Neutral Citation Number: [2018] EWHC 426 (Ch)

Case No: D30BS708

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BRISTOL DISTRICT REGISTRY

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 8 March 2018

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

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Between :

	(1) Stephen John Culliford **(2) Dawn Lane**	**Claimants**
	- and -	
	Jocelyn Thorpe	**Defendant**

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Adam Boyle (instructed by **Porter Dodson**) for the **Claimants**
Joss Knight (instructed by **Burnetts**) for the **Defendant**

Hearing dates: 14-15 December 2017

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Judgment Approved**HHJ Paul Matthews :**

Introduction

1. This is my judgment on a claim and counterclaim in relation to a residential property known as 9 Clover Road, Wick St Lawrence, Weston super Mare ("the Weston property" or simply "the property"). The claim is brought, as a simple claim for possession, by the personal representatives of Rodney Culliford (who died intestate on 25 March 2016), as the former owner. The counterclaim is made by the defendant, Jocelyn Thorpe, for a declaration of interest in the property by way of constructive trust and/or proprietary estoppel.

2. The claim form was issued, together with particulars of claim, on 19 December 2016 in the County Court at Weston-super-Mare, a grant of letters of administration *ad colligenda bona* having been made to the claimants (siblings of the deceased, who died intestate) on 13 December 2016. On 6 February 2017, probably after having read the first witness statement from the defendant dated 30 January 2017, District Judge Field made an order

reciting that the defendant was proposing to bring a claim for a proprietary interest in the property and transferring the claim to the Bristol District Registry of the High Court. In accordance with directions given by the district judge, the defendant filed a defence and counterclaim on 6 March 2017, and a reply and defence to counterclaim was filed on 3 April 2017.

3. The claim itself is very short and simple. It is alleged that the deceased was freehold owner of the property, that the claimants are the personal representatives of the deceased, that the defendant had only a licence to be in the property, and that the licence was terminated on 15 July 2016 by notice when in a letter dated 17 June 2016. The defendant accepts the claimants' legal title, and admits that he is not a tenant or subtenant of the property. But he claims to occupy it, not by virtue of a licence, but by virtue of a proprietary interest in it.

4. The defendant claims this first and foremost by way of a common intention constructive trust, based on an alleged agreement between the deceased and himself in May 2012 that they pool their property and other resources, and on monies then spent and work then done by him on the property in reliance on that agreement. Alternatively, he claims a proprietary estoppel based on an alleged assurance by the deceased that they owned the property together and that if the deceased died the defendant would inherit the property, which assurance the defendant relied upon by spending money and doing work on the property. He says that either way he is entitled to the entire beneficial interest in the property.

5. The defendant therefore resists the claim to possession and seeks a declaration as to his beneficial interest in the property and an order that the property be transferred it to him. The result of the statements of case is that the burden lies on the defendant to make his case good. In substance, therefore, he is the claimant (though I shall continue to refer to him in this judgment as the defendant).

6. This case was tried by me in Bristol on 14 and 15 December 2017. The claimant was represented by Adam Boyle of counsel, instructed by Porter Dodson. The defendant was represented by Joss Knight of counsel, instructed by Burnetts. I heard evidence from these witnesses in the following order: the defendant, PC Vinnie Anthony, Graham Bond, Florence Bennett, Lesley Wood, the first claimant and the second claimant. I should record that the defendant says he would like to have been able to have called more witnesses, including his own sister, who was apparently present in court during the trial. However, the order of DJ Watkins of 24 April 2017 (sealed 4 May 2017) by paragraph 4(ii) restricted him to a maximum of four witnesses including himself. At the end of the trial, time being short, I invited closing submissions in writing. Both were rather more lengthy documents than I had expected. In particular, that for the claimants was, at 111 paragraphs extending over 32 pages, far too long. Nevertheless, I have read them and taken them into account in reaching my decision.

The witnesses

7. I give my impressions of the witnesses here. The defendant in giving evidence was a clear, straightforward, indeed transparent witness. He made no attempt to spin his evidence, or

to make up what he did not know or remember. He had however at an earlier stage in these proceedings adduced in evidence a transcript of a voice recording made by a concealed recording device of a conversation with the claimants, perhaps to obtain evidence in support of his claim to a British Airways pension. I do not know if he made the recording himself or not, but he certainly sought to take advantage of it. This does not reflect well on him, but when placed against the impression which he made in the witness box, it does not make me change my view.

8.He was cross examined vigorously for some three hours on behalf of the claimants, though in my judgment without any significant impact. Towards the end of that period he appeared to grow in confidence, and a certain amount of belief that he was right began to assert itself. It may have resulted in some unconscious exaggeration, and also some selectivity in what he told me. But in my judgment it did not affect the veracity of what he was saying in any significant way. He was slightly defensive, especially when dealing with his first meeting with Graham Bond, and also in responding to questions which touched on his sex life. Nevertheless, in my judgment, he was telling the truth.

9.PC Anthony was a straightforward professional witness, dealing with the finding of the body of the deceased, and obviously telling the truth. Both Mrs Florence Bennett and Mrs Lesley Wood were transparently honest witnesses, doing their best to assist the court.

10.Graham Bond was a well educated, well spoken, knowledgeable and analytical witness. He thought carefully before answering questions and gave measured answers. He was plainly more experienced in business matters than the defendant. I had no hesitation in accepting what he said as the truth. In particular, and contrary to the suggestions put to him on behalf of the claimants, I accept that there was not in the past and is not now any sexual or other relationship between him and the defendant apart from ordinary friendship.

11.Stephen Culliford is the first claimant and the elder brother of the deceased. They were born some 9 years apart, and when the deceased was only 5 years old their parents separated. The deceased and his sister Dawn lived with their mother and the first claimant went with his father. It is clear that he retained great affection for his brother, but also that he did not have a lot to do with him. Their lifestyles were very different. In the years leading up to the death of his brother, the first claimant had very few communications with him. There was the occasional email or telephone conversation. The first claimant does not use Facebook, whereas his sister (the second claimant) and the deceased both used it frequently.

12.The first claimant in giving evidence came across as quick and affable, if a little old-fashioned. He saw things very much from his own point of view. He jumped around from one thing to another, and indeed jumped to conclusions which when tested were shown to be based on no or very little information. He freely admitted that he did not know the answer to many questions put to him, which he said would have to be referred to his sister, who he said knew the details. I am sure that he was trying to assist the court, but, given the lack of contact between him and his brother, the lack of information (especially up-to-date) about his brother's life and also the cultural distance between their lifestyles, I cannot place any real weight on his evidence where it is not

corroborated from another, more knowledgeable source.

13. His sister, Dawn Lane, the second claimant, had rather more contact and communication with their brother. It was clear to me that they had been closer than the deceased and the first claimant. Even so, there were very few communications after 2014. Thereafter, she obtained most of her information about the deceased from Facebook entries, although they did speak in June 2015 and he visited her very briefly on his way to Devon in December 2015. This was the last time she saw him. As one would imagine, she was genuinely upset at recalling this sad fact whilst at the witness stand.

14. She gave evidence in a very straightforward way, without hesitation. She was frank about some of the motives with which she had communicated with the defendant after the death, and she accepted correction when she realised that she was wrong, and both of these are to her credit. Surprisingly, however, she did not consider the works done at the Weston property to be "significant". She explained that for her that word would have applied to something like an extension built to a house. But it was clear that she had limited knowledge of exactly what had been done, and what was involved in it, as well as who had done it or paid for it, as she obtained her information largely from Facebook photographs. She was also unaware of significant events in the deceased's life, such as that he was HIV positive, that he had been grounded on health grounds in 2015 (until he came to her house in December 2015), or that he was taking drugs.

15. I am sure that she was trying to assist the court, and I accept a lot of what she said, but, as will be seen, I think she was mistaken about some of the evidence she gave, probably because of the limited information that she had to go on. Since she was, especially during the last part of the deceased's life, the principal source of information for the first claimant about what the deceased was doing, these mistakes have an impact also on his evidence.

Facts found

16. On the basis of the evidence and other material before me, I find the following facts.

17. As I have already said, the deceased's parents split up when he was 5 years old, and thereafter he lived with his mother and his sister, his mother's new husband (until he died not long after the wedding), and a further partner of her mother (who subsequently also died). He left home early, and worked in the travel industry, in particular as a holiday company representative, which he enjoyed. He subsequently became a flight attendant with Monarch Airways, then with Brymon Airways, which later was acquired by British Airways. He was still employed by British Airways at the time of his death. Indeed, an issue has arisen between the defendant and British Airways as to whether a pension should be payable to the defendant. That issue is no part of this litigation. The deceased's mother died in 1996, and he struggled to accept her death. He suffered with anxiety and panic attacks.

18. The deceased bought the Weston property in his sole name in September 2002 with the aid of a mortgage loan. He was an outgoing man, fun to be with. He enjoyed a drink and a

party. He had many relationships with other men. The deceased and the defendant met online in spring 2010, and met up in person for a first date in July 2010. Over the next few weeks they met again a few more times and the defendant stayed with the deceased at the property in August 2010. By October 2010 the relationship was serious. In November 2010 the defendant travelled to Hong Kong and Los Angeles with the deceased whilst he was working (what is apparently known as a 'cling-on'), and upon return from these trips he moved into the property with the deceased. This became his main residence, although he still had some of his belongings in his family property at Halberton in Devon.

19. The defendant was not then earning a living, though he had, or had access to, some family money. He was more practical than the deceased, and undertook repair and decoration jobs around the house. For example, he repaired the boiler when it broke down, and he decorated the main bedroom. He also obtained the services of others for small jobs by a system of barter, whereby he would do things for others and they would reciprocate. But the general outgoings for the property and for their lifestyle were funded largely by the deceased's income from his job.

20. The deceased loved his work as a flight attendant, and the opportunities it brought him to travel round the world, sometimes taking friends or relatives (including his sister the second claimant, but also the defendant). But he was also HIV-positive, which caused or contributed to a number of significant health issues, for which he took medication. He had reduced his working hours from 100% to 75% as a result. But because of his lifestyle and income needs he was unable to afford to reduce his working hours to a level which would be compatible with his health. It was a source of some annoyance to him that the defendant did not have a regular income. The deceased got into financial difficulty, and entered an IVA in October 2011.

21. At about the same time, the defendant's father (who had long been separated from his mother) became terminally ill. Between July 2011 and April 2012 (when his father died) the defendant cared for his father at the latter's home in Stratford-upon-Avon. During that time, the deceased came on occasion to visit and stay in Stratford-upon-Avon with the defendant and his father. However sometimes other family members stepped in, so that the defendant and the deceased could spend weekends away together. In March 2012 the defendant and the deceased travelled to Japan together (where the deceased's work took him), after the defendant's father (who had himself been to Japan when he was younger) insisted that the defendant take this opportunity. The defendant's father died on 14 April 2012. Thereafter, the defendant reverted to living full-time at the Weston property with the deceased.

22. Upon his father's death, the defendant became an executor of his will along with his sister. Under the terms of the will there was a gift by clause 6 of a residential property in Halberton, Devon, known as Alstree House ("the Devon property"), to three of his four children, including the defendant. However, as the clause makes clear, the house had been held by the father and the mother as joint tenants, and so the gift was expressed to take effect only if his mother should not survive their father (so that in that case the father would be sole owner by survivorship). This was the family home which the defendant had lived in whilst he grew up, and in which he retained a room on the top

floor, where he and the deceased stayed when they visited. His brother and his brother's partner, Florence Bennett, lived on the lower floors with their children. In the defendant's father's will there was also a gift, by clause 7, of the residue of his estate to all of his four children in any event.

23. Since the defendant's mother did survive his father, the gift in clause 6 did not take effect. In law the Devon property did not pass under the will, but passed by survivorship to the mother. However, at the time the defendant and his siblings did not realise this. They correctly reasoned that, since their mother survived their father, the gift of the house in clause 6 had no effect. But they mistakenly believed that he had a one half share in the house which survived his death and passed to them under clause 7. The defendant and his siblings therefore thought that they were immediately one third owners each of the one-half share (as they believed) which had belonged to their father, the other half share belonging to their mother.

24. The defendant's mother did not live in the house itself, but in a chalet in the grounds. It was agreed with the defendant's brother and his partner Florence that the defendant would convert the top floor into a separate apartment for himself. No-one else objected or claimed the right to live on the top floor. It is not clear when the mistake over the effect of clauses 6 and 7 came to light. In evidence the defendant thought it might have been September or October 2012, but he was not sure. I do not think I can safely find that it was as early as then. It may well have been later, as shown by the fact that it was over a year later, on 11 April 2014, just before the expiry of the two year window allowed for under relevant tax legislation, that a deed of variation was entered into with the defendant, his mother and siblings. I heard no evidence on this point, but it appears to have been professionally drafted. I note in passing that the deceased was actually one of the witnesses to the deed.

25. Under this deed, a new clause 6 was substituted, intended to implement what was thought to be the father's intention. This was for a one half share in the house to pass to trustees on trust for sale, to allow the mother to reside there or to pay any income to her during her life, and subject to her interest to hold the property or its proceeds on trust for the three siblings (including the defendant) interested under the original clause 6. I do not need to consider whether that actually was the legal effect. It is sufficient for present purposes that everyone (including the defendant) believed it to be. Moreover, even if there is a trust for sale of land, it is not improper for a beneficiary to speak of having an interest in the land itself. So the defendant understood that he had a one third capital share in half the house, to come to him on his mother's death. He also understood that his mother would leave her one half share to the same three children, so that at that stage he would have one third of the whole house. Her current will continues to reflect this thinking. In addition, under the gift of residue the defendant became entitled to about £80,000 in cash and some furniture.

26. The defendant and the deceased took the furniture back to the Weston property in May 2012. During the course of unloading this furniture they took a break and were discussing their future together. As they saw it, the position had now changed because the defendant's father had died and he had an inheritance, including (as they both believed) his interest in the house in Devon. The deceased told the defendant "This is it, it is time we joined

forces properly." They agreed that they would share their properties and their other assets, so that, as the defendant put it in evidence (although he attributed the words to the deceased) "What's mine is yours, and what's yours is mine."

27. There was, however, no discussion of changing the current legal title to any property. The arrangement between them was *informal*, in the original sense of the word. If there had been a *formal* conveyance to both of them, or a formal declaration of trust by one for the other, that would have been the end of the story, the court would enforce the conveyance or the trust, and no litigation would have been necessary. But, because the arrangement did not comply with the formality requirements of the law, it cannot be enforced without more. Yet the fact that it was informal does not mean that it was not seriously intended, or intended *to be relied upon*. The 'more' would be detrimental reliance, making it unconscionable not to make the gift promised.

28. The defendant and the deceased formed a plan to refurbish both properties, using the funds which the defendant had inherited. They would refurbish the Weston property in order to be able to let it at a good rent, and they would convert the top floor of the Devon property into a self-contained one-bedroom flat in which they could live together. The income produced by this arrangement (from the rent of the property) would in turn enable the deceased to reduce his working hours from 75% to 50%, which would make it easier for him to cope with his ill-health.

29. For the deceased and the defendant, I find that this agreement created a new state of affairs on which to base their life together, affecting their property rights. But one issue was not discussed. This was whether they were to share their property rights as beneficial *joint tenants* (with the benefit of survivorship on the death of the first to die) or as beneficial *tenants in common* (so that the share of each would pass on death under the applicable inheritance rules, testate or intestate, as the case might be). I find that they did not consider that. Probably they were unaware of its significance. The Defence at paragraphs [17]-[19] put forward the case for an intention that their properties should be held in beneficial joint tenancy, with acquisition by the defendant by survivorship of the deceased's rights on the latter's death, with an alternative case for a promise by the deceased that the defendant would inherit on his death, on which the defendant is alleged to have relied. But there was no evidence at trial to support either of these two parts of the defendant's case, and I cannot find any such facts. They are just wishful thinking on the defendant's part.

30. Moreover, I record that the defendant's evidence as to the existence of this agreement between them, and as to the works then done in pursuance of it, was fiercely challenged on behalf of the claimants. A considerable part of the claimants' written closing submissions were devoted to this, and a large number of points, almost wholly bad, were laboriously made over many closely-typed pages. I deal with only the most important here, and in summary form only. However, in my judgment the challenge failed.

31. First of all, I observed the defendant give evidence. In my judgment that evidence was entirely believable, and consistent with the general sequence of events, and I accept it. I reject the view that it was unclear or shaky. And I consider that the non-disclosure (if that is indeed what it was) of the defendant's father's will is of no more than peripheral

relevance to the case. And the fact that the defendant did not in fact inherit a one third share in the Devon property from his father does not matter if (as I hold) both the deceased and the defendant *believed* that he did. Similarly the relatively late mention of May 2012 as the date when the agreement was made, and the fact that they did not tell others about their agreement. Why should they? It was a matter between them. As it happens Graham Bond's evidence was that the deceased had told him in September 2014 that he and the defendant (whom the deceased called his "husband") were doing up their properties under a plan to rent out the Weston property and live in the Devon one. I accept this evidence.

32. But there was in addition clear evidence, both in documentary form and from a third-party witness (Mrs Wood), of significant refurbishment work being carried out by the defendant personally and using materials which he had paid for, or by others whom he paid (wholly or partly). I describe this below. The defendant's own evidence is supported by the fact of such significant building work having been carried out by him or on his behalf. I know that in *Lloyds Bank plc v Rosset* [1991] 1 AC 107, 133, Lord Bridge was doubtful that anything less than payment of mortgage instalments would justify an inference that there must have been an agreement of the kind put forward by the defendant. But the world has moved on since then, and in any event every case is different: *cf Stack v Dowden* [2007] 2 AC 432, [26], per Lord Walker, [70], per Lady Hale (with whom Lords Hoffman, Hope and Walker agreed). In the present case I find that the defendant would not have done the work he did if there had not been an agreement of this kind between them. His evidence (which I accept) was that, if they had not made this agreement, he would have done minor works of decoration or repair to the Weston property, just as he had done earlier, but no more than that.

33. The claimants criticised the defendant for recording a conversation between them without their knowledge in May 2016. This was done to try to obtain evidence useful for the defendant's claim to a pension from the deceased's employer, British Airways. This way of going about it does not reflect well on the defendant. But recording a conversation surreptitiously is not the same as lying about an agreement alleged to have been made. And, in any event, it occurred long after the agreement of May 2012 and the work done by the defendant in reliance on it. It does not mean that I should disbelieve the evidence of everything that went before.

34. The claimants also criticised the defendant for signing a questionnaire for a British Airways pension in September 2016 on the grounds of being the deceased's partner at the time of his death, when it contained an error as to the date on which the agreement to share property with the deceased was entered into. As drafted and signed, it stated that the agreement was made "about 2 years ago", *ie* 2014 rather than 2012. The explanation ultimately given by the defendant's friend Graham Bond was that he had asked the defendant the questions and had then filled in the form for him, and he (the defendant) signed it. He said that the deceased had told him in 2014 that the agreement was two years before, and so he had mistakenly written "about 2 years ago" when the year in which he was filling it in was 2016, and the defendant had signed it. In my judgment, this is just a simple mistake, rather than an indication of some terrible conspiracy, as the claimants appear to think.

35. The claimants, of course, were in no position to give any evidence rebutting the evidence of the defendant as to the agreement of May 2012. They did not live with the deceased, and were not present on that occasion. I accept that the deceased did not mention this agreement to the claimants, but it was, after all, none of their business, just like the HIV and the IVA. He may well have wished, for his own reasons, not to discuss it with them. I cannot regard the failure to mention it as in any way demonstrating that the agreement did not happen. In my judgment, it did.

36. The claimants seek to make much – indeed, as I say, far too much – of the fact that the deceased and the defendant were mistaken about the defendant's property rights after his father had died. I deal with this later, in considering the impact of the law on the facts.

37. The defendant began to undertake the works in relation to the Weston property in June 2012. He had some experience in building, and he also had time, whereas the deceased had his job as a flight attendant which took him away from home frequently. When the deceased came home from working abroad, he was understandably not inclined to do heavy renovation work. Nor did he have the money to spend on paying others to do it. The deceased was also not so practical as the defendant. Nevertheless, I accept that he contributed both ideas (for example for colours and materials) and occasional practical help (such as painting and other decorating). But, by comparison with the work done by the defendant, it was minimal. The vast bulk of the work was done by the defendant. The defendant had already done some minor works to the deceased's house before this agreement of May 2012, of the kind that one would expect a friend to undertake for another. He had decorated their bedroom in July 2011, and in February and April 2012 he had tried to repair the broken boiler with a "quick fix". But this work was of a different order of magnitude.

38. In June 2012, works were done to the three bedrooms at the property, including (i) removing carpets, skirting boards and radiators, (ii) sanding walls, ceilings and doors, (iii) painting walls, ceilings and woodwork, (iv) fitting and wiring in downlights, (v) laying wooden flooring in two bedrooms, (vi) refitting skirting boards and radiators, (vii) assembling mirrored wardrobes in one room, and so on. In September 2012 the kitchen and utility room were knocked into a single room to form a bigger kitchen, the walls having to be made good with plaster board. Radiators were removed, surfaces had to be prepared and then painted, downlights were wired and fitted, new sockets and switches fitted, a new sink and taps were installed, and radiators refitted. In November 2012 the lounge and dining room were knocked into a single room with a new steel lintel to support the weight of the upper floor fitted (by a local builder), the walls having to be made good with plasterboard. Again radiators were removed, surfaces prepared and then painted, downlights were wired and fitted, a new door was hung, and the radiators replaced. A new front door was fitted, again by an outside contractor, for which the defendant paid. Work was also done in the hall, the cloakroom and the understairs space. Most of the work was complete by spring 2014. The only works that were not carried out as originally planned were those to the ensuite bathroom. This is still unfinished. The expert evidence (which I accept) is that the value added to the Weston property is about £30,000.

39. At the Devon property, the first works done were the installation of the bathroom fittings, in

late 2012. Further works were carried out in June-July 2014, including removing the original partitions between the rooms and fitting new windows, insulating and plastering the walls, reinforcing the floor joists, installing a new electrical ring main and TV point, and then installing the new internal partitions.

40. The defendant produced a schedule of out of pocket expenditure for the building works he did. This was criticised by the claimants on the basis that it contained items incurred before the agreement of May 2012. There are in fact only three such items, totalling about £160. The total on the schedule is a little under £10,000. A further criticism was that only about £1000 of these items can be clearly linked to building material purchases. The vast majority cannot, and many of the items are in fact cashpoint withdrawals, rather than debits in building related shops for specific items. The defendant was unable to produce actual receipts for the items he claims he bought. I think the criticism is overdone. Most of the value added to the deceased's house by the works was added by the defendant's labour, not by work done and materials supplied by others. And I accept that the defendant and the deceased, in an intimate personal relationship, would not have expected to hold each other to account for expenditure of this kind (see *Kernott v Jones* [2012] 1 AC 776, [22]). The defendant cannot have known that he would need to demonstrate to sceptical relatives of the deceased that the expenditure really was made, and so cannot be blamed for not having kept receipts. In the modern world, few people do, and even fewer can find them when they turn out to matter. The defendant's evidence that he spent this money on building materials and fittings is plausible and I accept it.

41. As against that, it is also the case that the defendant benefited from largely free accommodation and keep at the Weston property. I say 'largely' because there were occasions when the defendant did the shopping or paid for meals out. But the fact is that the deceased had a regular income and the defendant did not. The defendant also accompanied the deceased on a number of trips abroad, as permitted by British Airways' rules for employees' partners. Sometimes, of course, they spent time at the Devon property, whether just visiting or because there was work to be done, and during those periods the defendant could not be said to be living at the expense of the deceased.

42. The defendant had a sinus operation in autumn 2014, but contracted an infection following it, which took 2 ½ months to get better. This had an effect on the works at the Devon property, because the defendant found it difficult to work during this time particularly in dusty areas. Once he was better, he completed some of the things that he had been doing before the operation. But the works as a whole remain incomplete. Photographs taken recently show that the apartment to be is still a building site. In part at least, this failure to complete the works at the Devon property is attributable to the following events.

43. The deceased and the defendant suffered a breakdown in their relationship in November 2014. Their Facebook pages were altered to show their status as single. The second claimant remembered speaking to the deceased about it. He was complaining that the defendant never paid anything. The second claimant called it "a big whinge", and accepted that relationships sometimes go through a bad patch. There is no evidence that the defendant lived anywhere else during this period than at the Weston property. But in any event the relationship was certainly back on again by February 2015, when the deceased referred in a Facebook message to his "beloved partner", a reference which the

second claimant accepted was to the defendant. Another Facebook message from the deceased in March referred to the deceased being with the Thorpe family at the Devon property. The defendant and the deceased then had a number of holidays together, including in San Diego (March 2015), Greece (June 2015), and Cornwall (July and August 2015).

44. However, there was now also another problem. The deceased had started using recreational drugs from about early 2015. The defendant's attitude was that he did not like it, but did not interfere. It was the deceased's choice. The drug use led to an arm infection in March 2015, caused by reusing a needle. This required surgery, and then nursing afterwards. The defendant helped with this, including changing his dressings. However, the deceased did not give up using drugs. Indeed, his use increased. He began to invite others to drugs parties at the Weston property. During these parties the defendant stayed out of the way, upstairs.

45. A further problem for the deceased was that he suffered a panic attack at work in June 2015 and was grounded for 6 months. Of course, this meant that they spent more time together, and they went camping together in Cornwall in July and August. In December 2015, the second claimant received a surprise visit from the deceased, apparently on his way to Devon, with his dog. He only stayed a few minutes, and was agitated the whole time. He told the second claimant that he and the defendant had split up again, that the defendant never paid anything, and had gone back to Devon. He also explained to the second claimant that he had been grounded for six months. After 10 minutes he left with the dog. It was the last time the second claimant ever saw him.

46. The deceased managed to give up drugs and become clean in order to fly again at or just before Christmas 2015. This was significant because if he had not flown for more than six months he would have had to submit to further tests. But he did not stay clean for long. He started taking drugs again in the New Year. Nevertheless, the defendant and he stayed together. There are chat messages from February and March showing that they were indeed a couple, and Florence Bennett (the partner of the defendant's brother) gave evidence, which I accept, that the defendant and the deceased had stayed together (as a couple) at the Devon property just a week before the deceased died.

47. The deceased was then away working for a few days. The defendant stayed in Devon during this time. When the deceased came back, a party took place at the Weston property. It involved drinking and drugtaking. The defendant was not present. He was still in Devon. Not being able to contact the deceased afterwards, the defendant came back to the Weston property, arriving shortly before midnight. He could not get his key into the front door, because the deceased's key was in the lock on the other side. So he went round to the back door, where he knew the key would be in the barrel, knocked it through and reached through the cat flap in the door to pick up the key. Then he let himself into the back of the house, and found the deceased's body lying on the floor in the kitchen. He then called the police. PC Anthony attended with another officer, examined the scene and the body and to the statement. The police found drugs paraphernalia and in particular a small amount of heroin.

48. The death was reported to the coroner. A post-mortem examination took place, the result of

which was initially inconclusive. However, once a toxicology test had been carried out, it became clear that the deceased had died as a result of a combination of the toxicity of drugs taken and pre-existing health problems, including disease of heart blood vessels. The coroner held an inquest into the death on 25 August 2016. I was not shown the record of inquest, but I assume it recorded the same cause of death as that indicated after the post-mortem and toxicology tests.

49. After the death there was a regrettable breakdown of relations between the defendant and the claimants. The defendant understandably remained in occupation of the Weston property, where he had lived most of the time in the previous six years, and where most of his clothes and personal effects were. But he also excluded the claimants from the property, refusing to let them have a key, and controlling their visits. Since they have become the personal representatives of the deceased (at least *ad colligenda bona*), this has created some difficulties for the administration of the deceased's estate. I shall have to return to the effect of this exclusion later.

The Law

50. The defendant's claim is put both on the basis of common intention constructive trust and proprietary estoppel. As to the former, the leading cases are now *Stack v Dowden* [2007] 2 AC 432 and *Kernott v Jones* [2012] 1 AC 776. These were both cases of a house in joint names, where it was argued that a common intention constructive trust meant that the beneficial ownership did not follow the legal title. The most recent case at the third level in England of a case of common intention constructive trust where the legal title was in the name of one party only is *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

51. In the latter case, Lord Bridge (in whose speech the rest of the House concurred) said (at p132):

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

Although the House in *Stack v Dowden* did not agree with some aspects of the decision in *Rosset*, there was no suggestion that the basic requirements for common intention constructive trust where the parties reached an agreement as to the beneficial ownership

of a house were any different from those set out by Lord Bridge.

52. As to the doctrine of proprietary estoppel, in *Thorner v Major* [2009] 1 WLR 776, HL, Lord Walker put the matter this way:

> "29. My Lords, this appeal is concerned with proprietary estoppel. An academic authority (Simon Gardner, *An Introduction to Land Law* (2007), p 101) has recently commented: "There is no definition of proprietary estoppel that is both comprehensive and uncontroversial (and many attempts at one have been neither)." Nevertheless most scholars agree that the doctrine is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance: see *Megarry & Wade, The Law of Real Property* , 7th ed (2008), para 16–001; *Gray & Gray, Elements of Land Law* , 5th ed (2009), para 9.2.8; *Snell's Equity* , 31st ed (2005), paras 10–16 to 10–19; *Gardner, An Introduction to Land Law* (2007), para 7.1.1."

That summary will suffice for the moment, though I shall deal in more detail with certain points in due course.

Some general points

53. Before I deal with the application of the legal principles of these doctrines to the facts, I will deal with some general points made on behalf of the claimants. The first is that the agreement relied on by the defendant to share properties with the deceased was founded on a common mistake, *ie* that the defendant at the time did own a one third (or indeed any) share in the Devon property. The claimants say that the result is that the agreement is void. I reject this argument. The parties were indeed mistaken in believing that in May 2012 the defendant had a share in the Devon property under his late father's will. But the defendant always had "expectations" (as the deceased himself recognised: see Graham Bond's witness statement of 23 June 2017, [10]). Moreover, the defendant, his siblings and his mother operated on the basis of the mistaken belief, at least until the mistake was discovered. Thereafter, the will variation was entered into, which gave the defendant a one sixth share, the other one sixth to come on the death of his mother. In the circumstances, especially of the close and loving relationship between them at the time, I do not regard this mistake as fundamental to the agreement between the defendant and the deceased. But in any event this is not contract law. It is equity (whether common intention constructive trust or proprietary estoppel) and the fundamental question is whether in the circumstances it is unconscionable for the estate of the deceased to deny the defendant a share in the Weston property. For that purpose, it is more important to consider whether the defendant relied to his detriment on a promise of the deceased intended to be relied upon.

54. The claimants also argue that, since the defendant could not perform his side of the bargain at the time the agreement was entered into, because he was not then in fact the owner of a share in the Devon property, the agreement is not valid in law. This criticism suffers from the same problem as the previous one. It treats the promise made by the deceased as

though it was part of a common law contract. But in fact the greater flaw in the argument is that even a contract by which a person promises to do something which at the date of the contract he is not in a position to do is not invalid. For example, A promises to sell to B property which at the date of the contract he does not yet own and indeed may never own. If A does not perform the contract on the due date, the contract is not invalid. On the contrary, it *is* valid, and he is in breach. This is an everyday occurrence in commercial markets. People frequently sell and promise to deliver things in future which at that date they do not own. Even if the contract is for immediate performance, it is not invalid, though it may well be broken as a result of non-performance.

55. In the context of the promise made by the defendant in relation to the Devon property, it is important also to notice that the defendant subsequently (on the making of the variation agreement) became entitled to an interest in that property. If it mattered, that acquisition of an interest would go to "feed" the estoppel created by the parties' agreement: see *Church of England Building Society v Piskor* [1954] Ch 553; *Southern Pacific Mortgages Ltd v Scott* [2015] AC 385, Sup Ct.

56. The claimants put forward a further argument to the effect that the words alleged to have been said by the deceased in May 2012 (and found by me to have been used) were not sufficient to create immediate property rights. There is a risk of confusion here. The arguments based on common intention constructive trust and proprietary estoppel are not that the agreement creates immediate property rights. It is that a promise is made which is intended to be acted upon, and, if in the future it is acted upon to the detriment of the promisee, then it may be unconscionable for the legal owner to resile from his promise. So the words used are apt create an interest in the deceased's property *in the future*, at the point when detrimental reliance makes it unconscionable for the deceased to go back on his promise. In my judgment the words used and found by me in the context in which they were used are sufficient for this purpose. If the argument is that they were not clear enough, then I simply disagree. As Lord Walker said in *Thorner v Major* [2009] 1 WLR 776, [56],

> "What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context."

57. The claimants also said that it would open the floodgates to allow post-mortem evidence of secret agreements between parties to govern property rights. But it is far too late to complain that informal agreements are being given effect to. Despite the Statute of Frauds 1677, the courts have been given giving effect to informal agreements governing property since the late 17th century, when equity regarded it as unconscionable for the legal owner not to give effect to his promise. The doctrines of common intention constructive trust and proprietary estoppel are simply modern manifestations of that practice. But it is not enough to allege a conversation or agreement. The court must find that the agreement was actually come to, and that there was then detrimental reliance on the agreement. The courts will be astute to evaluate the evidence put forward in favour of such agreements and the reliance on them. There is nothing in this objection.

58. The claimants also put forward an argument which they called a *reductio ad absurdum*. This was that if the defendant was entitled to a half (or any) share in the deceased's

property, then the deceased's estate was also entitled to a similar share in the defendant's property. I do not see why that should be regarded as absurd, if it is what the parties have agreed, and the relevant conditions making it unconscionable for the defendant not to perform his agreement have been satisfied. But in any event the short answer to this point in the context of the present case is that that is not what is asked in this proceeding. This proceeding is concerned only with whether *the defendant* has a sufficient interest in *the deceased's* property to be able to resist the claim for possession made against him. No case has been pleaded that (for example) the *deceased* relied to his detriment on the agreement of May 2012, and *his estate* is therefore entitled to a share in the Devon property, and I have heard no evidence on this. I can therefore say nothing about it.

59. The claimants also relied on the decision of the Court of Appeal in *Gallarotti v Sebastianelli* [2013] EWCA Civ 865. In that case, two young friends, both Italian, bought a London flat together in 1997. Each made a cash contribution to the purchase price, S contributing 46% and G 14%. The property was conveyed into the sole name of S. The balance of 40% was raised by S as a mortgage loan secured by a charge on the flat. The loan was taken out by S alone, who was in law solely responsible to the bank for its repayment. G agreed that any interest he had was postponed to the security interest of the bank. This was the case of an ordinary friendship, and not an intimate relationship. That friendship having broken down subsequently, and the parties having gone their separate ways, the question arose of their respective beneficial interests in the flat. The judge at trial in the County Court found that there was an agreement between them at the time of the purchase that they should own the beneficial interest in the flat 50-50. However, they recognised that their respective contributions were unequal, by agreeing that G would pay more of the mortgage repayments. In fact, G did not do so, because he did not have the means. On appeal, Arden LJ (with whom Tomlinson and Davis LJJ agreed) held that the agreement of the parties did not apply in the circumstances which had actually occurred.

60. Arden LJ said:

> "24. In my judgment, the agreement did not apply in the events which unfolded. It only covered the case where there was a slight imbalance in contributions. Neither party fussed over minor differences in payments made by them. Since they had no formal system of accounting, there was no system for equalising contributions. They did not place much store on that consideration. The Recorder put this down to the strength of their friendship. But the fact that they were strong friends simply meant that one party would not chase each other for money which the other did not have. It did not, in my judgment, mean that they gave up any chance of substantial equality at the end of the day. The express agreement put forward by Mr Gallarotti, and accepted by the Recorder, shows that the parties were concerned that their ultimate shares in the Flat should, broadly speaking, represent their contributions to it.
>
> 25. Accordingly, in my judgment, the inference to be made from the parties' course of conduct was that they intended that their financial contributions should be taken into account but not that there should be any precise accounting.
>
> 26. One of Mr Aylwin's submissions is that the Recorder elided the process of

finding a beneficial interest with that of determining its size. That is not how I see it. I conclude that, having found that there was an agreement which applied in particular circumstances, the Recorder did not go on to consider whether those circumstances occurred. Thus, in my judgment, the Recorder failed to pursue the logic of her own findings. She had found that at the date of the acquisition the parties recognised that there was some slight disparity between their contributions. However, in the event, she found that the disparity was much greater than the parties had expected at the date of their agreement. She found that Mr Gallarotti agreed that if he paid less towards the purchase price he would make that up by paying more towards the mortgage. If that was the agreement then she should have looked at the amount of the mortgage payments Mr Gallarotti had paid. He palpably had not made a substantial contribution on her findings. The logical result of the agreement, therefore, was that the agreement for 50/50 sharing was at an end. Miss Parker's submissions do not meet that point. The Recorder should have held that this was the case when the parties agreed to go their separate ways and Mr Gallarotti left the Flat. By that point in time, the only inference that could be drawn was that the parties intended the beneficial ownership should, in substance, reflect their financial contributions. It was wholly implausible that Mr Sebastianelli should make a substantial gift to Mr Gallarotti. Here were two flat sharers who were not in a family unit. They were people who for convenience lived together until they established their own homes."

61. The Court of Appeal took account of the cash contributions each had made, the mortgage loan taken out by S and the payments actually made by G, and awarded S 75% of the beneficial interest and G 25%. It is not however clear why non-performance by G of his contractual promise meant that the agreement no longer applied. A failure to perform an agreement is not generally a reason to say that. I am not aware of any previous case of common interest and attention constructive trust which has so held. And it is clear from the facts found that G had relied on the promise made by S to share the property 50-50.

62. Further, I do not understand why the court did not enforce the agreement for a 50-50 split, but then make a deduction from G's share by way of equitable accounting for the payments which he did not make and which S had had to make in his place. Possibly there were no sufficient factual findings at first instance. It seems to me to be a case which turns very much on its own facts, and does not express any principle capable of being followed in another case which does not replicate those facts. It is certainly a case which is very different from the present one. It was a case of a platonic friendship where there was no reason for one party to make a large gift to the other. But the present case is one of a committed, intimate relationship where two people decided to spend the rest of their lives together. Secondly, *Gallarotti* was a case where G did not in fact make the larger contributions to mortgage repayment instalments which he had promised, whereas in the present case the defendant did a lot of work on the Weston property pursuant to their plan, and even some work on the Devon property, making it available for the use of the deceased in the meantime, until the project was halted by the latter's sudden and unexpected death. Thirdly, there was no suggestion in the evidence in the present case that the agreement between the defendant and the deceased would only apply if both parties survived a particular length of time, or if the works reached a particular point of completion.

63. The claimants cite *Gallarotti* as authority for the proposition that the court cannot ignore what happens after an agreement has been entered into between the parties and some detriment incurred on the face of it, particularly when the party's contemplation is not borne out by events. I certainly accept that, when the court is considering the existence of a common intention constructive trust, the court must consider the whole of the relationship. But this is because the parties' intentions may change over time, and interests once agreed may be changed *because* they have changed their collective intentions: see *eg Stack v Dowden* [2007] 2 AC 432, [62]; *Jones v Kernott* [2012] 1 AC 776, [14]. I also accept that, in *Oxley v Hiscock* [2005] Fam 211, Chadwick LJ held that, in a case where there was no evidence of any discussion between the parties as to their shares, but the court must still find their common intention, that could only be found (as the Law Commission later put it in "Sharing Homes, A Discussion Paper", para 4.27) by

> "undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended": see *Stack v Dowden* [2007] 2 AC 432, [61].

But in a case where the agreement of the parties is established on the evidence, and that evidence does not show or even suggest any subsequent variation of that agreement, I do not see the need to look at the subsequent conduct in order to assess what the agreement was.

64. The claimants also argue that common intention constructive trust arises normally on the original acquisition of a property, and only rarely in cases where the legal owner has already acquired the property in question. They refer to *Lloyds Bank plc v Rosset* [1991] AC 107, 132, where Lord Bridge said that the

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

65. But this dictum is not authority for the proposition that an agreement to share the beneficial ownership made subsequent to the acquisition of the property cannot be made, or if made cannot result in a common intention resulting trust. As I read it, it simply attempts to reflect the experience of the courts up to that time as to the circumstances in which the question has arisen. The majority of cases in which it arose for decision were cases of agreement at about the time of acquisition, and Lord Bridge's dictum reflects that. There is nothing in the law to suggest that it cannot happen subsequently. That is a question of fact. And this is just such a case.

Application of the law to the facts: common intention constructive trust

66. Turning then to the application of the principles of common intention constructive trust to the facts which I have found in this case, I am satisfied that the agreement to share

their respective properties, followed by the detrimental reliance of the defendant, gave rise to such a trust of the Weston property in his favour. The defendant plainly relied upon that agreement in carrying out the significant works which he did on the Weston property, using his own labour and his own money to purchase materials, as well as occasionally paying others to do work. The defendant says that where there is an agreement to share property equally, the court will assume it is to be a beneficial joint tenancy rather than a tenancy in common, and cites *Eves v Eves* [1975] WLR 1338. But I do not consider that that case establishes that there is a principle that agreements for half shares must be construed as for joint tenancy. Each case must turn on its facts. In this case I am not satisfied that the one half share agreement should give rise to a joint tenancy of the beneficial interest in that property, rather than a tenancy in common. If I had been satisfied that at the time of the agreement the parties had considered what might happen if one of them died, then it might have been different. But I am not. I will come back to the question of remedy later.

Application of the law to the facts: proprietary estoppel

67. Given my conclusion on common intention constructive trust, it may not be necessary to reach a conclusion on the doctrine of proprietary estoppel. But I can do so shortly. In relation to proprietary estoppel, I am equally satisfied, first, that the deceased made a promise to share his property with the defendant (and indeed vice versa), intending it to be relied upon, and, second, that the defendant relied on this promise to his detriment, by carrying out the building work at Weston to which I have referred. In any event, there is a presumption of reliance in such a case, which arises from the decision of the Court of Appeal in *Wayling v Jones* (1995) 69 P & CR 170. In my judgment, it would have been unconscionable in the circumstances for the deceased, had he survived, to renege on that promise. I deal below with the question of remedy.

Unconscionability and detriment

68. But, before I do that, I should deal with the question of unconscionability which lies at the heart of both common intention constructive trust and proprietary estoppel. I say "at the heart" because there can be little doubt that these two doctrines spring from the same source. The speech of Lord Diplock in *Gissing v Gissing* [1971] AC 886 is widely regarded as the source of the common intention constructive trust. Perhaps the most famous paragraph is this:

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

69. In the first two thirds of the paragraph, Lord Diplock sets out the principle of a trust imposed by law where the legal owner will not be allowed to deny a beneficial interest in the property. The last third gives an example of conduct so inequitable as to lead to the imposition of the trust. The example is detrimental reliance on a expectation created by the landowner. This is pure proprietary estoppel. And every case of an *agreement* between the parties that the non-owner should share the property with the owner inevitably involves creating an expectation (usually a promise) that the non-owner shall have an interest. So every common intention constructive trust contains the elements of proprietary estoppel. Another way of putting it would be to say that common intention constructive trust is a sub-set of proprietary estoppel. But that is not how the caselaw has developed. In recent times, it has become fashionable to seek to *separate* the two doctrines, by reference to (for example) the remedies awarded, how far the claim is retrospective, and so on. For present purposes I do not need to focus on these matters. The element of unconscionability (which Lord Diplock called "inequitable") is the same for both. It is created by the non-owner's detrimental reliance on the expectation created by the owner.

70. However, the claimants cited a passage from the judgment of Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 to persuade me that the court could and should carry out a kind of arithmetical exercise to see whether in fact the conduct in reliance put forward in this case has in fact produced a detriment at all. *Davies v Davies* was a case where a daughter of landowning farmers who had worked for many years on her parents' farms had established a proprietary estoppel equity at the trial, and the question was how to satisfy it. The facts were unusual in that the relationship between the parties was volatile, and on several occasions the daughter left the farms to work elsewhere, before returning.

71. The judge at first instance started from the idea of satisfying the expectation created. The daughter sought the land and the farms. The parents argued she should have money compensation, but taking into account the benefits which she had received whilst living with them. The judge rejected both sides' positions, and eventually awarded the daughter a lump sum of £1.3m. The parents appealed. The appeal was allowed, on the basis that the judge had not sufficiently explored the facts or explained his reasoning for arriving at the figure he did. The Court of Appeal reduced the sum awarded to £500,000.

72. In the course of his judgment, Lewison LJ (with whom Patten and Underhill LJJ agreed) said:

> "39. There is a lively controversy about the essential aim of the exercise of this broad judgmental discretion. One line of authority takes the view that the essential aim of the discretion is to give effect to the claimant's expectation unless it would be disproportionate to do so. The other takes the view that essential aim of the discretion is to ensure that the claimant's reliance interest is protected, so that she is compensated for such detriment as she has suffered. The two approaches, in their starkest form, are fundamentally different: see *Cobbe v Yeoman's Row Management Ltd* [2006] EWCA Civ 1139, [2006] 1 WLR 2964 at [120] (reversed on a different point [2008] UKHL 55; [2008] 1 WLR 1752). Much scholarly opinion favours the second approach: see Snell's Equity (33rd ed) para 12-048; Wilken and Ghaly, *Waiver Variation and Estoppel* (3rd ed) para 11.94; McFarlane *The Law of*

Proprietary Estoppel, para 7.37; McFarlane and Sales: *Promises, detriment, and liability: lessons from proprietary estoppel* (2015) LQR 610. Others argue that the outcome will reflect both the expectation and the reliance interest and that it will normally be somewhere between the two: Gardner: *The remedial discretion in proprietary estoppel – again* [2006] LQR 492. Logically, there is much to be said for the second approach. Since the essence of proprietary estoppel is the combination of expectation and detriment, if either is absent the claim must fail. If, therefore, the detriment can be fairly quantified and a claimant receives full compensation for that detriment, that compensation ought, in principle, to remove the foundation of the claim: Robertson: *The reliance basis of proprietary estoppel remedies* [2008] Conv 295. Fortunately, I do not think that we are required to resolve this controversy on this appeal."

73. The first thing to notice about *Davies v Davies* is that it was a case of proprietary estoppel, where a promise was made to give land to the claimant at a point in the future. It was not argued, much less held to be, a case of common intention constructive trust, where the legal owner agrees to give a share in the property to another more or less straight away (even though in fact it does not take effect until it has been relied upon). The present case is obviously closer to the latter scenario than to the former, even though, as I have already said, it can also be analysed in terms of proprietary estoppel. The second thing is that the Court of Appeal does not seek to resolve the debate as to the underlying purpose of proprietary estoppel, *ie* whether it satisfies expectations or reverses reliance losses. It is left open. This is however a modern debate. In the seminal proprietary estoppel case of *Dillwyn v Llewellyn* (1861) 4 De G F & J 517, for example, where a father informally 'gave' land to his son to build a house on, and the son spent some £14,000 in buying out a tenant, building a house and laying out grounds, there is no trace of any argument that, if the £14,000 were to be repaid from (or a charge for this sum put upon) the father's estate, there would no longer be any detriment, and hence no basis for making the estate convey the land to the son. On the contrary, Lord Westbury LC says (at 522) that

> "the subsequent expenditure by the son, with the approbation of the father, supplied a valuable consideration originally wanting".

In other words, the detriment turned the promise into an obligation enforceable in equity.

74. A third point (connected to the second) is that the debate referred to by Lewison LJ appears to ignore that there is a difference between two quite different kinds of proprietary estoppel cases. There are those, such as in *Dillwyn v Llewellyn*, *Davies v Davies* and indeed the present case, where the property owner in effect makes a *promise*, intended to be relied upon, to transfer ownership wholly or partly to the other, who then relies on it to his or her detriment. In these cases there is an expectation, created by the property owner, to be satisfied. If the promise had been made in a formal way, it would have been a contract. It is not surprising therefore that the court's starting point, at least, is to consider ordering the promise to be made good. In *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501, [44]-[52], Robert Walker LJ subdivides this category into two: cases where there is a bargain in clear terms, and cases where the bargain is unclear or extravagant. This distinction is discussed in the literature.

But they are all cases of *promises*, creating expectations.

75. However, there is a second class of case where no promise to transfer ownership is made, but there is nonetheless reliance on a *statement* of the property owner, or a mistake is made by the other which the property owner realises and does not correct, and the other incurs detriment on the faith of it. In those cases there is no *expectation* created by the owner, and so no reason to do other than seek to remove the detriment. Until the detriment is removed, the owner is estopped from asserting his rights against the other. So, for example, if the owner mistakenly represents where his boundary lies and the non-owner builds up to it in reliance, then the owner suing for trespass to his land without first removing the detriment will fail: *Hopgood v Brown* [1955] 1 WLR 213, CA. Where the detriment can be removed by the payment of money, the result of such cases has been for the court to impose a *charge* on the land for the benefit of the non-owner: see *eg Neesom v Clarkson* (1844) 4 Hare 97; *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; *Re Foster (No 2)* [1938] 3 All ER 610. So one category of case is like contract, and the focus is on the expectation loss. The other is like tort, and the focus is on the reliance loss.

76. In a case like the present, which satisfies the requirements of common intention constructive trust, of course, this debate appears to be irrelevant. Moreover, no case was cited to me to show that in cases of common intention constructive trust, as opposed to proprietary estoppel, the court should embark on any arithmetical exercise of weighing up the advantages and disadvantages of the position in which the promisee now found him- or herself. It appears to be enough to show that the promisee has relied to his or her detriment on the agreement between the parties, such that it is unconscionable for the legal owner to renege on the agreement. This may be yet another emerging distinction between the two doctrines. In the present case the defendant did a great deal of building work which he would not have done if he and the deceased had not made their agreement. I am in no doubt that it would be unconscionable for the estate of the deceased not to give effect to the agreement made.

77. But in case I am wrong, and it is necessary to look more mathematically at detriment and benefit in cases of common intention constructive trust, I will briefly do so. The claimants argue that the detriment to the defendant is barely £1000, *ie* the sum which the defendant (they say) can demonstrate was actually spent on building materials or work for the improvements at the Weston property. They then ask me to take account of the countervailing benefits to the defendant in this way. The defendant received free accommodation and keep after the agreement. The claimants value that at £1434 per month for 66 months, totalling £94,644. Alternatively, they say the defendant has enjoyed free use of the property whose rental is £900 per month for the same 66 months, *ie* £59,400. To this they add exclusive use of the Weston property since the death of the deceased at £900 per month for 22 months (by the date of trial), totalling £19,800. Adding together £94,644 and £19,800, the grand total is £114,444. So the claimants say that the detriment is far outweighed by the advantages to the defendant flowing from the agreement.

78. I do not think this can be right. The agreement was to share their properties 50-50. Any advantages that flow from that sharing are simply the result of implementing the

agreement – the informal bargain – between them. There is no equitable accounting between co-owners for merely enjoying the co-owned property, save in exceptional circumstances, such as where one co-owner excludes another from the property. Nor do I think it would be right to take into account the fact that the deceased, having a regular income, paid for much (though by no means all) of the food and other 'keep' of the defendant (*eg* utility bills). If the agreement had not been entered into, then so long as the relationship continued the deceased would still have paid these bills, and for the extra food needed to cover the fact that the defendant was living with the deceased. (And I do not ignore the fact that sometimes the defendant paid for household expenses, or for them to eat out. Sometimes they were in Devon.) So the benefits of being 'kept', at least in part, would have occurred anyway, and were not caused by the agreement. In the result, therefore, the only benefit which I think it right to set against the detriment is the half occupation rent for the period since the death of the deceased, when the defendant wrongly excluded the claimants from the Weston property. On the claimants' figures this would amount to £9900. If he had not excluded them it would have been nothing. On the other side, the work done has added some £30,000 in value to the Weston property. The defendant's labour (and payments to others for their work) has contributed nearly all of that. I am not in a position to put a precise value on the labour element. The defendant estimates it at £30,000, with the same again for materials. On any view it is significant. The detriment is the effect on the defendant, of course, rather than the benefit to the legal owner. I do not have figures for the Devon property, but in any event no claim is made by the claimants in these proceedings for a share in that, and it is not obvious to me at this stage that they will be able to show detrimental reliance on the agreement justifying a share. I emphasise that the point has simply not been argued. I am clear that, even on a limited consideration of the arithmetic, the defendant's detriment far outweighs the collateral benefits to him of the agreement.

Remedy

79. I therefore turn to consider the question of remedy. I remind myself that this is first and foremost a case of common intention constructive trust. The normal remedy is to hold that the property in question (here the Weston property) is held by the legal owner on trust for the parties in the agreed proportions. Here that means 50-50. I can see no reason why that should not be given effect to. But the deceased is now dead, and the original purpose for which the agreement was entered into (first as a shared home for the defendant and the deceased, then to be let to produce income so that the deceased could reduce his hours) is at an end. There was no evidence to show that the defendant would suffer any especial hardship in moving out. Those entitled under the deceased's estate, whether as creditors or beneficiaries, should not have to wait longer than necessary to be paid. In my judgment the appropriate remedy is for the Weston property to be sold, and after discharge of any outstanding mortgage or other security interest, the net proceeds of sale be divided between the defendant and the deceased's estate, but deducting from the defendant's share one half of the occupation rent from the date of death to the date on which possession is given up by the defendant or the deceased's personal representatives cease to be excluded from the property.

80. If I were considering the remedy from the point of view of proprietary estoppel, the exercise would be a different one. In *Jennings v Rice* [2002] EWCA Civ 159, Robert

Walker LJ said:

> "50. To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. I have already referred to the typical case of a carer who has the expectation of coming into the benefactor's house, either outright or for life. In such a case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way.
>
> 51. But that does not mean that the court should in such a case abandon expectations completely, and look to the detriment suffered by the claimant as defining the appropriate measure of relief. Indeed in many cases the detriment may be even more difficult to quantify, in financial terms, than the claimant's expectations. Detriment can be quantified with reasonable precision if it consists solely of expenditure on improvements to another person's house, and in some cases of that sort an equitable charge for the expenditure may be sufficient to satisfy the equity (see Snell's Equity 30th ed para 39-21 and the authorities mentioned in that paragraph). But the detriment of an ever-increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes, is very difficult to quantify in money terms. Moreover the claimant may not be motivated solely by reliance on the benefactor's assurances, and may receive some countervailing benefits (such as free bed and board). In such circumstances the court has to exercise a wide judgmental discretion."

81. However, in the exercise of the court's discretion, I would consider that this was a case where the promise of the deceased ought in principle to be given effect to. The significant works effected by the defendant in reliance on the promise justify this approach. But, as with the common intention constructive trust, the whole point of conferring of an interest on the defendant, so that he could live there with the deceased, or that they could let it out and retire to the Devon property, is now frustrated by the untimely death of the deceased. Accordingly, the appropriate order would be to sell the property and to pay one half of the net proceeds (after any secured debts are paid) to the defendant, less a one half occupation rent from the deceased's death, to the date on which possession is given up by the defendant or the deceased's personal representatives cease to be excluded from the property.

82. When this judgment is handed down, I will invite counsel to draft an appropriate order for my approval.