a summer (for either side). The whole body of evidence covering a period of almost 50 years has to be examined in order to discern the true picture and reach reliable conclusions on the facts.

2016-2020

57. William's written evidence was to the effect that he was at a dinner with Elias and their cousin Emile at some time in 2016 when he recalls telling Elias that he could not recall whether Elias has paid him for the Property (§41, Witness Statement). I accept that unchallenged evidence.
58. In June 2017 William began exploring with his advisers, in particular one Paul Kelland, an accountant at WHC and subsequently GBJ Financial Limited, whether he had been paid for the Property in accordance with the Proposal. Thus on 1 June 2017 he wrote to Mr Kelland as follows:

“Dear Paul

At some stage in 1990 I had ceased to live in 106 Nottingham Terrace and Elias lived alone in it. A transfer took place in around 1991/1992 to establish the capital gains and the base for tax purposes.

...

The title in the lease was transferred from me in or about 2013/14.

However, I do not recall receiving payment for this and was wondering whether it went into the Cedardrive Directors account which normally only itemises any expenses paid that were not for business”.

59. That was the seed from which this dispute grew as did a number of other disputes between the brothers. I do not propose to trawl through all the correspondence that followed but there are certain matters which I should mention. However, before dealing with those matters, there is another point to mention at this juncture. The year 2017 marked the beginning of what is now a spectacular falling out between two brothers who were hitherto incredibly close. The cause of this falling out appears to have been, not this dispute (which appears to have been a consequence of the falling out), but rather the perception on the part of William that Elias was being less than obliging in relation to the use by Tanya, William’s daughter, of 100 Nottingham Terrace, a property owned by Cedardrive Limited, which was rented by Tanya but which William wished to buy on her behalf. Elias suggested that this was the reason for the present dispute. He is almost certainly right. Indeed, William accepts that the issues in relation to Tanya *“led me to question the relationship [with Elias] generally and ... this made me consider the transfer of the Property and the fact that I had no recollection of him paying for it which ... I had not questioned up to this point”* (§40, Witness Statement). However, I regard the precise reason for the current dispute as irrelevant, unless it is the case that this is a case based on revenge, as was put to William, rather than on the facts which William invites the Court to find. That will depend on my findings of fact.

60. The other post-2014 matters which warrant mention are these. On 27 March 2018 William emailed Elias as follows:

“You are seeking to benefit from what started as an act of kindness from me in 1990 and the mistake I made in transferring the property to you in 2013”.

61. Following a chaser email dated 16 April 2018, Elias replied as follows:

“With respect to your email, 106 is mine, however I do understand from our conversation ... that you would like me to transfer it to you.

I am unable to entertain any discussion regarding 106 including the terms and conditions until all outstanding matters have been finalised and resolved.

These have been dealt with extensively in correspondence and I look forward to hearing from you as to how you suggest the professionals can resolve these matters ...”

62. On 17 April 2018 William replied as follows:

“With respect, your position on 106 has not been dealt with in correspondence let alone extensively.

In fact in the correspondence ... you have avoided even mentioning it. So please set it out ... now.

The position is – it is mistakenly in your name.

You never paid for it in 1990 nor at any time since.

You have been receiving the rental income and you now owe that as well. That is my position.

What are you expecting the professionals to resolve that prevents you from being [able] to resolve [this] for yourself?”

63. I was not shown any response by Elias to this email.

64. Michael Zelouf, the brothers’ nephew, then became involved in an effort to resolve this and the other disputes that had begun to flare up between the brothers.

65. An email dated 6 May 2019 from Mr Zelouf to William begins: *“I just spoke to Elias over the phone”*. Paragraph 4 of that email reads as follows:

“106 – I asked the two questions as you asked, i.e. where is the evidence Elias paid and what price did you agree to sell for. He purposely avoided answering by asking why isn’t William giving me my loan money so I can live?”

66. On 7 May 2019 Mr Zelouf emailed Elias as follows:

“Dear Elias

As you know I have deep love and respect for both you and William. Not only is your dispute with William ripping our family apart, but it’s destroying a core value you both brought me up to believe in, i.e. the importance and strength of a united family.

...

As you requested I’m putting everything in writing.

...

106 Nottingham Terrace

I know this is a sore point for you but we need to be pragmatic here and deal with the matter. Either you bought the asset or you are William’s proxy.

William asked two reasonable questions yesterday:

- 1. Where is the evidence that you paid for the property?*
- 2. What price was agreed for the sale of the property to you?*

It is reasonable to deduce that if a price for the sale was agreed and if the agreed price has been paid it should be possible to evidence and therefore the question of William’s ownership falls by the wayside. On the flip side, if there is no evidence of a sale price being agreed and with no payment exchanging hands on what basis could it be anything else than you being William’s proxy in much the same way as I was your proxy when on paper I owned 71 Nottingham Terrace?”

67. On 13 May 2019 Mr Zelouf chased Elias for a response (*“please supply the evidence demonstrating that a price was agreed to buy 106 and that you paid so this matter can be put to bed”*). Elias responded on 15 May 2019 saying, *“Michael, sorry I haven’t had the head to reply – its easier to talk – have been in hospital virtually all day. Best we talk when I am up to it”*.

68. It would appear that Elias subsequently felt up to discussing the matter with Mr Zelouf because there was a meeting between the two of them on 31 May 2019. Elias accepts that he met with Mr Zelouf to discuss matters at 72/73. A purported note of that meeting survives and is dated 31/5/18. However, as Mr Zelouf explained to me, he is dyslexic and I am satisfied, based on his evidence and the chronology generally, that this meeting took place on 31 May 2019. I shall therefore refer to this document at the May 2019 Note.

69. The May 2019 Note records the following:

“Elias said he was prepared to pay off his financial ‘agreement’ to pay for 106. Said William always told him not to worry.

I pointed out William has said he has the evidence that the property financially belongs to him. William wants it back and is prepared to litigate for it.

Elias says if they litigate he would have a damages claim against all his share of monies put into Bluecom/Romex since they sold Datalect”.

70. Elias was asked about the May 2019 Note in cross-examination. His response was to the effect that the May 2019 Note was “*not accurate, it’s incorrect*”. When asked whether Mr Zelouf was lying, he said “*Yes*”. Elias said in evidence that Mr Zelouf was in fact just “*a mouth-piece for William*” and not the honest broker he portrayed himself as. Earlier in the trial, in the course of his cross-examination of Mr Zelouf, Mr Winn-Smith had suggested to the witness that he had created the May 2019 Note shortly before he sent it to William on 2 July 2020. This was an allegation of fraud and/or dishonesty, which clearly took the witness by surprise, as it did the Court. I expressed concern at the time about the appropriateness of this suggestion, it being entirely unheralded by anything in the pre-trial preparations, and there being no suggestion (see e.g. CPR 32.19) that the May 2019 Note was anything other than authentic, and I remain concerned. Trial by ambush is not the way we proceed in this or any other jurisdiction, and advocates should not make any allegation of fraud, unless they have clear instructions to allege fraud and reasonably credible material which establishes an arguable case of fraud. I am not satisfied that there was any proper basis for impugning Mr Zelouf’s honesty and Mr Winn-Smith, to his credit, accepted that he had “*overstepped the mark*”. This particular dispute of fact is one that I propose to resolve now. Mr Zelouf came across as an entirely honest and straightforward witness and I am satisfied that Mr Zelouf wrote the May 2019 Note more or less contemporaneously with events on 31 May 2019, and certainly within a few hours (at most) of his meeting with Elias on that date, and that it accurately reflects the content of his discussions with Elias, including what Elias said to him about the Property.

71. On 6 November 2019 William’s solicitors sent a letter before action. On 26 November 2019 Elias’s solicitors replied. The material part of the response is as follows:

“It is not accepted that at some point in 1990 your client offered to transfer the Property to ours in consideration of payment by our client of circa £400,000. Our client does not actually know what your client did but it is our client’s contention that your client simply allocated a sum or some other device in the accounts to reflect the transfer of your client’s interest to ours. The sum was not discussed. Our client cannot even now say for sure what the sum was, or what were the mechanics of the transaction which our client entrusted to your client, as he dealt with these matters which were wholly within your client’s control. Our client left the matter entirely to his brother on the basis of total and absolute trust.

Thus our client does not accept that no sum was paid nor no allocation made. In either case the transaction would have been conducted by your client.

Certainly after 1990 both brothers proceeded on the assumption that the Property beneficially belonged to our client, and that in some form, payment for his interest was made.

...

It appears to be common ground that the Property was originally purchased as a home for the two brothers, who were equal partners in the businesses, either using company monies and possibly including the sale proceeds of our client’s flat at Buttermere Court in Swiss Cottage.”

72. This claim was commenced by Part 7 claim form on 22 January 2020.

The Issues

73. Against that background, the parties agreed the following list of issues:

Main Claim: trust

1. Did the Defendant have a half beneficial interest, or any beneficial interest, in 106 Nottingham Terrace, London, NW1 4QE (“the Property”) upon its acquisition in 1972?

Are the elements of a constructive trust made out?

(i) Was there a common intention that Elias should have an interest?

(ii) Did Elias rely on that to his detriment?

2. Was a proposal made by the Claimant to the Defendant in late 1990 / early 1991 to purchase the Claimant's interest in the Property for £400,000 (or for any sum)?

3. Did the Defendant ever pay the Claimant for the latter's beneficial interest in the Property? More particularly, was a sum allocated in 1990 or 1992 (or at any time) in one of the accounts of the jointly owned companies, a director's loan account, a trust account or similar device so as to account for the movement of a sum of money from the Defendant to the Claimant for the Claimant's interest in the Property?

4. If so, was the Defendant the sole beneficial owner of the Property from 1990 or 1992 under a constructive or resulting trust?

5. Did the Defendant request the Claimant to transfer the Property to him in around 2010 or at any time before January 2014?

6. Did the Defendant make any representations as pleaded by the Claimant ("the Representations") as to the beneficial ownership of the Property?

7. In any event, did the Claimant execute the transfer of the Property to the Defendant in the mistaken belief that the Defendant had accepted the Proposal and paid him for his interest in the Property?

8. Did the Defendant know that the Claimant had not been paid for his interest?

a. If so, on what date did he obtain that knowledge?

b. If not, ought he to have known?

c. If so, from what date?

9. Is the Property held on trust for the Claimant by the Defendant?

Alternatively: Misrepresentation

10. Did the Representations induce the Claimant to believe that the Defendant had paid for the Property pursuant to the Proposal or otherwise and that the Defendant was therefore the beneficial owner of the Property?

11. Did the Claimant rely on the Representations by completing the transfer of the Property?

Relief

12. Should the Court make an order requiring the Defendant to transfer legal title to the Property to the Claimant, alternatively an order for sale of the Property and directions as to the net proceeds of sale?

13. Should the Court order an account and enquiry, including as to any rent which has been received by the Defendant and, if so, for what period, namely:

a. If there had been no accounting mechanism or other adjustment by which the Defendant provided consideration or payment for the Claimant's beneficial interest in the Property, when could the Claimant with reasonable diligence have discovered that fact?

14. Insofar as the Defendant has been unjustly enriched at the Claimant's expense, what compensation, alternatively damages, should the Claimant be awarded:

a. If the Property was held solely by the Claimant prior to the registration of the transfer, what was the market value for the Property as at 29 January 2014?

b. If the Property was held by the Claimant for the Claimant and the Defendant in equal shares prior to registration of the transfer, what was the market value for the Claimant's 50% share as at 29 January 2014?

74. I consider that this list of issues fairly represents the issues that arise on the statements of case and I proceed accordingly. I should, at this point, mention that I gave permission to Elias to re-amend his Defence for reasons that I gave at the time and the issues are therefore the issues that arise out of the Amended Particulars of Claim and the Re-Amended Defence.

The Witness Evidence

75. I heard evidence from William and Mr Zelouf for the Claimant and Elias and Ms Gallini for the Defendant. Clearly the evidence of the protagonists is central to the resolution of this case and I should therefore set out my general impressions of their evidence. I have already indicated that I accept the short, but important, evidence given by Mr Zelouf. Ms Gallini gave evidence for Elias. Her witness statement seemed designed to denigrate William in the eyes of the Court without actually assisting the Court to resolve the matters in issue. I make no criticism of Ms Gallini but I did not find her evidence helpful.

76. Both parties to this litigation used the opportunity to give evidence as an opportunity to ventilate many of their grievances with the other. I cannot sensibly summarise everything I heard or read in evidence or determine each and every dispute of fact however tangential its relevance. My not mentioning a particular matter should not be treated as my having overlooked it. I have taken into account everything that was before me but have attempted to distil into this judgment only such material as is necessary for the parties to understand what I have decided and why. I do not propose to set out the substance of William's or Elias's evidence. Where relevant, I will interweave it into my discussion and resolution of the issues that fall to be determined. Before I turn to those issues, I should set out my overall assessment of the credibility of William and Elias as witnesses.

77. William is 82 years old. He is the patriarch of the family. He is clearly a forceful personality and a very successful businessman. I am satisfied that at all material times to this action he has been a very wealthy man. He (and his brother) were given a very good start in life by their father who was also a very successful businessman. In particular, both brothers are beneficiaries of a Settlement dated 10 October 1970 which is administered in Guernsey. There are other family trusts, including the Fattal 1999 Trust. By 1990 I am satisfied that William had net worth of at least £5m, in all probability significantly more than that. He said his net worth at that time was probably in the £5-10m bracket. I accept this evidence and it fits with the other evidence, in particular the sale of Roboserve in 1987 for £18m. This is relevant for reasons which will become clear later on in this judgment. Sadly he has fallen out with Elias. He described the brothers as being engaged in a “5-year war” and the evidence was that this is one of 4 ongoing legal cases between the brothers, possibly with more in store. Clearly this is a source of great regret to William but it was clear to me that he is currently in no mood for compromise and his evidence reflected this unfortunate background and was undoubtedly somewhat coloured by the “fog of war”. William clearly had a lot that he wanted to say, much of it irrelevant to this case. He found the process of cross-examination irksome and was frustrated that Mr Winn-Smith was following his own course of questioning, rather than engaging immediately with the witness on his witness statement. The result was that his evidence was often discursive, unfocused and unresponsive and I had to repeatedly remind him to answer the question. Indeed as time went on he seemed to be less concerned to answer the questions put to him and increasingly determined to tell the Court his views about the case and his brother regardless of whether there was any discernible link between the question and what he said. It follows from all this that I have approached William’s evidence with a degree of caution. William is first and foremost an entrepreneur and deal-maker and until the brothers began to fall out in 2017, I am satisfied that he trusted his brother implicitly and vice versa. I also formed the view that he was not a man for detail, particularly when it came to accounting matters, unless that detail related to (legitimate) means of avoiding or mitigating tax which seems to have been a predominant concern of both brothers. However, even then, he would leave the fine detail to his professional advisers. These facets of William’s character, and the nature of his relationship with his brother, are important, particularly when it comes to considering the plausibility of William’s contention that it was not until 2017 that he discovered that Elias had not in fact paid him for the Property. As I observed at the outset of this judgment, there are a number of improbable features about both parties’ cases, and I have approached William’s evidence in relation to the issues of payment (or not) and mistake with particular care. However, ultimately I have concluded that he was a reliable witness whose evidence I could largely accept, particularly on the important issues. Where his evidence conflicted with that of Elias, I prefer William’s evidence.

78. I should mention, at this juncture, that both parties seemed to suggest that the other was primarily responsible for accounting matters. I do not accept either party's case on this issue. I accept that William was more involved in strategy and deal-making, whereas Elias was more involved in the operational side of their various businesses. However, it is a feature of this case that both William and Elias individually, and their various businesses, employed a variety of accountants, auditors, tax advisers and solicitors and generally relied quite heavily on professionals. In particular, WHC were responsible for auditing the various companies which the brothers ran and a book-keeper appears to have kept a fastidious hand-written ledger in relation to IEL, which was the main property-holding company operated by the brothers in the 1970s and 1980s, including details of all movements on the DLA of each brother. Thus, for example, costs or expenses referable to the Property were specifically identified as such in the ledger by use of the shorthand "*106 NT*". Similarly, there appear to be reasonably complete records for Cedardrive Limited, the brothers' main property development company, including records of all movements on the DLA of each brother for the whole of the 1990s.
79. The other point that must not be lost sight of when assessing the credibility of the evidence given by both brothers against the contemporaneous documents is that, certainly in the period 1996-2014, tax planning seems to have been a predominant concern of both brothers. Indeed much of the confusion that arose in the minds of their lawyers, accountants and other professional advisers about the ownership of the Property in the run-up to the 2014 Transfer seems to have arisen because the primary focus was on potential tax mitigation measures rather than on the legal and/or beneficial interests in the Property.
80. Elias is now aged 79. Elias's evidence suffered from many of the same defects as his brother's evidence, no doubt for many of the same reasons. The fog of war has clearly coloured his evidence too. Whilst in some instances, he was more willing to give short and direct answers to the questions asked, he also gave the very clear impression of having things which he wished to say and at times this deflected him from answering the question. His evidence also appeared markedly less fluent and natural than William's evidence. What I conclude has happened at some points with Elias's evidence, particularly on the important issues, is a particularly acute form of the situation which is not infrequently encountered, when a witness, during and in part because of the exercise of consideration inherent in the court's processes (pleadings, witness statements and so forth) has his recollection actually altered from what it would have been at the time. I am also satisfied that much of his evidence was speculation or wishful thinking, rather than being grounded in reality and referable to genuine recollection.

Issue 1

81. In the context of this dispute, the parties submitted that the applicable law in relation to constructive trusts is now to be found, primarily, in *Stack v Dowden* [2007] 2 AC 432 and *Jones v Kernott* [2012] 1 AC 776. For present purposes I take the following principles from those cases:

- (i) Where there is sole legal ownership the starting point is sole beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all: *Stack v Dowden* at §56;
- (ii) The conclusion that equity follows the law can, however, be displaced by showing that the parties had a different common intention when the property was first acquired or that they formed a different common intention at a later date, providing of course there is detrimental reliance;
- (iii) This displacing common intention may be express or inferred (“*deduced objectively from their conduct*”): *Jones v Kernott* at §51 per Lord Walker and Baroness Hale;
- (iv) The relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that person’s words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party: *Jones v Kernott* at §51(3);
- (v) Each case will turn on its own facts. The search is to ascertain the parties’ shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it;
- (vi) Many more factors than financial contributions may be relevant to divining the parties’ true intentions, including any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in one of their sole names; the purpose for which the home was acquired; the nature of the parties’ relationship; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses;

- (vii) The express or inferred common intention usually will also determine the size of the shares of the co-owners. The court should give effect to the intention thus discovered. If, however, there is no evidence to this effect, the court may impute an intention so as to ensure that the co-owners obtain that share which the court considers fair having regard to the whole course of dealing between them and the property.

82. In 1972 the Property was conveyed into the sole name of William. I thus take as my starting point the presumption that equity follows the law. If that is the starting point, it will be presumed that the legal effect of a conveyance into the sole name of William is that he is the sole beneficial owner of the Property. However, it is open to Elias to show (the burden being on him) that the parties did intend their beneficial interests to be different from their legal interests, and in what way. However, as Baroness Hale observed in *Stack v Dowden* at §68, “*this is not a task to be lightly embarked upon*”.
83. Both *Stack v Dowden* and *Kernott v Jones*, and indeed the subsequent case law emphasise the “*centrality of intention*”: see e.g. *Marr v Collie* [2018] AC 631 at §56. My search is to ascertain the parties’ shared intentions, and I have, ultimately, reached firm conclusions which do not turn on where the burden lies, or the resolution of any clash of presumptions, but rather on my conclusions as to what was actually intended by the parties, to be deduced objectively from their words and their actions.
84. William paid for the Property. He paid both the initial costs of acquisition and the subsequent refurbishment costs. He paid for both with what was clearly *his* money. The deposit was funded with a loan from IEL which William then paid back. There is no credible evidence to suggest, as did Mr Winn-Smith, that this may have been repaid from funds which belonged to Elias and William jointly. The mortgage was in William’s sole name and there is no evidence that anyone other than William paid the mortgage instalments. He also redeemed the mortgage with his own money. The money to redeem the mortgage came from his private account at NatWest. It is more likely than not that the money came from the proceeds of sale of some of his Roboserve shares, not from the proceeds of sale of some unspecified company property (as Elias suggested), despite the apparent timing discrepancy that Mr Winn-Smith relied on by reference to the date upon which the relevant sale of shares was registered. That is consistent with a manuscript note apparently made by Mr Wilding on 6 October 1983. However, it does not ultimately matter. What matters is that the money used to redeem the mortgage came from William’s private bank account, not from any pooled or joint fund belonging to the brothers.

There is not a shred of credible evidence to suggest that Elias made any contribution to the costs of acquisition.

85. The high point of Elias' case seemed to be a reference to a payment of £3,500 made by Elias to William shown in the ledger for IEL as having been made on 30 November 1972. Mr Winn-Smith suggested in his skeleton argument that *"this may represent an accounting between Elias and William at that time to reflect a sharing of costs"*. However, his own client's evidence did not support this contention. When asked about this payment in cross-examination, Elias said this:

"I've got no recollection of what it was. It must have been to make things a bit more equal. It could be a combination of two or three different things. It could have been nothing to do with 106".

86. Ultimately, when pressed on the subject of whether he made any contribution to the costs of acquisition, Elias replied: *"I can't recall"*.

87. I am left in no doubt that he made no financial contribution to the costs of acquisition of the Property and I so find.

88. Elias was then asked whether he made any contribution to the refurbishment costs. He said he was *"not in a position to say"* whether he paid for any of the refurbishment work. When pressed, he again said he could not recall whether he made any contribution to the costs of refurbishment. He was taken to entries in William's DLA which showed, for example, William paying for antiques for the Property and was asked if there were equivalent entries in his DLA. His response was: *"I don't know, I have not been through the entries in my directors loan account"*. It was put to him in cross-examination that he could not point to a single document evidencing a financial contribution by him to the costs of acquisition or refurbishment and his reply was: *"I can't point to a specific document"*.

89. Elias cannot point to a single document because, and I so find, he made no financial contribution to the costs of acquisition or refurbishment. I am satisfied that Elias knows that he paid nothing towards the costs of acquisition or the costs of refurbishment of the Property and that had he done so, there would be some documentary evidence to prove that he had, notwithstanding the lapse of time. His lack of recall is not due to the passage of time; it reflects the reality that he paid nothing and knows he paid nothing but could not bring himself to admit this in evidence. His statement of case, referring as it does to *"joint business ventures"* and *"joint business*

accounts”, is, in my judgment, deliberately opaque and again a reflection of the fact that Elias simply has no credible evidence to support his contention that he made a financial contribution to the acquisition of the Property. The fact that the brothers jointly owned and ran a number of companies, including the property investment company IEL, from which William drew a salary and borrowed money via his DLA, does not mean that anything bought by William with *his* money is somehow to be treated as bought from pooled funds or joint resources. I find as a fact that no pooled funds or joint resources were used in the acquisition or refurbishment of the Property. Elias cannot pierce the corporate veil and claim a beneficial interest in the Property on the basis that the ultimate source of William’s money was one of the various companies that he and his brother owned and controlled. On that basis William could probably claim an interest in 72/73 NT. William had his own money, Elias had his own money and each of the various companies which they jointly owned had its own money. Insofar as William borrowed money from, for example, IEL, to pay the deposit for the Property, this is taken to be William’s money. Insofar as William used money that he had received by way of dividend or salary from any company or from the sale of his shares, again this was his money. I am satisfied that William was intent on buying the Property for himself and used his own money to do so and am satisfied that Elias made no financial contribution to the acquisition or refurbishment of the Property. On the contrary, I find as a fact that William paid the entire costs of acquisition and refurbishment associated with the Property. Insofar as the 2014 Transfer suggests otherwise, there is no plea of estoppel by deed in the Re-Amended Defence and in any event the doctrine would not apply because this action is not an action brought to enforce rights arising out of the deed: see *Chitty* at §1-108 and the cases referred therein, e.g. *Carpenter v Buller* (1841) 8 M & W 209 at [213].

90. The fact that Elias then lived with William at the Property and subsequently paid some outgoings associated with the Property does not for one moment mean that he is to be treated as having made a financial contribution to the costs of acquisition. It seems to me to have been the least one might have expected giving that he was living in the Property rent-free for many years. I am prepared to accept that Elias was, at one stage in or about 1971 or 1972, keen to get on the property ladder himself but I am satisfied that the reason why he was content to relinquish any interest in Buttermere Court and did not pursue another purchase in his own right after the sale of Buttermere Court was due to inertia on his part and the fact that he was more than content to continue living with his brother in a large penthouse flat opposite Regent’s Park. It was emphatically *not* as a result of anything said or done by William or any arrangement, understanding or agreement in relation to the beneficial ownership of the Property. In fact, I am quite satisfied that this topic was never discussed and never needed to be discussed because, in this case, William’s actions made it quite clear what he intended, namely that this was to be his

property, paid for by him, and Elias understood as much and was quite happy to go along with this arrangement. I find as a fact that there was no common intention to share the Property beneficially whether from the outset or at any stage subsequently and there is nothing in the whole course of dealing between the parties that would warrant either an inference that this was the intention from the outset or a change of intention thereafter.

91. That the court can find that a beneficial interest is subsequently acquired by reason of conduct alone was confirmed in *James v Thomas* [2007] EWCA Civ 1212. However, having so found as a matter of principle, Chadwick LJ added this:

“But, as those cases show, in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition.”

92. There is no evidence in the present case of any post-acquisition agreement and I reject the suggestion of a post-acquisition constructive trust in Elias’s favour. I also reject the invitation to infer from post-acquisition conduct any intention to vary the beneficial interests.
93. The fact that William was content to treat the Property as a home for himself and Elias does not, without more, give rise to a constructive trust: see e.g. *O’Neill v Holland* [2020] EWCA Civ 1583 at §40. What is required is a common intention that Elias should take an immediate beneficial interest in the Property, coupled with detrimental reliance by Elias on the strength of such a common intention. In the present case, I am satisfied that there was no common intention and no detrimental reliance on the strength of any common intention. Insofar as Elias discharged some of the outgoings associated with the Property such as utilities and council tax, and I accept that he did, he did so because it was the decent thing to do whilst enjoying rent-free occupation, not in reliance on any common intention to share the Property beneficially.
94. When asked to explain why the Property had been bought in the sole name of William, Elias claims to remember a conversation about the mortgage and claims that “*we decided it would be better if just one of us was on the mortgage deed so that if we needed to borrow in the future then the other would not already have borrowings*” (§25, Witness statement). He concluded this part of his witness statement as follows:

“We thought it did not make commercial sense for us both to be on the mortgage. This was not a discussion about who owned the property as both understood it belonged to

us jointly. I definitely remember discussing the mortgage with William and it was a conscious decision for him to be on the mortgage in his name. I do not recall any specific conversation with William about who was going to be on the legal title to the property, but I understood that it would make sense for this to be the same person who would be borrowing the money”.

95. His oral evidence was to the same effect. Clearly, it is incumbent on Elias to explain why the Property was acquired in the sole name of William if his case is that there was a common intention to share the Property beneficially or that such a common intention should be inferred, and the suggestion (at least in part) appears to be that the position here is analogous to the position in the “*excuse*” line of cases (e.g. *Grant v Edwards* [1986] Ch 638) where the legal owner comes up with an excuse to justify his name alone going on the title and the excuse itself justifies the inference of the necessary common intention. However, when pressed on the detail of this conversation in cross-examination, I found Elias’s evidence entirely unconvincing, in particular the suggestion that the decision to put the Property into William’s sole name was all about “*financial engineering*” and “*gearing*”. I am satisfied, as a matter of fact, that there was no such discussion.

96. For all those reasons, I find that Elias did not acquire a beneficial interest in the Property at the time of acquisition (or indeed subsequently). There was no common intention to share the Property beneficially and none should be inferred and there was no action to detriment by Elias in reliance on any such common intention.

Issue 2

97. I have already dealt with this issue in paragraphs 29-31 above. For those reasons I find that there was a proposal made by the Claimant to the Defendant in late 1990 / early 1991 to sell the Claimant’s interest in the Property for £400,000.

Issue 3

98. This is the central issue in the case. Mr Holland accepted, rightly, that whatever had happened in the past, and whatever the legal consequences of those past events, if I were to find that Elias has in fact paid the agreed price of £400,000 in accordance with the Proposal, the claim must be dismissed. Mr Holland accepted that the burden of proof was on his client to prove non-payment, and invited me to find that William had proved that he has not been paid for the

Property. Mr Winn-Smith invited me to find that Elias had in fact paid William, by one means or another, alternatively that William had not proved the fact of non-payment; in other words, he invited me to resort to the burden of proof if I felt unable to find in his client's favour on this issue. In advancing this latter submission, he pointed to the absence of documentary evidence generally and in particular the absence of William's bank statements, the absence of any company ledgers for IEL for the period after 1989 and the absence of any trust documents (or only very few) relating to the various family trusts, it being Elias's suggestion that these trusts were one of the possible sources from which William had been paid.

99. The circumstances in which a court is entitled to determine a disputed issue of fact by resort to the burden of proof were discussed in *Stephens v Cannon* [2005] EWCA Civ 222, which concerned a dispute over the sale of a piece of land. One issue in the case was the rival evidence as to the price for which the property would have been sold at a particular time. The Master said that he was confronted with the expert evidence of two professional surveyors who had presented valuation ranges which were some way apart. He was unable to decide that he preferred one view over the other and the case therefore fell to be decided on the basis of the burden of proof. Wilson J (as he then was), with whom Auld and Arden LJJs agreed, considered seven authorities on the circumstances in which a court should resort to the burden of proof in order to determine a disputed issue of fact, from which he derived the following propositions at §46:

“(a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.

(b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.

(c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.

(d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to

perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.

(e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary.”

100. The principles set out in *Stephens v Cannon* were refined in *Verlander v Devon Waste Management and Another* [2007] EWCA Civ 835. The factual dispute in that case was how an employee came by an injury to his back when loading an industrial freezer onto the trailer of a lorry. He claimed that he had been required to lift the freezer to a height of about 4 to 5 feet to stack it onto refrigerators already loaded onto the lorry. The defendants claimed that he had only been required to lift the freezer a few inches so that although he had suffered the back injury claimed, there was no unsafe system of work. The Recorder at trial found the claimant to be an unimpressive witness who had been evasive and some of whose evidence had been contradictory. On the other hand he detected some closing of ranks and obfuscation on the part of the defence witnesses. The Recorder said he was unable to find that the claimant had proved his case and dismissed the claim. The Court of Appeal unanimously dismissed the appeal. Having cited the passage from *Stephens v Cannon* that I have set out earlier, Auld LJ reduced the analysis to two main propositions:

“[19] ... First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort.

...

[24] When this court in Stephens v Cannon used the word “exceptional” as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence,

conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice – and a respectable and useful part at that – where a tribunal cannot on the state of the evidence before it rationally decide one way or the other. In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue, particularly that of Mr Verlander, that he had considered carefully whether there was evidence on which he could rationally decide one way or the other.”

101. I proceed on the basis that the legal burden is on William to prove that Elias has not paid him for the Property and I find that he has discharged that burden. I decline to resort to the burden of proof. This is not an exceptional case where such resort is necessary or appropriate. I have striven to make a finding and believe that I am in a position to do so. The finding I make is that William has proved to the civil standard that he has never been paid by Elias for the Property in any shape or form. I reach that conclusion on the totality of the evidence, but in particular I rely on the following factors:

- (i) My general assessment of the credibility of the two protagonists, particularly on this critical issue;
- (ii) Such documentary evidence as exists (and the absence of any record in that documentation indicating payment by Elias);
- (iii) The evidence of Mr Zelouf, as recorded in the May 2019 Note and which I accept, to the effect that “*Elias said he was prepared to pay off his financial ‘agreement’ to pay for 106*”;
- (iv) The fact that it was not until his solicitors’ response to the letter before action in November 2019 that Elias first asserted that he had in fact paid his brother for the Property despite having been asked to set out his case long before that letter;
- (v) The fact that Elias’s whole case on payment seems to me to be entirely speculative in circumstances where, notwithstanding the passage of time, I would have expected him to be able to give a reasonably clear account of how and when he paid for the interest;

- (vi) The fact that Elias's case has changed on the important issue of whether there was a proposal in 1990 for him to buy the Property from William;
- (vii) The fact that neither Elias nor his solicitors appear to have done very much to pursue potentially relevant documents (the obvious example being the failure of his solicitors to make any enquiries with the trustees of the family trusts) in circumstances where one would have expected them to leave no stone unturned if Elias really believed that a payment had been made for the Property but where he could not find a record of that payment.

102. When pressed about whether there was any evidence to show that he had paid William for the Property, he said "*there doesn't appear to be*" before again reverting (without any conviction) to the possibility that "*funds could well have come from the trust*". When asked whether he had checked with William or Derek Hudson whether he had in fact paid for the Property, he replied: "*No, I did not check. I wouldn't need to check. I trusted William implicitly*". To be fair to Elias, he was candid (at times) about his inability to recall important facts but ultimately he insisted that he must have paid William for the Property by one means or another, because everyone else appears to have proceeded on that assumption, whereas I am entirely satisfied that Elias did not in fact pay William anything.

103. In considering Elias's case on the issue of payment, I have given very careful consideration, in particular, to the point that we are talking about events that occurred or may have occurred more than 30 years ago, and that due to the passage of time, it is possible that key documents have been lost, including documents that may have revealed that Elias did in fact, by one means or another, pay William for this interest in the Property. I have reminded myself that Elias's case on payment takes in a number of possibilities (see §27 of Re-Amended Defence) and in particular relies on the suggestion (emanating from William) that Elias's beneficial interest had been "*reflected by entries in [the parties'] respective accounts*". However, I note too the observation of Mr Buzzoni that if Elias had indeed paid for the Property, "*Derek [Hudson] would almost certainly have reported the transaction for tax purposes*". The suggestion that it might have been accounted for by means of entries in the parties' respective accounts is most likely to have been a reference to the DLAs in relation to Cedardrive Limited. The Court has copies of Elias's DLA for Cedardrive Limited covering the period from 1990-1999 and 2003. There is no evidence of any debit or payment by Elias to William for the Property. The Court also has copies of the brothers' DLAs for IEL and the position has been static since 1990. There were, of course, other companies but I am satisfied that any payment, had it been made in this

way, is likely to have appeared in the DLAs in relation to Cedardrive Limited and there is no evidence of any payment, entry or other adjustment to reflect consideration passing from Elias to William for the Property. Further, I am unpersuaded that any important documents are missing. I was not told of any extant disclosure issues between the parties. Mr Winn-Smith mentioned the absence of any of William's bank statements but it has never been Elias's case that he paid William directly in this way. There was also a suggestion that the payment may have come via one of the family trusts but there is no evidence to support such a suggestion and, as noted above, there appears to have been no real effort by Elias or his solicitors to obtain supporting documents if Elias really believed that this was a live possibility. The fact that he made no such effort is demonstrative of the fact that he knows that this is not what happened.

104. I also reject the submission that there was any kind of power imbalance between the parties or information asymmetry either now or in the past. It was Elias's pleaded case that he "*absolutely trusted the Claimant to make financial and other arrangements on his behalf relating to diverse matters including ... real estate*" and that "*had there been a movement of £400,000 or another sum, or its equivalent value, the Defendant would not expect to know the details of what mechanism or process would have been used by the Claimant or at the Claimant's direction*" (see §§40.1.3 and 40.1.4 of Re-Amended Defence). I accept that the brothers each trusted each other implicitly for more than 50 years; I accept too that William was the more dominant and forceful personality of the two, but I reject the suggestion that Elias was in any way naïve or unable to look after his own interests. That was not the impression I formed having seen him give evidence over an extended period and it is inconsistent with his background in business and his very considerable financial means, which include a substantial portfolio of valuable property held in either in his own or his wife's name.

105. In sum, my overriding impression on this part of the case was that Elias lacked any conviction in his own case. Had he really believed that he had paid William for the Property, he would have said so at the very outset of this dispute. Instead he engaged in, what Mr Zelouf tellingly described as, "*deflection*". By the conclusion of Elias's evidence, I was left in no doubt that he has not paid William anything for the Property.

Issue 4

106. It follows from my findings on issue 3 that the answer to the question posed under issue 4 ("*was the Defendant the sole beneficial owner of the Property from 1990 or 1992 under a constructive or resulting trust?*") is no.

Issue 5

107. I am not persuaded that this issue actually adds much, as I said at the time when considering the agreed list of issues, but as it may be relevant to the misrepresentation claim, I should resolve it and I do so in favour of Elias. I am not satisfied that Elias requested William to transfer the Property to him in around 2010 or at any time before January 2014. I accept that Elias raised the issue of the tax that he was paying on the rental income for the Property but the prime mover in instigating the transfer of the Property to Elias appears to have been William. The real issue is why he did so but that falls to be decided under Issue 7.

Issue 6

108. I was not addressed at any length on this part of the claim and it does not surprise me: I am bound to say that I found the claim in misrepresentation to be a makeweight with no merit. I have resolved the factual issue under issue 5 against William. That was a central part of his misrepresentation claim but in any event, largely for the reasons set out by Mr Winn-Smith in his Skeleton Argument (§§27-32 and §§75-83), I reject the misrepresentation claim. In particular, I am satisfied that this was a case of assumption on the part of William and passivity on the part of Elias, rather than misrepresentation (whether express or implied and whether by conduct or otherwise), and passivity and assumption are not generally enough because there is no general duty of disclosure: see e.g. *Marme Inversiones 2007 SL v. NatWest Markets Plc* [2019] EWHC 366 (Comm) at §123 & §157. I also agree with Mr Winn-Smith's submission that a claimant in the position of William should have "*given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently decides that those representations comprised*" (see e.g. *Marme Inversiones* at §286) and I am not satisfied that he did.

Issue 7

109. Alongside issues 1 and 3, this is the other central factual issue in the case. I have no doubt that the ordinary man on the street is most unlikely to have overlooked the fact that he had not received the agreed consideration of £400,000 and transferred real property in the mistaken belief that he had. However, I am satisfied that William is and was at all material times very far from being the ordinary man on the street. As he said in his witness statement (§33), evidence which I accept, "*a transfer to me of £400,000 was not in those days that significant a sum to me in terms of my personal wealth at the time, and it isn't really something I would have noticed, especially since most of my personal wealth and accounts were looked after by my*

accountants, advisers and trustees”. He was indeed very wealthy at this time. Further, his time, energy and attention was consumed by his business affairs and the various companies that he owned and controlled with his brother. I recall his observation in an email that “*one tends to overlook one’s personal affairs in attending to business affairs*”. I am satisfied that this is a case in point. Insofar as he had time for the brothers’ personal affairs, he appears to have been more interested in helping Elias to save tax than looking after his own interests. He also trusted his brother. The fact that William assumed Elias had paid and was only subsequently prompted to investigate the position following a falling-out with Elias over Tanya and the sale of 100 Nottingham Terrace is neither here nor there. There is no plea of estoppel by convention. Elias’s defence is that there was no mistake because he was in fact the beneficial owner of the Property having paid for it. The resolution of this issue is central to the disposition of the claim but ultimately, neither party devoted much time in their closing submissions to this issue and I see why – the resolution of this issue is largely dependent on my findings on issue 3. If Elias in fact paid William for the Property, there was clearly no mistake. If he did not, and there being no suggestion of a gift, the likelihood is that William executed the 2014 Transfer in the mistaken belief that Elias had accepted the Proposal and paid him for the Property and I so find. There is no other credible explanation for William’s execution of the 2014 Transfer.

Issue 8

110. I have not found this an altogether easy to resolve but I have ultimately concluded that Elias would have realised that he had not paid William for the Property by April 2018. William first raised the issue in 2016 and began his own investigations in 2017 and I thought it was telling that Elias made no response to William’s demand in April 2018 that Elias set out his case as to payment. I am satisfied that the reason for this is that by that date he knew that he had not paid William for the Property.

Issue 9

111. I propose to deal with this issue when I come to deal with the question of relief.

Issues 10-11

112. I reject the claim in misrepresentation for the reasons I have already given at paragraph 108 above.

Issue 12

113. The primary relief sought by William is an order requiring Elias to transfer legal title to the Property back to William. Alternatively, in the event that I decided that the parties were co-

owners in equity, William seeks an order for sale of the Property and directions as to the net proceeds of sale. William puts his case for the primary relief sought on three bases as follows.

114. Firstly, it is submitted that, on analysis, what has happened is that a void contract for the sale of land (by reason of its non-compliance with s.2 LP(MP)A 1989) has been partly performed by William but it remains a void contract (see e.g. *Keay v Morris Homes (West Midlands) Ltd* [2012] 1 WLR 2855 at §47) and on that basis the loss must not be left to lie where it falls; rather the intended transaction must be unwound and both sides put back in the position they were in before the deal was entered into. Further, so it is submitted, this unravelling entitles William not only to personal remedies in unjust enrichment, but also, on the facts of this case, proprietary remedies because by 2018 at the latest Elias knew that William was labouring under a mistake with the result that his conscience was thereafter affected: see *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 at 715. On this basis it is submitted that Elias holds the Property on constructive trust for William. In support of this analysis, Mr Holland relied on the recent case of *Ali v Dinc* [2021] 2 P & CR 19, a decision of Sarah Worthington QC, in particular at §222 where she said this:

“In short, the personal obligation to make restitution of the particular assets received under the void contract was rendered proprietary once the defendant was on notice that the assets (or whatever now remained of them in the defendant's hands) were not to be treated as the recipient's own and restitution was in order”.

115. Secondly, it was submitted that this was an appropriate case to grant relief in equity on the basis of William's mistake in making a voluntary transfer of the Property to Elias, relying on *Pitt v Holt* [2013] 2 AC 108, in particular at §§104-108.

116. The final basis on which William puts his claim is on the basis of a presumed resulting trust, arising out of his gratuitous transfer of the Property to Elias in circumstances where it is clear that an outright gift was not intended, and indeed no one asserts that such a gift was intended.

117. Dealing with the first basis of claim, in my judgment, Elias has no answer to it. Elias's case at trial depended, almost entirely, on his averment that he had provided value for the 2014 Transfer and that the oral agreement had therefore been fully performed on both sides. Alternatively, he invited me to find that William had not discharged the burden upon him of proving non-payment. But I have rejected both aspects of Elias's case on the facts. Beyond that, Mr Winn-Smith's only answer was to describe the (first-instance) decision in *Ali v Dinc* as “*pretty sketchy authority*”. I beg to differ and gratefully adopt the Deputy Judge's analysis in that case which I

agree with. In doing so, I note that her decision has recently been affirmed on appeal ([2020] EWCA Civ 34), the Court of Appeal having granted permission on a single ground only, namely whether the Judge had decided the case on a basis that had not been pleaded. The appeal was dismissed and there was no suggestion that there was any error of law in the Deputy Judge's legal analysis. On this basis Elias holds the Property on constructive trust for William. No issues of priority or third party interests arise as Elias remains the registered legal proprietor of the Property and it is now unencumbered.

118. Dealing next with mistake in equity, again, in my judgment Elias has no answer to a claim put on this basis, my having found against him on the primary facts which underpin the claim. The starting point is the principle which derives from *Pitt v Holt* and is helpfully summarised in Snell's Equity (34th Ed.) at §15.06 as follows:

"Gifts, gratuitous settlements and other gratuitous dispositions are more vulnerable to rescission and can be rescinded where there was a causative unilateral mistake which was so grave that it would be unconscionable to refuse relief. This test will normally only be satisfied where there was a mistake either as to the legal character or nature of the transaction or as to some matter of fact or law which was basic to the transaction".

119. The relevant principles to be derived from *Pitt v Holt* were very helpfully set out by Morgan J in *Van der Merwe v Goldman* [2016] 4 WLR 71 at §26 as follows (the references to paragraph numbers are to *Pitt v Holt*):

- (1) a donor can rescind a gift by showing that he acted under some mistake of so serious a character as to render it unjust on the part of the donee to retain the gift: para 101, quoting *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400;
- (2) a mistake is to be distinguished from mere inadvertence or misprediction: para 104;
- (3) forgetfulness, inadvertence or ignorance are not, as such, a mistake but can lead to a false belief or assumption which the law will recognise as a mistake: para 105;
- (4) it does not matter that the mistake was due to carelessness on the part of the person making the voluntary disposition unless the circumstances are such as to show that he deliberately ran the risk, or must be taken to have run the risk, of being wrong: para 114;

- (5) equity requires the gravity of the mistake to be assessed in terms of injustice or unconscionability: para 124;
- (6) the evaluation of unconscionability is objective: para 125;
- (7) the gravity of the mistake must be assessed by a close examination of the facts which include the circumstances of the mistake and its consequences for the party making the mistaken disposition: para 126;
- (8) the court needs to focus intensely on the facts of the particular case: para 126;

120. I have not included in that citation the passages where Morgan J focused particularly on a mistake about the tax consequences of a transaction, this not being such a case. In *Van der Merwe* there was disagreement between the parties as to whether, on the facts, the case was governed by the common law rules for declaring a contract to be void by reason of mistake or the equitable rules for setting aside a gift for mistake. Having found against Elias on the issue of consideration, I consider that the latter principles do apply. As Morgan J held in *Van der Merwe* at §31, “*the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction*”. In the present case, I have found that Elias did not provide any consideration for the transfer. He did not pay the figure of £400,000 or any sum pursuant to the Proposal and he did not provide the consideration (or any part of it) for the original transfer to William. Accordingly, applying the principles set out above to the facts of this case, I find that the 2014 Transfer was directly caused by a sufficiently serious mistake on the part of William so as to mean it would be unconscionable for Elias to remain the owner of the Property. In doing so, I explicitly reject the submission made by Mr Winn-Smith that the circumstances are such as to show that William deliberately ran the risk, or must be taken to have run the risk, of being wrong. On that basis the 2014 Transfer is liable to rescission and William is entitled to an order that Elias transfer the Property back to him.

121. Finally, I consider that the third basis of claim is also well-founded, based on established principles. Thus where one person, A, transfers the legal title of a property that he owns to another, B, without receipt of any consideration, the effect will depend on his intention. If he intends to transfer the beneficial interest in the property to B, the transaction will take effect as a gift and A will lose all interest in the property. If he intends to retain the beneficial interest for himself, B will take the legal interest but will hold the property in trust for A. Normally there will be evidence of the intention with which a transfer is made. Where there is not, the

law applies presumptions. Where there is no close relationship between A and B of the type that might give to a presumption of advancement, there will be a presumption that A does not intend to part with the beneficial interest in the property and B will take the legal title under a resulting trust for A. In the present case, there is no presumption of advancement as between William and Elias, and no evidence of an intention to make a gift; nor is there any evidence of any intention inconsistent with a trust. I am therefore satisfied that Elias holds the Property on presumed resulting trust. For completeness, I should also make it clear that I consider that the doctrine of presumed resulting trusts has not been abolished by s.60(3) LPA 1925: see *Ali v Dinc* at §§272-278.

122. It follows from the analysis above that the answer to the question posed under Issue 9 is yes. Notwithstanding that Elias is the sole legal owner of the Property, William has, on the evidence, successfully rebutted the presumption that Elias is also the sole beneficial owner. Elias is not the sole beneficial owner; William is. Elias therefore holds the Property on trust for William. It also follows that it is not appropriate to make an order for sale or grant any of the other relief that would have been appropriate had I concluded that the parties were beneficial co-owners.

Issue 13

123. It follows from my conclusions above that I am satisfied that William is entitled, in principle, to an account and inquiry, in particular as to the rental income received by Elias for the Property. There was a dispute between the parties about the accounting period. The claim having been commenced on 22 January 2020, I am *not* going to order an account in respect of any period before 22 January 2014 for these reasons. Elias relied on sections 21(3) and 23 of the Limitation Act 1980. William in turn relied on s.32(1)(c) of the same Act. Applying the test of discoverability and the standard of reasonable diligence as recently explained by the Supreme Court, I am satisfied that William could with reasonable diligence have discovered his mistake by 22 January 2014 and there was therefore nothing to stop time running from that date: see e.g. *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] 3 WLR 139 at §§193, 203, 209 and 213. When I circulated this judgment in draft, I invited further written submissions as to whether the accounting period should not in fact start until April 2018, which I have determined as being the date upon which Elias knew that William had not been paid for the Property. Mr Winn-Smith, on behalf of Elias, submitted that “*proprietary trust remedies are not appropriate for the period prior to Elias’ conscience being affected*”, and suggested that the accounting period should not begin before April 2018. He also sought to rely on an unpleaded change of position defence in relation to the claim for an account.

124. Mr Holland, for William, submitted that the Court should order the account of the rental income received by Elias to run from 22 January 2014. This, he submitted, would be consistent with the fact that William was, based on my conclusions above, entitled to personal remedies arising out of Elias's unjust enrichment at his expense. In support of that submission, he referred me to *Benedetti v Sawiris* [2014] A.C. 938 at [13] and the basic principle underpinning such claims, namely that they are for the “*recovery of a benefit unjustly gained [by a defendant]...at the expense of the claimant*”. He further submitted that Elias's knowledge of the mistake is *not* relevant to William's personal remedies for that unjust enrichment. The question is merely what the value of the enrichment was at the time when it was received by the defendant: *Benedetti v Sawiris, supra* at [14].

125. Having considered those further written submissions, I accept Mr Holland's submissions. Given my conclusions above, Elias had no beneficial right to any of the rental income from the Property; William was absolutely entitled to that income. It follows that on each occasion that Elias received and retained rent from the Property on or after 22 January 2014, he was unjustly enriched at William's expense due to the mistake that William was labouring under. I agree with Mr Holland that in those circumstances William has a personal right to restitution for unjust enrichment against Elias, and I should make an order requiring Elias to disgorge the benefits he received from 22 January 2014, namely an order that he pay William the sums which represent the income, net of expenses, from the Property. As a result, an enquiry into the damages payable from 22 January 2014 is necessary. For completeness, I should also say that I regard it as far too late to rely on an unpleaded change of position defence. There was no investigation at trial as to the factual merits of such a defence, which is hardly surprising in the circumstances, and it is too late to embark upon such an investigation. Although Mr Winn-Smith made no formal application to amend, had a formal application for permission to amend been made, I would have refused it.

Issue 14

126. I have effectively dealt with this issue above. William is entitled to personal remedies in the form of an account/inquiry as to damages in addition to the proprietary relief that I propose to grant.

Conclusion

127. There will therefore be judgment for the Claimant, a declaration that the Claimant is and has at all material times been the sole beneficial owner of the Property, an Order that the Defendant transfer the Property to the Claimant and an Order for the taking of an Account.

128. It only remains for me to thank Counsel for their invaluable assistance in trying what was a difficult (and at times emotional) case. I cannot leave the case without also expressing the hope that William and Elias can resolve their other disputes without further recourse to the Court and find a way to rebuild their relationship.