Neutral Citation Number: [2023] EWHC 435 (Ch)

Case No: BL-2020-002144

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

Rolls Building
Fetter Lane
London, EC4A 1NL

3 March 2023

Before :

MR JUSTICE RICHARDS

- -

Between :

(1) PRESCOTT PLACE FREEHOLDER LIMITED **(2) THOMAS PHILIP THRELFALL** **(3) BEN FREEMAN** **(4) ELENA BLANCA BACCINI** **(5) KIMBERLEY SUM** **(6) ESTHER CARRAGHER** **(7) ANNE CAMILLA FRANCES DARLING** **(8) EDWINA MARY GILLIAN BARKER**	**Claimants**
- and –	
(1) CONSTANTIN BATIN **(2) JOSEPH DONOVAN**	**Defendants**

Michael Walsh (instructed by **Judge & Priestley LLP**) for the **Claimants**
Nathaniel Duckworth (instructed by **Ashurst LLP**) for the **Second Defendant**
The **First Defendant** did not appear and was not represented

Hearing dates: 24-27 January and 30 January 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10am on 03 March 2023 by circulation to the parties or their representatives by email and by release to the National Archives.

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Mr Justice Richards:

1. C2 to C8 are tenants of a property at 34-36 Prescott Place, Clapham, London (the "Property"). D1 is the registered proprietor of the freehold, having acquired that freehold from Stephen Donovan (D2's brother) in 2014. The tenants have exercised their right under the provisions of Part I of the Landlord and Tenant Act 1987 (the "1987 Act") to acquire the freehold of the Property. On 25 October 2019 they obtained an order (the "Section 19 Order"), made by HHJ Lethem sitting in the County Court of Central London pursuant to s19 of the 1987 Act, that ordered D1 by way of injunction to transfer the freehold to C1, the company that C2 to C8 have nominated for the purpose.

2. D2 asserts that, notwithstanding the Section 19 Order, he has rights in respect of the Property as a consequence of the following:

    i) a trust that was created at or around the time SD acquired the Property in 2004 which was evidenced in an express declaration of trust (the "2004 Trust Deed");

    ii) the circumstances surrounding D1's acquisition of his interest in the Property in 2014 (the "2014 Transfer") which, D2 asserts, involved D1 acknowledging that he would hold the Property on trust for D2;

    iii) an express declaration of trust made in 2014 (the "2014 Trust Deed") under which D1 declared that he held the Property on trust for D2; and

    iv) two leases of part of the Property that D1 granted to D2 whose date of execution is expressed to be in 2014 (the "Equitable Leases"). Although these leases have not been registered at HM Land Registry by the applicable deadline to take effect as legal estates, D2 says that they take effect in equity pursuant to s7(2)(b) of the Land Registration Act 2002 (the "LRA").

3. After the Section 19 Order was made, the Claimants became concerned that D1 and D2 might take steps to dispose of interests in the Property. They issued Part 8 proceedings seeking injunctive relief. D1 has indicated that he will play no active part in the Part 8 proceedings and will simply abide by whatever order the Court makes. D2 has filed a Defence and Counterclaim asserting that he has the rights summarised in paragraph 2.

4. Accordingly, the present proceedings are concerned with the Claimants' claims for injunctive and other relief and D2's Defence and Counterclaim. The parties have helpfully produced an agreed List of Issues and at the end of this judgment, I will relate my conclusions to those issues.

5. I had witness statements from the following. All witnesses were cross-examined, except as specifically stated below:

    i) D1 and D2;

    ii) SD, D2's brother, who gave evidence about the initial acquisition of the Property and the circumstances in which it was transferred in 2014;

iii) Imran Ahmad, an English solicitor who undertook property work for D2. He had prepared documents associated with the 2014 Transfer and said that he had witnessed signatures on the 2014 Trust Deed and the Equitable Leases;

iv) Igor Dandara, who lives in Moldova and is a friend of D1. He gave evidence that he witnessed D1's signature on the 2014 Trust Deed. Arrangements were put in place to permit him to give evidence from Moldova from video link but, for reasons that are not material, he did not do so with the result that his witness statement was not tested in cross-examination;

v) Tatiana Batin, D1's wife, who lives with D1 in Moldova. She gave evidence that she witnessed D1's signature on the Equitable Leases;

vi) Kieran Griffin, a retired solicitor qualified in the Republic of Ireland, who gave evidence that he witnessed the signatures of both SD and of D2 on the 2004 Trust Deed. Mr Griffin was on holiday in Thailand at the time of the trial. Arrangements were made to permit him to give evidence remotely, but in the event he did not attend for cross-examination.

vii) Fergus Appelbe, a retired solicitor qualified in the Republic of Ireland, who gave evidence, by way of video-link from Ireland, that he witnessed D2's signatures on the Equitable Leases.

6. Since the evidence of Mr Dandara and Mr Griffin went to matters that were in some dispute, and that evidence has not been tested by cross-examination, I have given little weight to their witness statements.

7. Later in this judgment, I will set out specific conclusions that I have drawn from the witnesses' evidence. It suffices at this stage to say that I have concluded that D1 and D2 have not always told the truth particularly on the question of when the 2014 Trust Deed and the Equitable Leases were executed. That, obviously, has affected my assessment of their credibility generally. I have found Mr Ahmad's evidence unsatisfactory in a number of respects and characterised by an apparent wish to support D2's account uncritically without taking proper care to ensure that his evidence was correct. I have not accepted the account that D1, D2 and SD put forward of circumstances surrounding the transfer of the Property to D1 in 2014 and I have concluded that, in that account, they were providing an after-the-event rationalisation as to a basis on which D1 <u>might</u> have taken the Property on trust rather than an accurate explanation of the circumstances in which D1 <u>actually</u> acquired his interest. Mrs Batin was mistaken about the date on which she said she witnessed signatures on the Equitable Leases, but I am prepared to accept that was because her memory had been "refreshed" by sight of documents bearing that date rather than a wish to deceive. Overall, I have not accepted that the evidence of D1, D2, Mr Ahmad, SD or Mrs Batin was reliable in a number of respects albeit for somewhat differing reasons.

8. Mr Appelbe was appropriately careful in his oral evidence and took care to ensure that he did not "over claim" so as to mislead. The result, though, was that he was not able to assist greatly as to the date on which the Equitable Leases were executed.

9. At various points in his evidence, D2 sought to explain an absence of disclosed contemporaneous documentary material relevant to factual issues on his strong desire for secrecy or confidentiality. He maintained that he sought to avoid, where possible, creating a "digital footprint" of his business affairs. I am prepared to accept that D2 liked to keep his business dealings appropriately confidential but I do not accept that D2 was anywhere near as reticent about "digital footprint" as he claimed. The evidence showed numerous instances of him emailing business contacts. I regarded his evidence in this regard as an attempt to explain away some of the more implausible aspects of his evidence, including his assertions as to how the Equitable Leases and 2014 Trust Deed were created.

PART A - THE LEGISLATIVE BACKGROUND

10. In broad terms, the 1987 Act gives "qualifying tenants" of blocks of flats a right of first refusal when their landlord proposes to dispose of their reversionary interest. That is achieved at a most basic level by s1 of the 1987 Act which provides that a landlord cannot make a "relevant disposal" affecting premises to which the 1987 Act provisions apply unless the landlord first gives qualifying tenants a notice under s5 offering to dispose of the interest to them on the same terms. It is common ground that the Property in this case is within the scope of the 1987 Act and that the Claimants are "qualifying tenants" and so I do not need to set out how the legislation deals with those matters.

11. The concept of a "relevant disposal" is broadly defined by s4. Most disposals of an estate or interest (whether legal or equitable) are, on the face of it, embraced within the definition, except the grant of a tenancy over a single flat. However, s4(2) contains some exceptions. In particular, s4(2)(g) provides that the following is not a "relevant disposal":

> *(g) a disposal consisting of the transfer of an estate or interest held on trust for any person where the disposal is made in connection with the appointment of a new trustee or in connection with the discharge of any trustee.*

12. The 1987 Act deals with the possibility that a landlord might simply breach its obligations by making a relevant disposal to a purchaser without making the requisite offer to qualifying tenants. Section 10A provides for criminal sanctions. Section 12B(2) also seeks to give effect to the tenants' right of first refusal by permitting a majority of qualifying tenants to call for a conveyance from the purchaser. Section 12B(2) provides as follows:

> *(2) The requisite majority of qualifying tenants of the constituent flats may serve a notice (a "purchase notice") on the purchaser requiring him to dispose of the estate or interest that was the subject-matter of the original disposal, on the terms on which it was made (including those relating to the consideration payable), to a person or persons nominated for the purposes of this section by any such majority of qualifying tenants of those flats.*

13. In this case, there is no question as to whether the "requisite majority of qualifying tenants" was present. That majority served a notice under s12B(2) and nominated C1 for the purposes of s12B(2).

14. A notice under s12B(2) does not take effect immediately. Section 12B(5) makes it clear that an instrument needs to be executed to give effect to that notice. Section 12B(5) also makes some provision for what is to happen if the property in question has become encumbered since the disposal made in breach of s1 (referred to in the legislation as the "original disposal"):

> *(5) Where the property which the purchaser is required to dispose of in pursuance of the purchase notice has since the original disposal become subject to any charge or other incumbrance, then, unless the court by order directs otherwise—*
>
> > *(a) in the case of a charge to secure the payment of money or the performance of any other obligation by the purchaser or any other person, the instrument by virtue of which the property is disposed of by the purchaser to the person or persons nominated for the purposes of this section shall (subject to the provisions of Part I of Schedule 1) operate to discharge the property from that charge; and*
> >
> > *(b) in the case of any other incumbrance, the property shall be so disposed of subject to the incumbrance but with a reduction in the consideration payable to the purchaser corresponding to the amount by which the existence of the incumbrance reduces the value of the property.*

15. Although s12B(5)(a) provides for the tenants' nominee to acquire the property free of relevant charges (unless the court directs otherwise), that does not mean that the holder of the charge loses all security. Paragraph 2 of Schedule 1 of the 1987 Act provides that the tenants' nominee must pay over the relevant part of the consideration direct to the charge holder.

16. Section 12B(5)(b) approaches "incumbrances" differently from charges. Whereas s12B(5)(a) provides for the tenants' nominee to acquire the property free of charges, subject to the mechanism set out above, s12B(5)(b) provides (subject to any contrary court direction), for the tenants' nominee to take subject to such "incumbrances". However, in such a case, the purchase price payable is reduced to take into account their effect on the value of the property so acquired.

17. The 1987 Act divides jurisdiction to determine relevant matters between the First-tier Tribunal (the "FTT") and the county court. By s13(1) of the 1987 Act:

> *The appropriate tribunal [i.e. the FTT] has jurisdiction to hear and determine ... any question arising in relation to any matters specified in a notice under section 12A, 12B or 12C*

18. By s52 of the 1987 Act, the county court has jurisdiction to hear and determine any question arising from Part I of the 1987 Act other than a question falling within the jurisdiction of the appropriate tribunal. Section 52 does not deal with

the jurisdiction of the High Court but no-one argued that the law was anything other than as set out in paragraph 11.1 of *Radevsky & Clark: Tenants' Right of First Refusal*, 3rd Edition:

> *The county court is given jurisdiction to determine any question arising under any provision of Part I of the LTA 1987, other than a question falling within the jurisdiction of a FTT by virtue of s13(1) of the LTA 1987. There is now no longer any specific reference to proceedings taken in the High Court, which retains its inherent jurisdiction.*

19. If the "purchaser" (i.e. the person who acquired the property from the landlord without an offer first being made to qualifying tenants under s1) fails to comply with a notice served under s12B, the tenants' nominee can serve a 14-day warning notice under s19(2) and thereafter can apply for an order under s19(1) which provides as follows:

> *(1) The court may, on the application of any person interested, make an order requiring any person who has made default in complying with any duty imposed on him by any provision of this Part to make good the default within such time as is specified in the order.*

20. There was some suggestion in Mr Walsh's submissions that the Claimants regard s12B and s19 of the 1987 Act as setting out a self-contained regime that determines what, if any, interests in land are to bind a tenants' nominee on an acquisition from "the purchaser" ordered by s19. At points in his submissions, Mr Walsh argued that:

    i) the Act precluded "the purchaser" (i.e. D1 in the circumstances of this case) from granting <u>any</u> interest in the land after the making of the Section 19 Order;

    ii) if a particular "incumbrance" affecting land was not drawn to the attention of the county court or FTT as part of proceedings connected with the Section 19 Order, C1, the tenants' nominee would necessarily take free of that incumbrance; and

    iii) whether C1 is to take subject to any particular equitable interest affecting the land is determined by asking whether that interest is an "incumbrance" as defined in s12B(5) and that, construed in context, "incumbrance" can only include interests that consist of <u>registered</u> estates or interests.

21. I do not accept those submissions. I was referred to no statutory provision that supports the conclusion in paragraph 20.i). D1 was not, therefore, precluded by any statutory provision from granting interests over the Property after the Section 19 Order was made. That said, the law prescribes that consequences might flow from the granting of such interests. By way of example only, and without providing an exhaustive list of consequences, the court might exercise its power under s12B(5) to direct that C1 is to take free of particular incumbrances. Alternatively, the price payable by C1 under s12B(5)(b) might be reduced. (It would by no means be "too late" to make such provision for interests created after the Section 19 Order by parity of reasoning with the approach of Lewison J in

paragraphs 12 and 13 of *Jones v Mahmut* [2018] 1 WLR 6051 who envisaged that multiple applications to the court might be necessary to require a recalcitrant reversioner to comply with his obligations). D1's grant of further interests over the Property after a Section 19 Order might entitle C1 to seek to acquire those interests from a "subsequent purchaser" under provisions set out in s16 of the 1987 Act.

22. As to the points set out in paragraphs 20.ii) and 20.iii), when enacting s12B(5)(b) and s19, Parliament would have been aware that it was legislating against a backdrop that provided for certain rights and interests, but not others, to run with land. Parliament cannot have intended this body of land law to be replaced with a free-standing regime applicable only to the 1987 Act. I do not accept, therefore, that the question whether C1 will take the Property subject to the Equitable Leases can be answered solely by deciding whether an equitable lease is generally described as an "incumbrance" or not. Viewed in context, the purpose of s12B(5)(b) is clear: having just made an adjustment to the ordinary run of land law in s12B(5)(a), by providing that charges would not, absent an order to the contrary, bind the interest transferred to the tenants' nominee, Parliament emphasises the continuity of other aspects of land law in s12B(5)(b) by providing that other "incumbrances" that would otherwise pass with the land will continue to do so. Consistent with this interpretation, the concept of "incumbrances" in 12B(5)(b) is not limited to "registered" incumbrances since in 1987 there was much land that was still unregistered and the scheme of the 1987 Act had to work for both registered and unregistered land.

23. Therefore, I agree with Mr Duckworth that s12B(2), s12B(5) and s19 of the 1987 Act do not oblige either the county court, or the FTT, in exercising their respective functions under the 1987 Act to produce a "report on title" with anything left off that "report" being swept off the register once a transfer is executed in accordance with an order under s19. However, that said, the 1987 Act clearly sets out a mechanism by which the county court and the FTT between them can adjudicate on (i) disputes on whether particular "incumbrances" exist, (ii) if so, whether the court should exercise discretion to prevent them passing to the tenants' nominee and (iii) the effect of any such incumbrances on the price payable. As will be seen from my later analysis of *Henderson v Henderson* abuse, I do not accept Mr Duckworth's broader submission to the effect that D2, having chosen not to air matters relating to asserted "incumbrances" of which only he and D1 could have had knowledge in proceedings before the county court and FTT, should escape any consequences for that failure.

PART B - FACTUAL BACKGROUND

History of the Property and those factual matters that are in dispute

24. Paragraphs 25 to 35 below are intended to be a neutral summary of relevant factual matters. Therefore, except to the extent that I highlight specific issues that are in dispute, I understand the facts set out in those paragraphs to be common ground.

25. SD became registered proprietor of the Property in 2004. Both D2 and SD gave evidence that D2 paid the purchase price of £640,000 out of sums that he borrowed. D2 says that this, together with surrounding conduct, resulted in SD holding the Property on Trust for D2 and that this trust was, in any event, expressly set out in the 2004 Trust Deed, said to have been executed on 5 July 2004. These assertions are strongly disputed and I will refer to it as the "2004 Trust Issue". As will be seen later in this judgment, I have concluded, on a balance of probabilities, that SD did hold the Property on trust for D2 in 2004.

26. Planning permission for an initial redevelopment of the Property was obtained with that redevelopment completing in 2006. Those works resulted in four residential flats being created. The ground floor of the Property was let as office space. Before that ground floor was converted into flats (see paragraph 28 below), it was referred to as "36C" Prescott Place. That became "Flat 36C" and "Flat 36E" after the conversion works.

27. Initially the four flats were let under assured shorthold tenancies that produced periodic rent. However, in 2013 long leases of those flats were granted in return for a premium, and a nominal annual ground rent, to C2 to C8.

28. In 2013, the business tenancy on the ground floor of the Property terminated. On 8 January 2014, D2 made an application for planning permission to convert the ground floor offices into two further residential flats (to be known as Flat 36C and Flat 36E). Conversion works started on 20 March 2014 but were not completed until 2015.

29. On or around 7 May 2014 SD and D1 executed a form TR1 transferring the Property to D1 (the "2014 Transfer"). There is no dispute that the 2014 Transfer was effected on this date. The 2014 Transfer was registered at HM Land Registry with a deemed date of registration of 29 May 2014 (the date of the application to register). Section 8 of the 2014 Transfer indicated that the interest in the Property was transferred "in consideration of the release of a debt of £125,000". D2 argues that this was not a correct description of the transaction and that, in fact, the 2014 Transfer was made for nil consideration. The Claimants dispute this. Later in this judgment, I will explain why I conclude that the 2014 Transfer was for a consideration of £125,000.

30. Also on 7 May 2014, Close Brothers Limited ("Close Brothers") registered a charge over the Property as security for a loan made to Perpetuum Construction Limited ("Perpetuum"), a company controlled by SD (see further paragraph 106 below).

31. On or around 29 May 2014, D2 asserts that he and D1 executed the 2014 Trust Deed under which D1 declared that he held "the freehold property at 36c Prescott Place" as bare nominee for D2. Later in this judgment, I will explain my conclusion that the 2014 Trust Deed was not executed in May 2014, as D2 claims, but in fact was executed between April and June 2019 i.e. after the County Court Proceedings had commenced, but before the Section 19 Order was made.

32. In or around May 2014, D1 executed, but left undated, a Form TR1 transferring "land and buildings forming part of the Manor Works, Prescott Place" for no

consideration. D1 handed this TR1 (the "Blank TR1") to D2, leaving blank the section containing details of the transferee and thus permitting D2 to fill in those details himself so that he could seek to register a transfer of the Property to a person of his choosing. (Prior to the trial, the Claimants did not accept that the Blank TR1 was executed in May 2014 or at all, but ultimately there was no challenge to the evidence of D1 and D2 that it was indeed executed in May 2014).

33. D2's case, also disputed, is that on 30 May 2014, D1 (as registered proprietor of the freehold title) granted D2 the Equitable Leases of Flat 36C and Flat 36E respectively. Later in this judgment I will explain my finding that the Equitable Leases were not executed in May 2014 as D2 claims but were in fact executed after the date of the Section 19 Order, but before 15 January 2021.

34. No application to register the Equitable Leases was made by the deadline set out in the LRA and so the parties agree that, to the extent the Equitable Leases take effect at all, they do so as agreements for lease made for valuable consideration.

35. In March 2017, the charge that Close Brothers had over the property was released.

The previous county court and Tribunal proceedings

36. C7 and C8 became dissatisfied with the way in which the Property was being managed. On 1 September 2017, they issued proceedings in the FTT for the appointment of a manager under the 1987 Act. Those proceedings were issued against D1 (the registered proprietor) but perhaps because of investigations into the title of the Property made in connection with the FTT proceedings, C2 to C8 came to realise that SD had transferred the Property to D1 in apparent breach of his obligations under the 1987 Act. They started the process of serving statutory notices under the 1987 Act and, on 9 November 2018, served a s12B notice on D1 requiring him to convey the freehold interest in the Property to C1.

37. D1 did not comply with the s12B notice and so on 25 February 2019, the Claimants issued proceedings against D1 in the county court for an order under s19 of the 1987 Act (the "County Court Proceedings"). By then, the Claimants were aware that D2 had some connection with D1, not least since, in discussions about the management of the Property, D2 had represented that he was D1's "agent" for the purposes of management of the Property. Therefore, the Claimants obtained permission from the county court to serve proceedings on D1 by a variety of means, including by post at D2's last known UK address, by email to a hotmail account in the name of Joe Donovan and on Bloomsbury Law Solicitors where Mr Ahmad worked.

38. D1 showed no sign of taking proper steps to defend the County Court Proceedings and the Claimants applied for a debarring order against him on 14 May 2019 and served it on D1 the same day. On 29 May 2019, the Claimants' solicitors, (Judge & Priestley) received an email from Freeman Fisher LLP on behalf of D2. That letter asserted that D2 was the beneficial owner of the Property and that he intended to defend the County Court Proceedings on the basis that the transfer to D1 was prevented from being a relevant disposal by s4(2)(g) of the 1987 Act. The letter also requested that the Claimants agree to a stay of their debarring application. Judge & Priestley suggested that D2 should use the time that

remained until the county court made directions on the debarring application to provide representations outlining in more detail the basis of his opposition to the County Court Proceedings.

39. There can be no doubt from this correspondence that D2 was aware of the County Court Proceedings and was also aware of the potential significance of any trust to which the Property was subject at the time it was transferred to D1. D2 made no such representations either to the County Court or to Judge & Priestley even after Judge & Priestley chased the matter up on 13 June 2019. D2 did not even send Judge & Priestley a copy of the 2004 Trust Deed or the 2014 Trust Deed which he asserted demonstrated that D1 held the Property on trust for him. Judge & Priestley did not have those documents at the time of the trial of the County Court Proceedings referred to below.

40. Meanwhile, in the absence of meaningful engagement from D1, D1 was debarred from further participation in the County Court Proceedings by order of 17 June 2019. The trial was listed for 25 October 2019. Judge & Priestley sent a copy of the notice of hearing to D2, explaining that in view of the fact he had provided no further information substantiating his claim to be beneficial owner of the Property, they would oppose any belated application to join the proceedings.

41. On 25 October 2019, HHJ Lethem heard the trial of the County Court Proceedings. D2, through counsel, made an oral application to be joined as a defendant to the County Court Proceedings and for those proceedings to be adjourned. That application was made on the footing that, as evidenced by the 2004 Trust Deed and the 2014 Trust Deed, the 2014 Transfer to D1 was not a "relevant disposal" to which Part I of the 1987 Act applied. No reference was made to the Equitable Leases.

42. HHJ Lethem refused to join D2 to the proceedings. He made no findings as to the effect, if any, of the two declarations of trust. HHJ Lethem's refusal was based largely on his finding that D2 had known of the County Court Proceedings since 29 May 2019 but, since that time, despite being given all reasonable opportunity to make his case, D2 had not even provided the declarations of trust to the Claimants' solicitors or otherwise done anything to advance his arguments based on s4(2)(g) of the 1987 Act.

43. Having refused D2's application to be joined, and for a stay of the County Court Proceedings, HHJ Lethem proceeded to deal with the application for a Section 19 Order. In his oral judgment he noted that the task of the county court was "to simply require the transfer, and to leave it to the First-tier Property Tribunal to set out the necessary terms of that acquisition." He made the Section 19 Order that provided, among other matters:

> *(i) The Defendant shall transfer to the First Claimant the freehold interest of [the Property], which is registered at HM Land Registry under [the specified title number] and*
>
> *(ii) On the same terms as the Defendant acquired the freehold of the Property, or alternatively on terms as may be determined by the Appropriate Tribunal.*

44. On 27 February 2020, the Claimants applied to the FTT (the "FTT Proceedings") for a determination of the consideration that C1 should pay D1 for a transfer of the freehold in the Property. The respondent to the FTT Proceedings was D1 only. D2 was clearly aware of those proceedings (as demonstrated by the fact that Mr Ahmad, during the application on 3 March 2021 referred to below indicated that he acted both for D1 and D2) but D2 made no application to join the FTT Proceedings as defendant. D1 did not comply with case management directions in the FTT Proceedings requiring a Statement of Case by 22 January 2021.

45. By 3 March 2021, the present proceedings in the High Court, summarised in the section below, had commenced. Mr Ahmad applied to the FTT for a stay of the FTT proceedings on the grounds that the High Court proceedings were on foot. The FTT refused that application and ordered (i) that, if D1 wished to participate in the hearing, he had to file a Statement of Case supported by a witness statement by 8 March 2021 (ii) that if D2 wished to join the FTT proceedings, he needed to apply accordingly by 8 March. Neither D1 nor D2 provided any further material to the FTT in response to this direction.

46. The hearing before the FTT took place on 10 March 2021 and the FTT released its written decision on 12 April 2021. Mr Ahmad appeared on behalf of D1 but, because of D1's failure to comply with the FTT's directions of 3 March 2021, the FTT permitted him to make some submissions but not to advance a positive case. In response to some questions from the FTT, Mr Ahmad said that the 2014 Transfer had been no more than a change of trustee, and for that reason no consideration had been paid under it. That prompted Mr Walsh (who appeared for the Claimants in the FTT Proceedings) to argue that, in that case, the consideration C1 should pay might be £nil rather than £125,000. However, the FTT declined to entertain that argument saying, at [12] of its decision, that this risked creating an "elephant trap" for the Claimants since, if the FTT found that no consideration was paid because the 2004 Transfer was in connection with the appointment of a new trustee, D1 might be able to apply to the county court to set aside the Section 19 Order on the grounds that the transfer to D1 was not a "relevant disposal" because it was exempt under s4(2)(g) of the 1987 Act.

47. The FTT then proceeded to consider the question of consideration in the light of documentary evidence before it, noting that it had no witness evidence and that Mr Ahmad's responses to the FTT's questions did not constitute evidence either. The FTT concluded that the most persuasive contemporaneous evidence of the terms of the 2014 Transfer came from the Form TR1 that had been filed at HM Land Registry. That form contained, in Box 8 dealing with consideration payable, the words "in consideration of the release of a debt of £125,000". The FTT noted Mr Ahmad's explanation that in fact no consideration had been paid gave no credence to it, saying that Mr Ahmad was putting forward two "apparently contradictory accounts". The FTT concluded that (i) it was more probable than not that D1 paid monetary consideration pursuant to the 2014 Transfer; and (ii) that the Property was unlikely to have been a gift. It concluded that there was no evidence to support any consideration other than the £125,000 stated on the 2014 Transfer and therefore decided that the consideration paid pursuant to the 2014 Transfer was £125,000.

History of the present High Court proceedings

48. In November 2020, after the Section 19 Order had been made, and after the FTT Proceedings had been commenced, but before they were concluded, the tenants noticed "For Sale" signs for Flats 36C and 36E. The Claimants issued Part 8 proceedings seeking an injunction restraining D1 from marketing, or disposing of, these flats on 8 December 2020 and applied for interim relief. Adam Johnson J made an interim injunction, on a "without notice" basis, against D1 to this effect on 16 December 2020.

49. D1 was notified of the interim injunction and the matter came back before Meade J "on notice" on a return date of 15 January 2021. On 12 January 2021 (before that hearing), D2's solicitors notified the Claimants' solicitors of D2's claim to be tenant under the Equitable Leases. Although D1 and D2 had previously in the course of the proceedings under the 1987 Act asserted that D1 held the property as bare nominee for D2, neither D1 nor D2 had previously relied upon the Equitable Leases, or even asserted their existence, in the course of those proceedings.

50. Also, just before the hearing before Meade J, at 21.00 on 14 January 2021, a lawyer at Bloomsbury Law (who were representing D1 in the injunction proceedings) made an application to HM Land Registry to register the Equitable Leases.

51. Mr Ahmad was given permission to make submissions to Meade J on D1's behalf at the hearing on 15 January 2021. He did not mention the application to register the Equitable Leases that his firm had made the previous evening. The Claimants found out about this application only after the hearing before Meade J so went back before him on the afternoon of 15 January 2021 seeking further orders. It is sufficient to note that the outcome of the two hearings before Meade J on 15 January and a further hearing before Zacaroli J on 8 February 2021 was that: i) D2 was joined as party to the High Court proceedings; (ii) D2 was ordered to cancel his application to register the Equitable Leases at HM Land Registry; (iii) both D1 and D2 were enjoined not to market interests in the Property for sale, dispose of interests, or grant new interests in the Property (with some exceptions for assured shorthold tenancies) until the Section 19 Order had been complied with; and (iv) a restriction was registered against the freehold title to the Property which provided that no disposition of the registered estate was to be registered without the consent of C1. When providing typographical comments on the judgment circulated in draft, D2 pointed out that, in the proceedings before Zacaroli J, the Claimants undertook not to register a transfer of the Property into the name of C1 under the Section 19 Order until disposal of the High Court proceedings or an earlier order of the Court permitting them to do so.

52. On 22 February 2021, the Claimants served their Particulars of Claim in the Part 8 Proceedings. On 22 March 2021 (after the hearing before the FTT, but before the FTT had given judgment), D1 and D2 served their Defence and Counterclaim.

PART C – "RES JUDICATA"

Henderson v Henderson abuse

53. A principle explained by Wigram V-C in *Henderson v Henderson* 1843 3 Hare 100 precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. The rule is capable of applying not just to subsequent litigation between the same parties and their privies but also to parties in the subsequent proceedings who were not joined as parties to the earlier proceedings.

54. In *Barrow v Bankside Agency Limited* [1996] 1 WLR 257, Lord Bingham explained the policy behind the rule in the following terms:

> *The rule is not based on the doctrine of res judicata in a narrow sense, nor even on any strict doctrine of issue or cause of action estoppel. It is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever and that a defendant should not be oppressed by successive suits when one would do. That is the abuse at which the rule is directed.*

55. A leading case in this area is *Johnson v Gore Wood & Co (No.1)* [2002] 2 AC 1. It was common ground between the parties that the applicable principles are those summarised by Clarke LJ in *Dexter v Vlieland Boddy* [2003] EWCA Civ 14 which were quoted with approval in *Aldi Stores v WSP Group Plc* [2008] 1 WLR 748:

> *i) Where A has brought an action against B, a later action against B or C may be struck out where the second action is an abuse of process.*
>
> *ii) A later action against B is much more likely to be held to be an abuse of process than a later action against C.*
>
> *iii) The burden of establishing abuse of process is on B or C or as the case may be.*
>
> *iv) It is wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive.*
>
> *v) The question in every case is whether, applying a broad merits based approach, A's conduct is in all the circumstances an abuse of process.*
>
> *vi) The court will rarely find that the later action is an abuse of process unless the later action involves unjust harassment or oppression of B or C.*

56. The principles set out above are formulated from the perspective of a claimant (A) who, having brought an action against B subsequently seeks to bring an action against C. D2 is in a somewhat different position. He is a defendant (to the

Claimants' application for injunctive and other relief) and is also a counter-claimant in these proceedings. He was neither a claimant nor a defendant in the FTT Proceedings or the County Court Proceedings. Nevertheless, both parties agree that the abusiveness or otherwise of D2's conduct in these proceedings should be assessed in the light of the above principles.

57. The "broad merits based" approach referred in (v) of the above quotation must, of course, take into account all the facts of the case including the public and private interests of the parties involved. However, its focus must be on the crucial question whether a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before (see the speech of Lord Bingham MR at 30H of *Johnson v Gore-Wood*).

58. I have already explained that both D1 and D2 had ample opportunity to assert D2's alleged beneficial interest in the Property before both the county court and the FTT. D2 was well aware of both sets of proceedings. He had tried to be made party to the County Court Proceedings, but ultimately his attempt was half-hearted since it was only made, orally, on the very day of the trial. For his part, D1 was party both to the County Court Proceedings and the FTT Proceedings. D1 was D2's trustee from 7 June 2019 at the latest (see paragraph 116 below) and knew the basis on which he held the Property for D2. Yet, far from advancing any case based on D2 having a beneficial interest in the Property, D1 failed to engage with either set of proceedings to the extent that he was formally debarred from defending the County Court Proceedings and permitted, through his solicitor Mr Ahmad, only to provide limited submissions and answers to the FTT's questions in the FTT Proceedings.

59. In his witness statement, D2 said that he suffered from post-traumatic stress disorder that affected his ability to deal with court directions promptly. He made a generalised offer to share letters from his consultant psychiatrist with the judge of this claim (on terms that they would not be disclosed to the Claimants). However, he did not put forward any expert medical evidence that the Claimants could test confirming either that he suffered from a psychiatric condition or the effect any such psychiatric condition would have had on his conduct of the County Court Proceedings or the FTT Proceedings. In the circumstances, I cannot find that the serious failings I have outlined can be explained by any psychiatric condition from which D2 suffered at the time.

60. In my judgment, the matters set out in paragraph 58 are serious failings that amply justify the Claimants' assertion that they have been unjustly oppressed by the present High Court proceedings. Even though it does not go as far as requiring the county court and FTT to prepare a "report on title" (see paragraph 23) above, the statutory scheme of the 1987 Act that I have outlined above contains a clear mechanism for the County Court and the FTT between them to identify incumbrances that are capable of passing to C1 and, once identified to determine (i) whether the court will exercise discretion to prevent those incumbrances from running with the land and (ii) to determine what, if any, effect those incumbrances should have on the price that C1 must obtain. The interest that D2 asserts has a value broadly equal to that of two London flats in a good location. At the time of its decision, the FTT thought that value would be between £1m and £1.5m. The value of D2's asserted interest would likely make it uneconomic for C1 to pay

£125,000 to acquire the freehold of the Property. Yet, because of the way D1 and D2 chose to conduct the County Court Proceedings and the FTT Proceedings, and despite the statutory process for which the 1987 Act provides being largely concluded, it is only now that this court is being asked to adjudicate on the existence or otherwise of D2's interest.

61. D2 seeks to escape from that conclusion by arguing that he was party neither to the County Court Proceedings nor the FTT Proceedings. He argues that it would have been a "brave step" for him to intervene in those proceedings and argues that his situation is "light years away from the paradigm *Henderson v Henderson* situation where A has two claims that belong in one set of proceedings but holds one back to a second set of proceedings".

62. I do not accept that submission. I quite accept that the fact that D2 was not party to the FTT Proceedings or the County Court Proceedings is a powerful factor in the application of the broad merits-based judgment. However D1 held the Property on trust for him throughout most of the County Court Proceedings. That alone means that D2 cannot fairly argue that he was a stranger to the litigation. D1's fiduciary duties should have resulted in him asserting D2's beneficial interest in the proceedings relating to the 1987 Act. Moreover, as I have explained, D2 was well aware of the proceedings at all stages. If concerned that his interests were not being appropriately defended he should have made a proper application to join those proceedings instead of the half-hearted approach he took in the county court.

63. D2's next argument relies on dissection of the various jurisdictions of the FTT, the county court and the High Court. He says first that the FTT, rather than the county court was the appropriate venue in which to raise questions relating to the nature and extent of his interests in the Property. Therefore, he argues, he cannot be criticised for failing to raise the issue in the county court. He acknowledges that he did not raise the issues in the FTT either but argues that he cannot be criticised for that since, by the time of the trial of the FTT proceedings, the High Court proceedings were on foot and there was nothing objectionable about him making his arguments about the nature of his interest in the High Court rather than the FTT. He goes as far as to argue that it could have been an abuse of process for him to raise these issues in the FTT Proceedings given that they were already due to be considered in the High Court. Those points needs to be addressed separately in connection with (i) the assertion that D1 acquired the Property on constructive trust (or similar) in 2014; (ii) the assertion that D2 holds a beneficial interest by virtue of the 2014 Trust Deed and (iii) the assertion that D2 holds an interest under the Equitable Leases.

<u>The constructive trust in 2014</u>

64. Part of D2's argument in these proceedings is that (i) prior to the 2014 Transfer, SD held the Property as bare nominee for him (ii) it was expressly contemplated and agreed that the 2014 Transfer would result in D1 holding the Property on trust for D2 so that (iii) D1 took the place of SD in holding the property as trustee for D2, whether under a constructive trust, the rule in *Pallant v Morgan* or otherwise. On a straightforward reading of that argument, that involves the proposition that the 2014 Transfer was, in the words of s4(2)(g) of the 1987 Act "a disposal

consisting of the transfer of an estate or interest held on trust for any person where the disposal is made in connection with the appointment of a new trustee". Yet if the 2014 Transfer fell within s4(2)(g), HHJ Lethem would have had no jurisdiction to make the 2019 Order since the 2014 Transfer would not be a "relevant disposal" that triggered C1's right to acquire an interest in the Property from D1. D2's argument therefore had to be aired in the County Court Proceedings.

65. D2 seeks to escape from that conclusion by reference to the following chain of propositions: (i) the FTT determined that the 2014 Transfer was for a consideration of £125,000, (ii) D2 does not seek to challenge that finding, and indeed embraces it because (iii) given the judgment of Henderson J (as he then was) in *Artist Court Collective v Khan* [2017] Ch 53, the 2014 Transfer, being made for consideration is legally incapable of falling within s 4(2)(g) and therefore (iv) his argument in these proceedings is not inconsistent with HHJ Lethem having power to make the Section 19 Order. Rather, he argues that he is simply seeking to establish what interests C1 will take subject to when the Section 19 Order is complied with.

66. The line of reasoning set out in paragraph 65 breaks down at proposition (iii) as the *Artist Court Collective Ltd* case is not authority for the proposition that D2 advances. That case dealt with what Henderson J described as a "strange" sequence of transactions at [8] of his judgment that included, so far as material, a transfer of a property dated 5 August 2011 from a Mr Khan to a company called SGR, expressed to be for a consideration of £225,000 and a trust deed, also dated 5 August 2011, under which SGR declared that it held the property on trust for Mr Khan. At paragraph [11] of his judgment, Henderson J noted that it was common ground that the transfer to SGR (for a consideration of £225,000) fell outside s4(2)(g).

67. The agreement between the parties in the *Artist Court Collective Ltd* falls far short of setting out any legal principle to the effect that a conveyance for consideration is legally incapable of falling within s4(2)(g). First, Henderson J made no such determination. Second, s4(2)(g) does not expressly invite any examination of whether the transfer in question is for consideration and there is no suggestion in the *Artist Collective Ltd* case that the parties' agreement was determined solely by the fact that SGR paid consideration of £225,000.

68. Henderson J noted, at [26], that the trust set out in the trust deed could not be constituted and take effect until the legal estate was vested in SGR. At [38], he concluded that the parties must have intended that the trust deed would apply to the property once it became vested in SGR. In my judgment, the parties' agreement in *Artist Collective Ltd* is readily explicable by the fact that the property in question was held on trust only once the legal transfer was executed. As a result, the parties might well have agreed that the transfer was not of "an estate or interest held on trust" or, if it was, that it was not in connection with the appointment of a "new" trustee, since there had been no "old" trustee. Either would have provided a satisfactory basis for the parties' agreement and it is in my judgment not surprising that Henderson J expressed no disquiet at that agreement.

69. D2 argues that, since the 2014 Transfer was a sale for value it could not fall within s4(2)(g) but I see no support for that proposition in s4(2)(g) itself. All parties were agreed that the idea of property held on trust being sold to another trustee is a curious one. However, curious or not, s4(2)(g) does not refer to concepts of consideration, or sale, at all. Moreover, s4(2)(g) requires only that a transfer be "in connection with" the appointment of a new trustee or the discharge of an outgoing trustee. That indicates that a transfer can have some other feature and that the presence of such a feature, such as consideration payable, does not necessarily take a transfer outside the scope of s4(2)(g).

70. I conclude that D2's argument to the effect that the 2014 Transfer resulted in D1 holding on constructive trust or similar to D2 is, in substance, an argument that s4(2)(g) applied that is inconsistent with HHJ's contrary implicit conclusion in when making the Section 19 Order. For that reason alone, D2's arguments about the existence of a constructive trust needed to be raised in the County Court Proceedings. The points made in the section below also apply to the assertion of a constructive trust just as much as they do to the 2014 Trust Deed.

The 2014 Trust Deed

71. Given the points that I have made in paragraphs 20 to 23 above, conceptually it is possible that, when C1 acquires an interest in the Property executed by D1 in compliance with the Section 19 Order, C1 will take subject to overriding interests not protected at HM Land Registry. D2's argument is that his rights under the 2014 Trust Deed are such an interest (or at least will be to the extent he is in "actual occupation" at the time of the transfer pursuant to the Section 19 Order). Unlike the argument as to the existence of a constructive trust, D2's argument in this regard is not inconsistent with HHJ Lethem making the 2019 Order. It is an argument about the effect of a Form TR1 executed in compliance with the 2019 Order.

72. I nevertheless conclude that, having regard to the history of the proceedings to date, it represents an abuse of process for D2 to make this argument now. As I have explained above, the county court and FTT are not required by the Act to produce a "report on title" to determine all property interests that will bind C1. For example, interests could be overlooked in those proceedings but nevertheless bind C1 as a consequence of ordinary principles of land law applying to the transfer by which C1 acquires that interest. However, that is not this case. The only people with knowledge of the 2014 Trust Deed and its terms were D1 and D2 since no hint of D2's averred beneficial interest could be found at HM Land Registry. D1 and D2 would have been aware that, if C1 truly would take the Property subject to D2's equitable interest, that would have had a material effect on the value of C1's interest. In that case, the county court would need to consider the exercise of its power under s12B(5) to direct that C1 should take free of D2's interest and also what, if any, direction the county court would make under s12B(5) as to the effect that the existence of D2's interest should have on the consideration payable. In these circumstances, D2's assertion that he held rights under the 2014 Trust should have been raised in the County Court Proceedings.

73. That conclusion is only fortified by considering the consequences of D2 not raising the issue in the County Court Proceedings. The Claimants have, in the

words of Lord Bingham in *Barrow v Bankside Agency Limited*, been oppressed by successive suits when one (proceedings in the county court and the FTT under the 1987 Act) would do. It is fortified further still by my finding, explained in paragraph 135 below, that the 2014 Trust Deed has been backdated to make it appear to have been executed in May 2014, even though it was actually executed in 2019. Put shortly, D1 and D2 have between them created a backdated document and, instead of ensuring that this document (or the fact that it was backdated) was properly drawn to the attention of the county court they have waited until after the 1987 Act proceedings have concluded before relying on that document to seek to deprive the Section 19 Order of much of the benefits that the Claimants could have expected to obtain from it.

74. Nor do I accept that fine debates about the extent of the FTT's jurisdiction as compared with that of the county court can paper over the abusiveness of D2's conduct. As I have explained, the 2014 Trust Deed needed to be mentioned in the county court so that it could, among other matters, consider orders under s12B(5). If the 2014 Trust Deed had been mentioned in the County Court Proceedings there might well have been an effect on the FTT Proceedings. Without deciding the point, the FTT might, for example, have been the proper forum to determine whether the 2014 Trust Deed set out a trust arrangement and, if so, from when. The FTT was probably the appropriate forum to decide what, if any, effect the 2014 Trust Deed would have on the consideration C1 should have to pay D1. That does not alter the conclusion that the 2014 Trust Deed needed to be mentioned in the County Court Proceedings.

75. Finally, I do not accept that the existence of the High Court proceedings excused D2 of the consequences of failing to raise relevant matters relating to the 2014 Trust Deed in the FTT Proceedings. The 1987 Act gives the FTT, rather than the High Court, power to determine questions relevant to matters specified in a notice under s12B. The FTT refused to stay the FTT Proceedings pending conclusion of the High Court proceedings so it is no answer for D2 to say that he chose to raise those matters in the High Court instead of the FTT. In any event, D2's Defence and Counterclaim in the High Court proceedings was served on 22 March 2021, <u>after</u> the hearing in the FTT and after the point at which D1's entitlement to participate in the FTT Proceedings had been significantly constrained because of his failure to comply with directions. Moreover, the High Court proceedings only came about because D1 was seeking to circumvent the effect of the Section 19 Order by offering Flats 36C and 36E for sale. I do not accept that the High Court, rather than the FTT or the county court is the proper venue for the arguments that D2 now seeks to make about the 2014 Trust Deed.

<u>The Equitable Leases</u>

76. The Equitable Leases had been granted by 14 January 2021 and so <u>could</u> have been mentioned in the FTT Proceedings (since the trial of those proceedings did not start until 10 March 2021). I am far from uncritical of D1 and D2's decision to grant the Equitable Leases after the Section 19 Order was made. However, I do not consider that arguments relating to the Equitable Leases <u>should</u> have been raised in the FTT Proceedings. As a consequence of the Section 19 Order, the function of the FTT Proceedings was to determine the terms on which SD

transferred the Property to D1 in 2014. The Equitable Leases had no bearing on that question.

A "full opportunity" before the county court and FTT?

77. D2 asserts that, he did not have a "full opportunity" before the county court or the FTT to make his arguments about the extent of his beneficial interest in the Property, whether arising under a trust or under the Equitable Leases. He relies on (obiter) statements of Sir Thomas Bingham MR in *Smith v Linskills* [1996] WLR 763. That case was not concerned with *Henderson v Henderson* abuse but instead the aspect of the res judicata doctrine that restrains, as an abuse of process, actions that amount to a "collateral attack" on another judgment. In *Smith v Linskills* itself, the claimant, having been found guilty of a criminal offence sought to sue the solicitors who advised him, with an essential ingredient of that claim being that he should never have been found guilty of the offence. In that connection, Sir Thomas Bingham MR considered Lord Diplock's earlier formulation of the concept of a "collateral attack" in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and said as follows, at 769H:

> *This argument is, in our judgment, founded on a misunderstanding of what Lord Diplock meant. It is plain from his speech (see [1982] A.C. 529, 542H and the authority relied on) that Lord Diplock was giving his ruling with reference to both civil and criminal cases. It is evident in civil cases particularly that a party may lack any opportunity to resist a hostile claim, as for example where judgment is entered against him on the ground of procedural default, or may lack a full opportunity, as when summary judgment is given against him. We understand Lord Diplock to have been intending to preserve a party's right to make a collateral attack on a decision made against him in such circumstances.*

78. Since my findings of *Henderson v Henderson* abuse do not extend to the Equitable Leases, I will focus on D2's assertion that D1 holds the freehold in the Property on trust for him. As I have said, that issue should have been raised in the county court. It is correct that D1 was debarred from the County Court Proceedings. However, I am quite unable to accept that this protects D2 from a finding of *Henderson v Henderson* abuse. The comments of Sir Thomas Bingham MR set out above were directed at a situation of where, in the course of litigation between X and Y, X wishes to assert that a judgment given in litigation between X and Z was wrong. D2's approach is quite different. He is arguing that, even though he and his trustee D1 failed to take a proper opportunity in litigation with the Claimants themselves to make their arguments on the existence of the trust in the County Court Proceedings, the consequences of that failure should be wiped clean and they should have the right to make their arguments against precisely the same opponents in these High Court proceedings instead. That does not fall within the scope of Sir Thomas Bingham MR's exception. If D1 or D2 felt that they had been wrongly treated in the County Court Proceedings (whether by D1 being debarred, D2 not being joined as party or the Section 19 Order being wrong in law), the remedy was to seek permission to appeal in those proceedings. Having failed to do so, they should not be able to escape the consequences of the way in which they chose to conduct the County Court Proceedings.

Conclusion

79. It is an abuse of process in the *Henderson v Henderson* sense for D2 to assert the presence of a beneficial interest in the Property whether under (i) a constructive trust or similar to which D1 took subject at the time of the 2014 Transfer or (ii) the 2014 Trust Deed. It is not an abuse of process for D2 to assert that he has an interest by virtue of the Equitable Leases, though I am critical of D1 and D2's conduct in granting those leases after the Section 19 Order.

80. I do not consider that any issue estoppel operates in relation to the Equitable Leases. Nor do I consider that the arguments that D2 seeks to make in relation to the Equitable Leases involve any "collateral attack" on any aspect of the County Court Proceedings or the FTT Proceedings given those proceedings made no determination relevant to the Equitable Leases. I do not consider it necessary to decide whether arguments relating to the constructive trust in 2014 or the 2014 Trust Deed offend against any other aspect of the *res judicata* doctrine although I observe that my conclusion in paragraph 70 indicates that an issue estoppel arises as regards D2's argument that D1 took the Property subject to a constructive trust (or similar) as a consequence of the 2014 Transfer.

PART B – DETERMINATION OF FACTUAL MATTERS IN DISPUTE

81. Much of the evidence put forward in this case consists of the recollections of individual witnesses of events going back to 2004. I will not quote any passages from familiar authorities such as *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 although I have those authorities well in mind. In assessing the witness evidence, I have borne the following principles in mind:

    i) The human memory is often unreliable. External events can intrude to such an extent that witnesses can genuinely and honestly claim to recall events that did not take place.

    ii) The process of preparing for civil litigation can itself be such an external evidence that shapes and alters recollections. As part of that process, witnesses can see documents that set out a party's position that have the effect of "refreshing" memories so that they become, after the event, consistent with the facts as set out in the documents.

    iii) That does not mean that witnesses' evidence as to their recollections should be ignored altogether. However, it should be recognised that what is said in contemporaneous documents will often be a more reliable guide to what actually happened than a witness's recollection after the event.

    iv) Because of the points made above, it should be borne in mind that just because a witness expresses a high degree of confidence in a recollection does not mean that the recollection is accurate.

82. In the sections below I will, since I have heard the evidence, make factual findings on both the 2004 Trust Issue and the question whether D1 held the Property on

trust for D1 following the 2014 Transfer (the "2014 Trust Issue") notwithstanding my conclusion on *Henderson v Henderson* abuse.

The 2004 Trust Issue

83. I note that the original of the 2004 Trust Deed has not been put into evidence. D2 said that this was because the National Asset Management Agency ("NAMA") seized documents from him in 2015. I am not prepared to accept D2's uncorroborated evidence on that issue. However, even putting D2's issues with NAMA to one side, I do not find it inherently unlikely that the original of the 2004 Trust Deed has not been located given that it was executed such a long time ago.

84. The 2004 Trust Deed is relatively short. I am prepared to accept that D2 asked someone more skilled with a computer than him (perhaps a secretary at Mr Appelbe's firm) to copy-type a precedent declaration of trust that he had used for tax planning with some adaptations so as to set out the basis on which SD was to hold the Property on trust for him. That was not inherently implausible behaviour in 2004. (As will be seen, I have much more reservations about D2's evidence that he did something similar with the 2014 Trust Deed and the Equitable Leases but that is driven in part by particular features of those documents that are not present, or have not been shown to be present, in the 2004 Trust Deed). I did not regard it as suspicious that, after nearly 19 years, D2 remembered signing the document in his office, whereas SD recalled it being signed in a coffee shop nearby.

85. I note that Mr Griffin's evidence, that he witnessed the signatures of both D2 and SD was not tested by cross-examination and I have given that statement correspondingly little weight. However, while Mr Walsh was able to identify in his skilful cross-examination of other witnesses that they could not have witnessed the signatures on the 2014 Trust Deed and the Equitable Leases on the dates they had claimed, he made no such submissions as regards the 2004 Trust Deed. It follows that I have nothing like the concerns about the 2004 Trust Deed as I do with the 2014 Trust Deed and the Equitable Leases.

86. That said, there is an important matter to deal with. D2 has been involved in arrangements to backdate the 2014 Trust Deed and the Equitable Leases to make it appear that those documents were executed earlier than they were. It needs to be considered whether he has done the same with the 2004 Trust Deed but that the documentation disclosed is insufficient to enable the Claimants to work that out. Therefore, the apparent regularity of the 2004 Trust Deed needs to be tested against other evidence.

87. In his closing submissions, Mr Duckworth urged me to infer that there was contemporaneous evidence, other than the 2004 Trust Deed itself, that D2 was the beneficial owner of the Property. For example, when the Property was being developed in 2013, D2 dealt with architects and planning consultants himself, but told Barnes Design who were helping with planning matters that the Property was held "in my brother's name" with the result that Barnes Design agreed to submit a change of use application in the name of SD rather than D2. When trying to

raise finance between 2011 and 2013, D2 referred to the Property as being his asset in email correspondence with potential lenders.

88. References in contemporaneous documents such as these do support D2's case to an extent. However, I give them relatively little weight. In cross-examination, SD referred to documents that he still had from the time he acquired the Property in 2004. Conceptually those documents could have helped D2's case (if, for example, they showed funds to purchase the Property coming from D2) or hindered it, if the apparent source of the funding was SD himself. Moreover, the fact that such documents exist, but have not been disclosed, at least raises the possibility that D2 has disclosed only documents that support his case (for example the significant quantity of documents he disclosed in connection with construction works at the Property) but has held back documents that do not support it. There is a risk, therefore, in giving significant weight to isolated paragraphs in particular emails as those paragraphs may not tell the whole story.

89. More reliable, in my judgment is to consider conclusions that can be drawn from the unchallenged conduct of D2 and SD. There was no challenge to D2's evidence that he conducted redevelopment works at the Property in 2006 and 2007. Similarly, there was documentary evidence that D2 paid for development works in 2013 and was engaging directly with designers and planning consultants in order to progress these. It was not suggested to D2 that the money came from SD instead. Factors such as these are not conclusive. They are consistent with D2 being the sole beneficial owner of the Property. However, SD and D2 had other business dealings together, so they are also consistent with the Property being property of a partnership, or of a joint venture, which required D2 to defray these particular expenses.

90. However, the way the Property was dealt with on disposal provides more reliable contemporaneous evidence that, until 2014 at least, D2 was the beneficial owner. The Property was transferred for just £125,000 to D1, and SD's unchallenged evidence was that he did not know D1 at the time. That suggests that, as between D2 and SD, D2 had the power to direct to whom, and for what price, the Property was transferred.

91. I am not untroubled by this issue. The existence of undisclosed documents described in paragraph 88 has given me much pause for thought and I am alive to the very real possibility that the assertion of the trust in 2004 is an after-the-event rationalisation designed to spare D1 and D2 the uncomfortable consequences of the 1987 Act. However, on balance and given that the copy of the 2004 Trust Deed appears regular and its terms were consistent with aspects of D2 and SD's contemporaneous dealings, I am prepared to accept that the 2004 Trust Deed was executed on the date it bears.

The 2014 Trust Issue

The 2014 Transfer and the Blank TR1

92. It is not disputed that, on or around 7 May 2014, SD executed a Form TR1 transferring his interest in the Property to D1. D1 was, at the time, unknown to

SD. D1 and D2 were business partners and good friends who had worked together on a number of business ventures in Moldova.

93. Mr Ahmad assisted with the preparation of that document and witnessed SD's signature. Section 8 of the Form TR1 dealt with the consideration payable. The box indicating that the transfer was for no consideration was marked with a cross in manuscript. That cross was then itself crossed out, also in manuscript. The third box in Section 8 (which permitted details of "other receipts") to be given was marked with a cross in manuscript together with the words "In consideration of the release of a debt of £125,000".

94. I find that Mr Ahmad made the amendments shown on the Form TR1. As executed, the Form TR1 stated that the transfer was not for money or for anything that has a monetary value. Mr Ahmad amended that, after SD and D1 had executed the form, so as to indicate that consideration was given consisting of release of a debt of £125,000. Mr Ahmad identified himself as the author of these changes by initialling them.

95. Mr Ahmad did not deny making the amendments but gave evidence to the effect that the amendment was mistaken saying that in fact the 2014 Transfer was for no consideration, consistent with its purpose being to transfer the Property to D1 to hold as bare nominee for D2.

96. I found Mr Ahmad's evidence on this issue to be vague and evasive. He did not explain with any real precision (i) what had caused him to make the manuscript amendments to the Form TR1 in the first place or (ii) what caused him to realise that no consideration had passed pursuant to the 2014 Transfer. Moreover, his evidence of a "mistake" was inconsistent with contemporaneous documentation. In 2017, when he was acting on a transaction that was to involve money advanced by Together Commercial Loans ("Together") being secured on the Property, he was asked by solicitors for Together how D1 came to acquire the Property. Mr Ahmad's answer was that "The property was acquired in lieu of development equity in the property". Mr Ahmad gave no satisfactory explanation of the inconsistency.

97. In the absence of any proper explanation on these issues, I conclude, as the FTT found, that the 2014 Transfer was in consideration of the release of some liability owed to D1, probably a liability that D2, the beneficial owner of the Property prior to the 2014 Transfer, owed to D1 that arose out of some other aspect of their business dealings together.

98. D2's case is that the Form TR1 does not tell the whole story and that the 2014 Transfer was executed as part of arrangements (including the Blank TR1) under which D1 was to acquire the legal estate only and hold it on trust for D2. I address that in the sections below.

<u>The 2014 Trust Deed and surrounding circumstances</u>

99. The 2014 Trust Deed bears a manuscript date of 29 May 2014. It is, in substance the same document as the 2004 Trust Deed and provides, in essence for D1 to hold the Property as bare nominee for D2. It is executed as a deed. D1 signed it

and his signature is expressed to be witnessed by Mr Dandara. D2 signed it with his signature expressed to be witnessed by Mr Ahmad who signed and affixed the stamp of Bloomsbury Law to provide his name and address.

100. No original of the 2014 Trust Deed has been produced and so it has not been possible to use scientific means to determine the date on which the "wet ink" signatures were placed on the document.

101. There are only two material differences between the 2004 Trust Deed and the 2014 Trust Deed (other than the different parties). The 2014 Trust Deed describes the Property as "36c Prescott Place" whereas the 2004 Trust Deed describes it as "the Manor Works Prescott Place". The 2004 Trust Deed uses the defined term "Trustee" consistently throughout; the 2014 Trust Deed sometimes uses the term "Owner" which is not defined in that document. The typeface and layout of the two documents are not just similar, but identical.

102. The complete identity between the layout and typefaces of the two documents would not be surprising, and indeed would be entirely expected, if an electronic version of the 2004 Trust Deed had been used as a precedent for the 2014 Trust Deed with a lawyer or other person drafting the latter document making only those changes needed to reflect the slightly different arrangements and parties. However, D2 was adamant in his evidence that the 2014 Trust Deed had not been produced in this way. Rather, his evidence was that he marked some manuscript changes on a hard copy of the 2004 Trust Deed and asked a typing agency in London (not Mr Appelbe's secretary who he thought he had asked to type the 2004 Trust Deed) to prepare the document that would become the 2014 Trust Deed.

103. I do not believe that evidence. It is simply not plausible that a process of copy-typing could have replicated the precise look and layout of the 2004 Trust Deed. Moreover, it might be expected that such a process might lead to at least some transcription errors, but not a single such error was drawn to my attention. That raises the question of why D2 was prepared to give untrue evidence on the apparently unimportant question of the physical process that led to the production of the 2014 Trust Deed. In my judgment, his untrue evidence on this point raises the inference that he did not wish to reveal the existence of an electronic draft of the 2014 Trust Deed since such an electronic draft could easily have been examined to ascertain when it was prepared. It suggests that the 2014 Trust Deed may not have been executed on the date that D2 claims.

104. There is a further problem with the 2014 Trust Deed. Mr Ahmad is emphatic in his witness statement that he witnessed D2's signature in his office in London on 29 May 2014, the date that appears on the document. He remained emphatic in cross-examination until he was shown a copy of stamps from the Moldovan authorities in D2's passport that showed that D2 could not have been London on 29 May 2014 because he was in Moldova. I understand, of course, that Mr Ahmad might, some time around May 2014, have witnessed D2's signature in a document that was undated and had his memory "refreshed" having seen the 29 May 2014 date with the result that he came to believe that he witnessed the signature on 29 May 2014 itself. However, I do not consider that the explanation is as benign as that. Mr Ahmad's evidence as a whole shows that he was prepared to give sworn

evidence to the effect that he witnessed signatures on the Equitable Leases when he unequivocally did not (see paragraph 131.i) below). He has also given sworn evidence that the expressed consideration of £125,000 on the 2014 Transfer was a "mistake" without having any coherent basis for that view. I will not go as far as to say that Mr Ahmad was deliberately lying. However, he has shown a willingness to put forward evidence that supports D2's version of events without taking appropriate care to ensure that his evidence was accurate. That calls into question whether Mr Ahmad witnessed D2's signature in 2014 at all.

105. The points made above give rise to a real question whether the 2014 Trust Deed was executed on 29 May 2014 as D2 claims. However, those points are not conclusive since there are indications pointing in the other direction. D1 was consistent in his evidence that he signed the document on or around 29 May 2014 at his home in Moldova and that D2 was with him when he did so. That was entirely possible since D2's passport demonstrates that he was in Moldova between 17 May 2014 and 9 June 2014. Therefore, before expressing a conclusion on the date of execution of the 2014 Trust Deed and the 2014 Trust Issue generally, I must consider other contemporaneous evidence.

106. D1, D2 and Mr Ahmad all gave evidence that the rationale for the 2014 Transfer was to make it possible for D2 to do a favour for his brother, SD. They say (and I have found) that until 2014, SD held the Property on trust for D2. In around March 2014, SD found himself in a situation where his company, Perpetuum, had put down a deposit of some £600,000 to acquire a property on Goldhawk Road in Shepherd's Bush. Perpetuum proposed to acquire that property with funds to be advanced by Close Brothers. However, late in the day, Close Brothers indicated that without more security it would not lend. If Perpetuum could not give Close Brothers the additional security required it ran the risk of being unable to complete the purchase and losing its deposit.

107. It is said that D2 agreed to permit the Property to be charged as security to Close Brothers for the Perpetuum loan. Close Brothers, however, was uncomfortable with this arrangement because it would have involved SD (a trustee) executing a charge over trust property as security for what was in substance his own personal obligation (albeit one owed by his company, Perpetuum) raising the question whether he would be in breach of fiduciary duty. Therefore, it is said that D2 identified his friend and trusted business associate, D1, to act as replacement trustee since he could then charge the Property as security for Close Brothers' loan to Perpetuum without being seen to be securing his own obligations with trust property.

108. I do not consider this explanation to be inherently implausible. Brothers do favours for each other. I can understand Close Brothers feeling uncomfortable about SD himself giving a charge over property held in trust. However, apart from the fact that ultimately D1 did grant a charge over the Property to Close Brothers, almost no contemporaneous documentation has been provided that substantiates the account set out in paragraph 106. Importantly, the fact that Close Brothers were not prepared to accept security granted by SD does not compel the conclusion that D1 was to take the Property as trustee. Close Brothers' concerns would be allayed if D1 was, or Close Brothers thought him to be, a beneficial owner. D2 has referred to the seizure of his documents by NAMA. However, no

good reason has been given why SD did not disclose documentation from Close Brothers articulating the concern they are said to have, and showing how D1's acquisition of the Property was said to resolve that concern, when such documentation would have been of great assistance. Ultimately the account that relies on Perpetuum's dealings with Close Brothers was advanced largely by way of an averment by witnesses unsupported by contemporaneous documentation.

109. D2 points to other aspects of his dealings with the Property that are suggestive of him having a beneficial interest in the Property after 2014. For example, in 2015, D2 contested a rates bill for the Property. In May 2017, he arranged for Flats 36C and 36E to be marketed for sale. D2 has, between 2017 and 2018 granted assured shorthold tenancies of Flats 36C and 36E, naming himself as landlord. When D1 started receiving claims under the 1987 Act in relation to the Property, he simply forwarded them by email to D2.

110. However, there is a real difficulty with that analysis. In 2017, D2 had discussions with one of the Claimants, Dr Camilla Darling, which were ultimately to lead to the claim to appoint a 1987 Act manager. Dr Darling was expressing strong dissatisfaction with the absence of management by the ostensible freeholder of the Property, D1. D2 claimed in those discussions that he was acting as agent for D1. I do not consider that D2 was simply seeking to distance himself from the legitimate anger of a dissatisfied tenant because in an email of 29 March 2017 with Dr Darling, Mr Ahmad described Mr Donovan as D2's "representative", also stating that he (Mr Ahmad) was the "UK Solicitor for Mr Batin and look after his legal affairs". Moreover, in 2015, when contesting the rates bill mentioned in paragraph 109, he said to Capita "I act for the owner Constantin Batin (who lives abroad)". D2 had no reason to lie to Capita. Much of the behaviour referred to in paragraph 109 is just as consistent with D2 acting as D1's agent as it is with D2 being the beneficial owner of the Property.

111. In his oral submissions, Mr Duckworth placed emphasis on D2 agreeing in 2015 with a neighbour that a right of way over the neighbour's property would be given up. However, the documentation relied upon consisted of emails between, among others, D2, the neighbour and Mr Coughlan, D2's building contractor in which D2 indicates that "we" will give up the right of way. That is also consistent with D2 relaying, with authority, the instructions of a principal. It does not compel the conclusion that D2 was himself a beneficial owner.

112. There is a striking example of contemporaneous documentation failing to indicate that D2 had a beneficial interest in the Property after 2014. On 4 April 2019 D1 ostensibly made an application for an extension of time in the County Court Proceedings. I say "ostensibly" because D1 said that the signature on that application was not his and I believe him because it is very different from the signature that appears on documents that he agrees he signed. That application contains a statement that D1 held the Property as nominee for SD (i.e. not as nominee for D2). D1 was not the author of that statement. D1 was clearly being given detailed instructions as to how to deal with the County Court Proceedings by others (in my judgment D2, or lawyers acting on D2's instruction). Those instructions involved D1 being supplied with the verbatim text of letters and emails to which D1 adhered so closely that, on 21 March 2019 just after the County Court Proceedings had commenced, he sent an email fully enclosed

within the quotation marks that would have surrounded the text with which he was provided, to Joseph Green (presumably a solicitor for the Claimants). That email also included a statement that D1 was just a nominee and that he held for SD. D1 would not have been told to take this position in correspondence if D2 thought he was beneficial owner of the Property at the time.

Conclusion on the 2014 Trust Issue

113. D2 argues that the circumstances in which D1 acquired the Property in 2014 of themselves constituted D1 as D2's trustee. He puts that argument in various ways: as a common intention constructive trust, an application of the *Pallant v Morgan* principle or on the basis that, since D1 expressly agreed to hold the Property on trust in 2014, it would be a fraud on the statute for him to argue otherwise. All those cases rely on the proposition that there was a clear agreement or understanding that D1 was to take the Property on trust for D2 in 2014.

114. I do not consider that there was any such clear understanding. I am in no position to decide what the precise arrangement was between SD, D1 and D2 in 2014 since I have been provided with almost no documents that explain that arrangement. The arrangement was obviously not straightforward. It involved D1 giving up some claim to £125,000 (hence Mr Ahmad's handwritten statement on the Form TR1). It involved the Property being charged as security for Perpetuum's debt. It involved D2 continuing to play a role in the ongoing conversion of the ground floor into Flats 36C and 36E. It involved D1 agreeing to allow D2 to direct a transfer of the Property for nil consideration to anyone D2 chose. I quite accept that aspects of that relationship look unusual. But D1 and D2 had extensive business dealings with each other and trusted each other completely. The fact that D1 executed the Blank TR1 does not mean that it was expected that D1 would necessarily give up his interest in the Property for nothing. D1 and D2 would have had their reasons for transacting in this way and there may well have been other countervailing transactions, not disclosed, why the arrangements between them made commercial sense. Unusual though those arrangements are, I am not satisfied that they set out a clear contemporaneous understanding that D1 was to hold the Property on trust for D2.

115. I have concluded that the explanation put forward on behalf of D2 as to the rationale for the 2014 Transfer represents a rationalisation, after the event, as to a possible basis on which D1 could have taken the Property as bare nominee. I do not accept it as demonstrating that D1 did take as nominee.

116. If indications from contemporaneous circumstances had been stronger, my concerns about the date of execution of the 2014 Trust Deed might have been allayed. However, given the conclusions in paragraphs114 and 115, my concerns are not allayed. I find that the 2014 Trust Deed was executed much later than 29 May 2014. It is not possible to pinpoint a precise date, not least because D2 and D1 have sought to obscure that matter. I do not consider that it was executed before 4 April 2019, because on that date, somebody was providing D1 with a narrative to the effect that the Property was held for SD. I conclude that the 2014 Trust Deed was most likely executed between 4 April 2019 and 7 June 2019 (the date on which it appears on a schedule of documents sent to the barrister that D2

instructed to seek to intervene in the County Court Proceedings) and backdated to make it appear as though it was executed on 29 May 2014.

Whether D2 was in "actual occupation" of the Property at times relevant to the 2014 Transfer

117. The findings set out in paragraphs 114 and 116 above do not fully dispose of the 2014 Trust Issue. Since the outcome of the 2004 Trust Issue is that SD held the Property as bare nominee for D2 until the time of the 2014 Transfer, it is necessary to consider whether D2's (unregistered) interest in the Property under the 2004 Trust Deed was a right of a "person in actual occupation" for the purposes of paragraph 2 to Schedule 3 of the LRA. That question arises because, while s29 of the LRA provides that, since the 2014 Transfer was for valuable consideration, any beneficial interest of D2 in the Property would, being unregistered, be postponed to the interest of D1, Schedule 3 of the LRA makes an exception for certain rights of persons in "actual occupation".

118. The Claimants argue, by reference to obiter dicta of Lewison J (as he then was) in *Thompson v Foy* [2009] EWHC 1076 that, to avail himself of the exception, D2 would need to be in "actual occupation" both at the time of the 2014 Transfer and at the time that transfer was registered (on 29 May 2014). D2 did not argue otherwise. I will, therefore, consider the question of "actual occupation" on both dates, though in doing so I should not be taken as expressing any view on the question whether actual occupation on both dates is indeed necessary which I understand to be a matter of some controversy in academic literature.

119. In deciding whether D2 was in "actual occupation" of the Property at any particular time, I will apply the guidance that Lewison J gave on the meaning of this term in *Thompson v Foy* as follows (omitting references to authorities that he cited in support of his summary):

> *i) The words "actual occupation" are ordinary words of plain English and should be interpreted as such. The word "actual" emphasises that physical presence is required…;*
>
> *ii) It does not necessarily involve the personal presence of the person claiming to occupy. A caretaker or the representative of a company can occupy on behalf of his employer…;*
>
> *iii) However, actual occupation by a licensee (who is not a representative occupier) does not count as actual occupation by the licensor: …;*
>
> *iv) The mere presence of some of the claimant's furniture will not usually count as actual occupation: …;*
>
> *v) If the person said to be in actual occupation at any particular time is not physically present on the land at that time, it will usually be necessary to show that his occupation was manifested and accompanied by a continuing intention to occupy….*

120. D2's claim to be in "actual occupation" at the time of the 2014 Transfer is based entirely on the presence of builders, engaged by D2, at the Property who were engaged in works converting the former business premises into the flats that would become 36C and 36E. D2 argues that anyone inspecting the flats at the time of the 2014 Transfer would be alerted to D2's presence as a consequence of those works.

121. D2 has put some documentary evidence relating to building works. The parties' joint chronology identifies 20 March 2014, the date on which D2 obtained a grant of planning permission, as the date on which the works started. I will not look behind that agreed fact,but conclude that some preliminary works were undertaken prior to this date largely for the purposes of assessing the suitability of the works that were proposed.

122. Although D2 has put forward some documentary material, he has not explained what the builders were actually doing at or around the time of the 2014 Transfer. It is not realistic to expect that I should find for myself each document in the bundle to try to form my own view on the nature of the builders' presence at that time: I needed some first-hand evidence describing the works from someone with knowledge of them. Evidence of that kind was scanty indeed.

123. In paragraph 12 of his witness statement, D2 gave an explanation of the works and why they were difficult and complex. However, that explanation shed no light on what works were ongoing at or around the time of the 2014 Transfer. There was no evidence from the builders. I was provided with some correspondence with Thames Building Control, dated 25 March 2015, well after the 2014 Transfer. That correspondence attached earlier correspondence and plans dating back to 8 May 2014. The fact that D2 was reattaching May 2014 correspondence to a March 2015 letter suggests that the works referred to were not completed in May 2014.

124. Email correspondence between D2 and Greg Coughlan, a building contractor, dated between 17 and 18 May 2014 (after the date of the 2014 Transfer) suggests that work was scarcely in full swing at that time. The email thread starts with Mr Coughlan expressing dissatisfaction with a lack of contact from D2 and D2's delays in funding the renovation work. Mr Coughlan offers to cover "the next week's expenditure of about another £7.5k along with [the] £5K already spent" but that after that D2 would need to provide some funds. D2 replied, expressing regret and offering to pause Prescott Place if Mr Coughlan was feeling "under pressure". It appears that Mr Coughlan did not take up that suggestion since he reiterated his offer to fund the next week's work. It is not clear at all from this email exchange what works precisely were involved, whether they were to take place inside, or outside the Property and, if so where.

125. The question of where any works were being carried out is important because, paragraph 2 of Schedule 3 of the LRA could only protect an interest "so far as relating to land of which he is in actual occupation". The LRA changed the previous law under which a person in actual occupation of part of a parcel could thereby protect an unregistered interest held in the whole.

126. From D2's explanation of the works, I can only deduce that around £12,500 had been spent towards the conversion of Flats 36C and 36E by 25 May 2014. Conceivably that money could all have been incurred after the 2014 Transfer. It could have been spent on materials, or on work outside the Property. Even if some of the work was inside the Property before the 2014 Transfer, I cannot tell where that work was being done. I am in no position to conclude from this material that D2 was in actual occupation of the Property, through his builders, at or around the time of the 2014 Transfer. In those circumstances, the question of "actual occupation" at the time of registration strictly does not arise. In any event, registration took place on 29 May 2014. I am prepared to accept that, by then £12,500 had been spent on renovation works. However, the other deficiencies in the evidence that I have outlined remain and I conclude that D2 was not in "actual occupation" of the Property, by his builders, on 29 May 2014 either.

The date of execution of the Equitable Leases

127. D2's evidence was that the Equitable Leases were based on other long leases of flats at the Property that Andy Ho, a solicitor at Bloomsbury Law, had drafted in 2012 and 2013. I accept that evidence: it makes perfect sense to base a demise of Flats 36C and 36E on such obviously suitable precedents. I accept that Andy Ho provided D2 with a bound hard copy of the long leases of Flats 34, 36A, 36B and 36D of the Property on one of D2's visits to Bloomsbury Law after the last of those leases was granted in 2013.

128. I was provided with copies of those leases taken from HM Land Registry's records. Three of those leases (of flats 36A, 36B and 34) were expressed to have been drafted by Ahmud & Co Solicitors. They bear a reference that includes "AH" and I infer that Andy Ho previously worked at Ahmud & Co and moved to Bloomsbury Law. After joining Bloomsbury Law he then worked on the last lease to be granted, of 36D Prescott Place, which was expressed to have been drafted by Bloomsbury Law and bears the reference "AH/0191/RS/Donovan".

129. I am unable to accept D2's evidence that, when he thought it would be desirable for D1 to grant him long leases of Flats 36C and 36E, he arranged for a secretary at Mr Appelbe's firm to copy-type one or more of the hard copies (the "Precedent Leases") that Andy Ho had provided for the following reasons:

    i) Each Equitable Lease was over 25 pages long. It is inherently implausible that D2 would have commissioned a large job of copy-typing complex legal documents when a much more straightforward alternative would be to ask Bloomsbury Law (or anyone else holding an editable soft copy of the Precedent Leases) to amend the electronic version.

    ii) Copy-typing a Precedent Lease would have taken Mr Appelbe's secretary a reasonable period of time and, while she was doing it, she would not have been able to do work for Mr Appelbe who was paying her salary. Yet Mr Appelbe said in his witness statement that he did not know how the Equitable Leases were produced.

    iii) The Equitable Leases both contain Bloomsbury Law's address and Bloomsbury Law file references. Mr Appelbe's secretary could,

conceivably, have copy-typed a Precedent Lease, including Bloomsbury Law's details. However, I think that unlikely as I doubt whether a legal secretary at Mr Appelbe's firm would have felt comfortable passing off her work product as having been prepared by Bloomsbury Law. As noted above, only the lease of 36D Prescott Place contained Bloomsbury Law's details, so on D2's case, that must have been the only Precedent Lease. However, the Equitable Leases contain two different Bloomsbury Law reference: the Equitable Lease for Flat 36E gives a Bloomsbury Law reference "AH/0191/RS/Donovan" (the same as on the lease of 36D Prescott Place), but the lease for Flat 36C contains Bloomsbury Law reference "IA/Batin/Donovan". On D2's account, Mr Appelbe's secretary must have fashioned her own Bloomsbury Law reference when copy-typing the lease for Flat 36C. That makes no sense.

iv) The address for Bloomsbury Law on the Equitable Leases is given as 17 Manchester Street, London which is their current address. The address on the only candidate Precedent Lease was Bloomsbury Law's former address in Brent Street, Hendon. In cross-examination D2 said that he asked the secretary to update Bloomsbury Law's address details because he planned to ask Bloomsbury Law to register them in due course and so wanted HM Land Registry to see that the details on the Equitable Leases matched with those of the firm acting on their registration. I did not believe that evidence which emerged for the first time in the witness-box as a response to a searching question.

130. In my judgment, D2's untrue evidence in relation to the Equitable Leases raises the inference that he was seeking to conceal the existence of electronic copies of those documents which would have revealed that they were prepared later than 2014. I will, however, test the strength of that inference against other indications.

131. In support of his case that the Equitable Leases were executed in May 2014, D2 relied on the evidence of people said to have witnessed his signature in May 2014. The witness evidence of Mr Ahmad and Mrs Batin in that regard was unsatisfactory in the following respects:

i) Mr Ahmad said in his witness statement that he witnessed D2's signature on the Equitable Leases and took a copy of those leases. On close inspection, he does not confirm when he did so. He quite clearly did not witness D2's signature because that was done by Mr Appelbe. Mr Ahmad's signature appears nowhere on the execution pages of the Equitable Leases.

ii) Mrs Batin claimed to have a vivid recollection of witnessing D1's signatures on the Equitable Leases in 2014 as she was pregnant at the time with her third child. However, her third child was born on 9 May 2015. Mrs Batin could not have been pregnant on 30 May 2014 when she claimed to witness the Equitable Leases.

132. Significantly in my judgment, both Mr Ahmad and Mrs Batin made the very specific claim that they remembered witnessing signatures in May 2014. They did not say, or even acknowledge the possibility, that this evidence had been refreshed by seeing copies of the Equitable Leases bearing that date. It follows

that, once their evidence on this issue was shown to be incorrect in cross-examination, I was left with serious misgivings about their evidence. I have already explained conclusions I have drawn from Mr Ahmad's evidence. Mrs Batin's evidence did not leave me with any confidence that she had witnessed D1's signature on any particular date. I conclude that she could have witnessed those signatures years after she had claimed.

133. Mr Appelbe was conscious of his duty to the Court when giving his oral evidence. In cross-examination, he accepted that he could not be sure when the Equitable Leases were signed or when he witnessed D2's signature. When asked, if he had witnessed the signature on any leases for D2 within the last three years or so, Mr Appelbe said "that's a very big question and I would need notice to think it through". Mr Appelbe's evidence reinforced the impression I had formed from the matters set out above, namely that the Equitable Leases could have been executed many years after 2014.

134. There is no sufficient reference in documents dating from 2014, or even 2015, to the Equitable Leases to displace the concerns I have set out above. Indeed, on 11 May 2015, in correspondence with solicitors for Close Brothers in connection with a proposed increase in the loan to Perpetuum that was secured on the Property, Mr Ahmad confirmed that there was no lease in existence over the ground floor of Prescott Place. I recognise that it is possible that by then D2 had been granted the Equitable Leases but had decided, because of his concerns about business secrecy that he did not wish to have them registered at HM Land Registry. It is possible, therefore, as Mr Ahmad said, that he was giving a confirmation only about registered leases. However, Close Brothers' solicitors did not need any confirmation from Mr Ahmad about registered leases as they could obtain that information from HM Land Registry. I conclude that it is more likely than not that Mr Ahmad's confirmation was intended to cover both registered and unregistered leases and therefore points against the Equitable Leases being in existence on 11 May 2015.

135. Putting all these matters together, I have concluded that the Equitable Leases were not executed on, or even around, 30 May 2014. I accept that they were executed at some point. The Equitable Leases did not feature in the list of documents sent to the barrister who represented D2 at the hearing before HHJ Lethem on 25 October 2019. HHJ Lethem's judgment of the same date does not refer to the Equitable Leases. I infer from this that the Equitable Leases were executed after the 2019 Order was made.

136. Mr Duckworth for D2 accepts that the earliest mention of the Equitable Leases in the documentation available to the court (apart from the 30 May 2014 date specified on the documents themselves) was 14 January 2021, when D2 applied to HM Land Registry to register them. My conclusion is that the Equitable Leases were executed at some point in the period between 25 October 2019, the date of the 2019 Order, and 14 January 2021.

PART C: FINAL MATTERS

Whether the backdating of the 2014 Trust Deed and the Equitable Leases

rendered those documents void

137. I have found that both the 2014 Trust Deed and the Equitable Leases were backdated: they were duly executed but made to appear to have been executed earlier than they actually were. In his closing submissions, Mr Duckworth noted that, if D1 and D2 had backdated the documents, they had not been cross-examined on why they did so. That, he submitted, left open the possibility of a relatively benign interpretation: for example that they had backdated the documents to give effect to what they understood to be a pre-existing oral agreement. I am quite unable to accept that. D1 and D2 denied backdating the documents and, in doing so, gave untrue evidence. Any cross-examination as to why they backdated the documents would inevitably have been met by a denial that the documents were backdated. It is quite appropriate for me to infer reasons for the backdating from the circumstances in which the backdating took place.

138. The 2014 Trust Deed was actually executed in 2019, after the Claimants served their notice under s12B of the 1987 Act. It was backdated to 2014 to seek to bolster, after the event, the argument that the 2014 Trust Deed was effected pursuant to an agreement or understanding in 2014 that D1 was to take the Property on trust. I do not know how strong D1 and D2 thought the contemporaneous evidence was. It is possible, therefore, that they thought that backdating the 2014 Trust Deed simply made a strong case even stronger. However, whatever their views on the strength of that case, backdating the 2014 Trust Deed can only have been intended to deceive by representing a document that was signed in 2019 as having been signed in 2014.

139. The Equitable Leases were granted in 2019, after the Section 19 Order was made, but represented as having been signed in 2014. The Equitable Leases were long leases, granted for no premium and nominal rent. Their purpose was to devalue the freehold interest that C1 was entitled to acquire pursuant to the 2019 Order. They were backdated, with an intention to mislead, in order to disguise the fact that they had been granted after the 2019 Order.

140. I have heard no argument as to whether this conduct amounts to "forgery" within the meaning of s1 of the Forgery and Counterfeiting Act 1981. Nor have the Claimants made any submission to the effect that, applying the principles of *Patel v Mirza* [2016] UKSC 42, the 2014 Trust Deed or the Equitable Leases should be treated as void. In those circumstances, I treat both documents as having legal effect from their date of actual execution.

A1P1

141. In his closing submissions, Mr Duckworth confirmed that D2's challenge based on A1P1 arises only if (i) D2 is correct that he was the beneficial owner of the Property and/or held equitable leases of Flats 36C and 36E as at the date of service of the Claimants' notice under s12B of the 1987 Act and the making of the Section 19 Order but that (ii) the cumulative effect of s12B and 19 of the 1987 Act is that the Section 19 Order wipes the freehold clear of D2's equitable interests or achieves the same result by disabling D2 from protecting his interest ahead of the transfer of the freehold.

142. Those preconditions are not satisfied in this case and so the A1P1 issue does not require determination.

Disposition

143. I answer the parties' agreed list of issues as follows:

i) *Factual Issues A, B and C*: The 2004 Trust Deed was executed on the day it bears. The 2014 Trust Deed was executed some time between 4 April 2019 and 7 June 2019. The Equitable Leases were executed some time after 25 October 2019 but before 14 January 2021.

ii) *Issues 1 and 6*: It is an abuse of process in the *Henderson v Henderson* sense for D2 to assert that the Property was at all material times held on trust for him. Although I am critical of the grant of the Equitable Leases and the backdating of those leases, this did not involve any abuse of process of the kind specified in Issue 6.

iii) *Issue 2*: D1 did not hold the Property on trust for D2 when the Section 12B Notice was served. He only came to do so when the 2014 Trust Deed was executed.

iv) *Issue 3*: The Section 19 Order obliges D1 to execute a transfer of the freehold title to the Property to C1. The county court has made no order altering the effect of s12B(5)(a) of the 1987 Act, so unless any further or additional order is made, C1 will take free of charges referred to in that subsection. The county court has made no order altering the effect of s12B(5)(b) of the 1987 Act so unless any further or additional order is made, ordinary principles of land law will apply to determine what incumbrances C1 takes subject to when D1 complies with the Section 19 Order.

v) *Issues 4 and 5*: These do not arise given my conclusion on Issue 3.

vi) *Issue 7*: This does not arise on my findings since the Equitable Leases were not granted in 2014.

vii) *Issue 8(i)*: D1 was not precluded by the 1987 Act from granting the Equitable Leases though D1 and D2's conduct in doing so and backdating them, as an attempt to devalue the interest in the Property that C1 is entitled to acquire pursuant to the Section 19 Order, is to be deprecated.

viii) *Issue 9*: This does not arise given the way that Mr Duckworth put the A1P1 issue in his closing submissions.

144. I have not addressed Issue 8(ii) on the parties' agreed list. That is because, if the parties are not able now to agree the terms of an order, I will need further assistance from the parties on the proper order to make in the light of my findings on other issues.