K01ME209

IN THE MAIDSTONE COUNTY COURT

BEFORE DISTRICT JUDGE SARAH WRIGHT

(1) ELLIOT HARRY GREEN (As Liquidator of Vanquish Developments Ltd)
(2) VANQUISH DEVELOPMENTS LTD (IN LIQUIDATION)
V
(1) DAVID GRAHAM DANAHER
(2) SARAH JANE DANAHER
(3) ROSEMARY SALLY BRABON
(4) KENNETH ALAN BELCHER

Dates of hearing: 5th and 6th November 2024
Judgment handed down: 4th December 2024

1. In this claim the claimants are represented by Miss Pratt of Counsel and the Defendants are represented by Mr Fox of Counsel.

2. Due to the number of parties, I have referred to them as either C1, C2 or D1-D4. This is for my ease of reference, and I mean no disrespect to any of them.

3. The Claimants seek to enforce 4 charging orders. 2 are dated 10th December 2021 and 2 are dated 15th March 2022. These charging orders secure 2 judgment debts that arise from court orders following claims under the Insolvency Act 1986 against D1 and D2. These arise out of the Liquidation of C2, of which company D1 and D2 were directors. The first judgment is dated 28th May 2021 and is for the sum of £11,337.48 plus interest and costs. The second judgment is dated 9th November 2021 and is for the sum of £486,142.95 plus interest and costs. Neither judgment order has been appealed or set aside and no such applications are pending.

4. The property that is charged is 145 Grovehurst Road, Sittingbourne, Kent ME10 2TA. This property is registered with title number K556003. Also charged is land adjoining 145 Grovehurst Road which is registered with title number TT57996. Both properties are registered in the name of D1 and D2. The charging order in relation to the first Judgment charges the sum of £11,429.48 and the charging order in relation to the second judgment charges the sum of £508,342.95. C1 seeks an order for sale of the properties in order to satisfy the Judgment debts, or as much of them as possible. There are 3 other creditors with charges over the property which will take priority. These are Capital Homes, Arrow Global (referred to as Equivo) and HSBC. The most recent redemption figures are in the region of £239,000, but these figures are substantially out of date.

5. D3 and D4 have brought a counterclaim which claims a beneficial interest in the property and adjoining land. They seek a declaration to this effect in the sum of £216,457.16 or other sum determined by the Court, and an order that they are entitled to a life interest Trust over their interest in the property and the adjoining land held by D1 and D2. D1 and D2 purchased the property in 1999. The adjacent land was purchased in 2016. In around 2016 D3 and D4 moved into the property, using the dining room as their bedroom. Subsequently over the next few years an annex was built onto the property and D3 and D4 have lived in the annex since 2020. They say that D3 paid for the additional land and that they paid for the materials for construction of the annex. It is also asserted that D3 paid a contribution of around £69,000 to the purchase price of the property in 1999. As such a beneficial interest is claimed by D3 and D4.

6. The issues for the court to determine at trial are whether D3 and/or D4 enjoy a beneficial interest in the property as a result of their conduct; if D3 and/or D4 do enjoy a beneficial interest in the property, the quantification of that interest and to what extent it affects the overall equity available in the property; and whether the Court should exercise its discretion to make an order for possession and sale of the property.

7. The claim for possession and an order for sale was issued in the High Court by way of a Part 8 claim form dated 12th July 2022. D1 and D2 acknowledged service on 7th September 2022, but this document does not make any mention of D3 and D4's occupation of the property. The arguments raised by D1 and D2 were largely similar to those which had been adjudicated upon in the insolvency proceedings. It does not appear that these arguments continue to be pursued by D1 and D2. At a hearing on 24th November 2022, it was first alleged that D3 and D4 occupied the annex. At that hearing the deputy master directed that D3 and D4 should be served with notice of the proceedings. At a further hearing before Master McQuail on 6th February 2023 directions were given for the filing and serving of a counterclaim, defence to counterclaim and any reply to that defence.

8. The claim was transferred to the County Court by the order of Master McQuail dated 1st June 2023.

9. Thereafter the claim has suffered as a result of delay and a lack of meaningful case management. A directions hearing took place before a District Judge on 21st May 2024. At that hearing it appeared that the parties had already agreed a consent order to exchange evidence and that exchange had taken place. The order records the dates which had been agreed and that exchange has happened. The matter was listed for final hearing before me for 2 days, but without any other case management directions being given. The matter has never been reallocated to Part 7, which means there has never been any costs management. There have been no directions for disclosure, no direction for specific disclosure of documents such as the planning application nor any conveyancing files. Neither was there any direction for joint expert valuation evidence of the property.

10. Nonetheless we have proceeded with the hearing over the last two days making the best of the evidence before the court. There has been no application to adjourn and clearly the matter requires resolution bearing in mind the delay already encountered.

11. At the outset of the hearing before me there was an application made on behalf of D1 for permission to rely upon a witness statement dated and served on 21st October 2024, which exhibits a further 135 pages of disclosure which had been disclosed a few weeks earlier. I gave a short judgment and granted permission for the evidence to be relied upon at this hearing. I also gave permission for a statement in response from the Claimant's solicitor to be relied upon.

12. The order of 21st May 2024 makes it clear that the Defendants should make themselves available to be cross examined. D4 has filed and served a statement but has not attended the hearing due to ill health and no hearsay notice has been served. It was submitted on behalf of the claimants and not disputed on behalf of D4 that his statement cannot be relied upon by the Defendants.

Evidence

13. I have before me a main trial bundle of 658 pages, a supplemental bundle of 151 pages and authorities bundle of 436 pages. Within the bundle I have read the first statement of the Claimants' solicitor Matthew Kelly dated 12 July 2022, and I have also read his second statement which is dated 4th November 2024 and not in any bundle. I have read the statements of C1 dated 1st February 2023 and 1st March 2024; the statements of D1 dated 30th January 2024 and 21st October 2024; Witness statements of D3 dated 2nd January 2023 and 31st January 2024; and statement of D4 dated 8th January 2023. D2 has not filed any evidence in this matter. I have also read the helpful skeleton arguments by both Counsel.

14. As I indicated above, no direction has ever been given for a formal valuation of 145 Grovehurst Rd and as such I have no compliant P35 report. Within the bundles I have a desktop valuation obtained by the Claimant in 2022, and 2 recent valuations. The first is dated 17.9.24 and is a desktop valuation by Pantera obtained by the Claimants. The second is dated 23.10.24 and was prepared by SW Surveyors Ltd on behalf of the Defendants. I will consider these further below.

15. I have heard live evidence from D1 and D3. D1 gave her evidence first on the morning of the first day. Her statements are dated 2.1.23 and 31.1.24. In her written statements it sets out that she has invested some £216,457.16 into building a purpose-built annex bungalow attached to her daughter's home and buying an additional strip of land from the neighbouring farmer. She says it was planned so she could live out her twilight years with her daughter as she would be providing ongoing support care and assistance. She says that she has an agreement in place with her daughter over her Will when she passes. She goes on to say that she has lived at 145 Grovehurst Rd. since March 2016

together with her partner of 45 years, Kenneth Belcher. She says that in 1999 she lent D1 and D2 £69,000 as their deposit for the property. She did this by raising a mortgage which she secured against her own home at the time. D1 and D2 made monthly payments against that interest only mortgage until it was redeemed in 2015. Around that time, the Defendants began to think about living together. She said it was agreed that it would be practical for her to invest in D1 and D2's property and that D1 would provide his skills and labour to custom build an annex suitable for D3 and D4 in their elderly years. In return for D1's labour and project management D3 and D4 would forgive the loan of £69,000. When they sold their house, they moved into the property in March 2016 and made do by turning the dining room into their bedroom. She says that she set up a bank account at Lloyd's in her name for the purpose of constructing the annex which they called the "building fund". She would allow D1 to use the debit card himself or he would withdraw cash to make purchases or repay trade accounts. She purchased the neighbouring slip of land for £15,754.20 and covered the £3500 solicitors fee for this purpose. They lived in the property for 3½ years while the annex was being constructed. Over that time D1 worked and managed the build. She says as a result the loan was forgiven so this labour effectively cost her £68,715.51. She says she also spent some £141,541.65 on materials and construction costs funded through the building fund. The funding of the materials was covered by the proceeds of sale of the previous property, 23 Windmill Road. She opened the building fund account for D1 to use to purchase the materials. D1 kept receipts and invoices for everything. In 2020 D3 and D4 moved into the annex and have been living there since. She has since invested by adding a hot tub and a covered outdoor kitchen. Owing to all of the investment since 2015 she believes that she and D4 have equity in the property in the sum of £216,000. She goes on to say that it was on the understanding that they would have equity in the property that the investments were made in the first place.

16. In cross examination, D3 agreed that her bank statements from February to March 2024 showed a balance just under £46,000. When it was put to her that she does have assets, D3 replied that she did have assets, but that she didn't have them now. When asked why statements to August 2024 are the most recent, D3 said she had given what she had been asked for. She accepted that we do not know what assets she has now. She agreed that she has pension coming in, but said it is not enough to live on. She agreed that she has lived at Grovehurst Road for eight years and that the property is registered in the names of D1 and D2. When it was said that there is no Declaration of Trust showing a beneficial interest for D3 or D4, D3 replied "*she is my daughter so why would I need to do anything*?". When it was put to her that when she moved in there was never any intention that D3 and D4 should acquire a beneficial interest in the annex she replied "*no just to build the annex*". When it was put to her that there was no intention that D3 and D4 should acquire a beneficial interest in the property of D1 and D2 D3 replied "*no I suppose not. I don't like to say. It's my daughter's property not mine*". She was asked about when the land was acquired in 2016 and that it was put into the names of D1 and D2. She was asked why there is no Declaration of Trust showing a beneficial interest to her and D4. D3 replied "*no because it will all go to her when I die. We do not need*

anything else." She agreed that the purchase of the land contains an express Declaration of Trust in favour of D1 and D2, but not to her even though she paid for the land. She agreed that there is no Declaration of Trust in her favour even though this would have been fresh in all of their minds when the land was purchased. She repeated that she paid for it, but when asked whether it was not intended that she should acquire a beneficial interest D3 replied "*no*". D3 agrees that there are no documents to evidence that she paid for the land and said, "*I don't know, I get what I'm told to get*". She accepts that the bank statement at page 650 shows 2 payments to Botrills solicitors but that it does not reference what the payments were for. When taken to the Land Registry documentation she confirmed that the annex is in the back garden of 145 Grovehurst Road and is not on the adjacent land.

17. D3 agreed that she was not buying a share in the existing house. She accepted that there is no written agreement regarding her occupation; no documents to say she would pay for the annex; no document to say she'd have a share in the property. D3 said "*she's my daughter I didn't think I needed to*". She agreed that her primary motivation for moving was so that D2 could care for her at home and that this was the full extent of the agreement. When asked whether any money was given to D2 in exchange for care, D3 said no in a rather exasperated manner.

18. D3 was taken at length through receipts and invoices in the bundles. She agreed that documents on page 251 from Bookers show groceries and nothing spent on the annex. She was taken through receipts for domestic items, computer software, storage boxes, lawn seed and agreed that none of them were related to building the annex. D3 appeared quite unsure in answering these questions and did not understand why these documents had been exhibited to her statement. She was taken to an invoice for a starter motor. She said that it was for D1's van and said, "*I paid for it because they didn't have the money to pay for it*". She agreed that the invoice for the surveyors for a different property was not spent on building the annex. When asked about invoices which are not in her name, she said that she would pay cash when D1 gave her the invoices but that "*I don't do receipts because they're family*". She agreed that the invoice for enterprise car hire is not expenditure on building works and that the car parts invoice in her name is not part of the building works. D3 agreed that there are only three invoices in her name and that none relate to the building works. She said that D1 would get the parts and she would give him the money. He would be able to get it cheaper through his building work. When taken through receipts D3 agreed that there have been six different debit cards used to settle invoices. She did not know which of the cards related to the Lloyd's account designated the building fund. When asked about invoices which are too faint to read D3 said "*why would I keep receipts when my daughter bought it*". She did not accept that she has spent less than £141,000 on the building works. When taken to the completion statement for the sale of 23 Windmill Road D3 did not agree that there is £31,000 unaccounted for and said, "*I just don't know*". She agreed that anything incurred within the alleged £141,000 must have been incurred prior to March 2023 when the counter claim was filed claiming that figure. She said that D1 and

D2 pay for utilities, and she pays for the food. It was put to her that nowhere has she matched the payments from the statements with the invoices, and D3 wearily said no. She accepted that there is no proof of where cash is being spent. D3 said that one cash payment for £4300 was for her new bathroom, but she agreed that there is no invoice for this. She accepted that some of the debits on statements are for items such as furniture, a barbecue, and supermarket payments.

19. She agreed that within the bundle there are no photographs of the annex, no plans, no building specifications and no copy of the planning application. She said that either D1 or D2 made the planning application. She disputed that the invoices payable to D1 or his business were used for his other business. When she was asked whether it doesn't matter if the payments about the property were recorded because D2 will get it all anyway D3 replied "*true*". She was asked that this accelerates the process, that D2 gets her inheritance early and D3 replied "*that's right*".

20. She confirmed that the £69,000 loan has been repaid through labour. When she was asked why she had told Master McQuail that it was a gift D3 replied "*I'd just lost my mother-in-law that morning and I didn't know what I was saying. I'd wanted an adjournment*". Regardless of whether it is a gift or a loan she agrees that it has been paid off.

21. In re-examination D3 said it was all of their idea to move in together so when she is old D2 can look after her. D3 is healthy but her partner is diabetic with high blood pressure. The annex has a kitchen, one bedroom, lounge and bathroom. She did not know why some of the invoices in the bundle did not relate to building work and said D1 and D2 decided what to put in. She was asked what her view of the ownership was and said, "*I had it built but I thought it would go to her anyway so I didn't need to do anything*".

22. D3 was clearly anxious and stressed when giving evidence. I thought she struggled with the rigours of cross examination and the relevance of some of the questions. She clearly never imagined that she would ever have to be in Court proceedings about her home. The issues are black and white to D3. Whilst she found the process of cross examination difficult, I found her to be an honest witness who had come to Court to assist. She was entirely frank about her wish to live with D2 in her later years to be cared for at home. She was entirely frank that she did not see the need for any Declaration of Trust because D2 will inherit it all anyway. I thought she answered the questions openly, and clearly expressed her bemusement at the documents she was being taken to. It seemed to me that D3 has had very little involvement in the preparation of the counterclaim; she displayed very little insight into the issues and clearly had had no input into the provision of documents. Having heard evidence from both D3 and D1, my impression is that D3 had little day to day knowledge of what was being done, where money was coming from and where it was being spent. It was clear from her evidence that she was happy for her money to be used on general household expenses, and to help out D1 and D2 when they were short of money. I accept that she did her best to answer questions and assist the

Court, but I consider that her actual knowledge of what has been spent and from where it came is limited.

23. D1 gave his evidence on the afternoon of the first day. His statements are dated 30.1.24 and 21.10.24. In his written statements he sets out the background to the initial £69,000 loan. He refers to the initial plan to buy Grovehurst farmhouse, so that D2 could care for and support her parents, and how instead they decided to develop 145 Grovehurst by building an annex with D3 and D4 funding the materials and D1 providing the labour in order to redeem the loan. He says that before the works could start, it was necessary to purchase the additional strip of land, that D3 paid for it, and she engaged Botrills solicitors. He goes onto say that the building works were funded from the building fund account, either by card or cash; that he had access to a friend's Jewson's account which was repaid by cash, and occasionally D2's Bow Window's trade account was used. His second statement essentially exhibits the bank statements which have recently been disclosed.

24. In cross examination D1 said that he is a skilled tradesman of 35 years and that he worked as project manager and labourer on construction of the annex. He said that at the time the work was carried out he was not doing other work. He had come out of the overseas project depleted having lost everything. He and D2 sold a property in order to set up the Bay Window company for D2. He said until around 2020 he did not work for or invoice anybody else. He said that over the last two to three months his solicitors have been trying to negotiate terms with the claimant and it is not strictly true to say that he has waited until these proceedings are at an end before trying to settle. He said it is also not strictly true that he does not want to pay the judgment debt. He explained that the outstanding mortgage is interest only and will be broadly the same amount. He accepted that there would be some equity in the property but denied that there was scope to remortgage further. He did not appear to understand that in his acknowledgement of service he had sought to defend this claim on the same grounds that he had tried to defend the insolvency claim. However, when asked whether he accepts he owes the money he replied clearly and without hesitation "*no*". He said that he did not appeal the judgment at that particular time because he was in poor mental health. He is in discussion with solicitors now about an application to appeal out of time or possibly to set aside the orders.

25. D1 was taken to his e-mail to creditor Elizabeth O'Brien in the bundle at page 59. He was invited to read it to himself. As he was taken to the page, D1 laughed. He agreed that he was referring to Mr. Kelly the solicitor, and that in his email he said that he was sitting outside Mr Kelly's house and made reference to shooting him. He accepted that this shows an extreme level of personal anger. D1 said he hadn't actually tracked down Mr. Kelly but he was intoxicated, stressed, clutching at straws and the only avenue he had was to speak to Elizabeth O'Brien. He had no intention of carrying out the threats in his email and he regrets them and apologises.

26. He did not agree that if the families rented a property that D2 would still be able to care for D3 and D4. He said they would have problems renting with their credit history and difficulties finding a property for six. He said it was obvious that he would be including his adult children in rehousing, and he didn't mention them before because he didn't think it would be relevant. He accepts there is no Declaration of Trust from when D3 and D4 moved into the property and said they did not feel that they needed to. It was put to him that this was because he did not intend for them to have an interest. He replied "*they are family there is no need. Why would we need to? If we sold it, we'd pay Rose and Ken back or buy them something else*". He went on to say, "*why would we do that and put an asset in their name just to be transferred back in the event of their passing*". He agreed that the adjacent land bought in 2016 is registered in the name of D1 and D2. He said he did not understand what an express Declaration of Trust is and was taken to the document. He said that he hadn't ticked the box. He said that the solicitor asked if it should be registered as a separate or adjoining title and then advised him to "*do it jointly and leave it as it is*". He added "*why spend money on solicitors putting names on deeds when it is going to pass to me and Sarah*". He went on to say that he did not ask for the Declaration of Trust to be set out in that way. He agreed that 145 Grovehurst Road needed to have the space increased and major works were carried out. It was put to him that it was never agreed that D3 and D4 would acquire an interest in the property and he said, "*no we did not need to*". It was a "*gentleman's agreement*". He said it was a foregone conclusion that D3 and D4 would fund the building works after his business had gone and they had the cash to do it.

27. D1 was taken through the invoices. He said that they had been told that they had to provide every receipt for what was on the bank statements and that is what they have done. When asked whether not all of the documents are relied upon for paying for the building works he replied, "*no not at all*" and repeated that every receipt that they had is provided. When asked why the statements had only been made available last week, he said he was not sure why they were left out as they had been given to his solicitor. When taken through receipts he agreed that an invoice for Vanquish Letting would be "*nothing to do with Rose*". He thought that lawn seed would be included as evidence of payment for the infrastructure of the property. It was put to him that he had paid the £69,000 loan off by labour, he replied "*labour and materials*". He was looking at the various bank cards which have been used, but was not certain exactly which card related to whom, but thought one was his, one related to Bow Windows and one was a joint account for D1 and D2. He was asked why he had not provided this information last week. He said that he had only been asked for it late last Friday evening, and he did not want to scan card details over because of fraud and scam risk. He said he had been asked for full details of the cards and that there was no point just giving the last four numbers because none of the cards tallied now because they are new cards. He was asked how we are supposed to identify which of the invoices relate to the building works and he said because it is "*quite clear*". It was pointed out to him that he has had months to sort out his evidence and his reply was that this has all been with his solicitors and there have been no complaints from the claimant's solicitor about the evidence.

28. He said the building works did not finish until mid-2020 because by the time planning was approved there was no shovel in the ground until March 2016. In response to questions, he said that D2 had in fact paid for the kitchen, but that this should not be disregarded because it was indirectly incurred as a result of the loan. He said that D3 should be able to claim for the cost of two bathrooms because she did not like the first one. When taken through where he has highlighted as relevant on the bank statements, he said he was asked by their solicitor to identify what Rose had spent on the property. He has therefore included everything, including furniture, because it adds value. He's included charcoal as a highlighted item but wasn't sure whether it was included in the calculation of the counter claim. He said that there are no photographs of the annex because no one ever asked him for any. There was one photograph in the valuation showing the back of the annex and he offered to show photographs which he has on his phone. He said that the £69,000 had initially been a loan and not a gift, and so they helped her build her bungalow. He said it all came out of a crisis and that he didn't have all the receipts. He said, "*we got it done phenomenally cheaply*". He then when asked how much it cost to build the materials said he was frightened to add it up and it would be in the region of £300,000 and it was a colossal project.

29. I asked him whether there is planning permission for a kitchen in the annex. He said there is no permission for two kitchens in the property, but Rose wanted one. He said he spoke to planning and said they would remove their kitchen in the main house, but they have never got that done and it is likely one will have to come out. He confirmed that the Building Regulations approval has never been given because there are a couple of items left to finish.

30. I entirely accept that D1 was anxious when giving evidence, but I found D1 to be much more combative in his answers to questions. I did not find that he was lying, but many of his answers were at best unhelpful and unclear. He appeared to be utterly inconsistent about how much the works might actually have cost. I found that when he was challenged about late evidence, or a lack of evidence, he did not accept any responsibility. It was either the fault of his solicitor, or the Claimant's solicitor. I have been hampered in this case by the sheer volume of irrelevant disclosure. I do not accept that there has been any misunderstanding about what documents should be disclosed, or indeed when. The case has always been about financial contributions to property and the building costs. No-one, particularly someone legally represented, could have thought that either the Claimant or the Court would want to have receipts and invoices which are irrelevant. Whatever the reason for the avalanche of irrelevant documents, it has not made it easier to locate evidence to assist the Defendants to prove their case.

31. I must comment on the email within the bundle at p.59, even though D1 clearly did not want it to be included. I was troubled by D1's reaction to its introduction, which did not come across to me as embarrassment. I entirely accept that D1 was at his lowest ebb, but there is no excuse for the personal comments about and the threats contained

within to someone who was just doing his job. I do not know whether any action was taken by Mr Kelly's employer, but if the police were not involved or took no action then D1 should consider himself lucky. It is, in my view, evidence of a lack of acceptance of D1's culpability for the judgment debts and a tendency to blame others for the position in which he finds himself.

32. All of the evidence for the counterclaim appears to have been collated by D1. It is not clear to me why he does not appear to checked with D3 which of the documents she thought were relevant, as she had clearly never seen these before.

33. As with D3's evidence, D1 was clear that there was no need to set up a Declaration of Trust as he and D2 would inherit it all anyway. I did not consider that his evidence about the purchase of the land and registration of the legal and beneficial title made sense. On one hand he said that it was not his instruction that it should be in the name of he and D2, but then went on to say there was no point spending money on solicitors about a trust when he and Sarah will inherit it anyway. I am satisfied that thought was given to this at the time and indeed that parties had been instructed to obtain independent legal advice on the issue and did not do so.

The Law

34. Order for Sale

35. The enforcement of a charging order by sale of the property to which that charging order attaches, is made pursuant to CPR r73.10C. The court applies a test of proportionality bearing in mind the value of the debt, the value of prior charges and the remaining equity in the property. A distinction is drawn between situations in which the whole of the legal and beneficial interest in a property stands charged, and those in which only part of the beneficial interest in a property stands charged. However, whilst the court does not strictly have to have regard to the provisions of ToLATA in a case where the whole of the legal and beneficial interest in the property is charged, when exercising the courts wide discretion, the same considerations have to be taken into account as would be taken into account if ToLATA did apply.

36. Factors which the court should take into account include that it is in the public interest to enforce charging orders because of the economic importance of ensuring that there is an efficient machinery for the enforcement of debt obligations; the courts discretion must be applied in a way which gives due respect to the Article 8 rights of all of those living in the relevant property and not just the debtors. The court must weigh this against the right of the charge holder not to have to wait indefinitely for payment or to have no means of enforcing the security; the court should consider the size of the debt and its value relative to the property to be sold along with the parties conduct and the absence of other enforcement options; it is for the person who resists the order for sale to adduce the relevant evidence, including any evidence as to how welfare may be adversely affected if an order for sale is made. In a situation whereby land is held under

a trust the court should also consider the statutory factors in ToLATA, which include intention or intentions of the or persons who created the trust, the purposes for which the property is held, the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession of the property. The white book summarises "*to order sale is a draconian step to satisfy a simple debt and is likely to be ordered for example in a case of a judgment debtor's contumelious neglect or refusal to pay or in a case where in reality without sale the judgment debt will not be paid*".

Beneficial interest in land

37. It is trite law that equity follows the law, and such has been well established by *Stack v Dowden* and *Jones v Kernott*. The starting point is that the beneficial interest in land reflects the legal interest. This presumption can be displaced by an express declaration of beneficial interests or by establishing that an implied trust has arisen in the form of a resulting or constructive trust. The burden is on the person seeking to show that the beneficial ownership is different from the legal ownership.

38. The counterclaim is pleaded on the basis of a Resulting Trust, on the basis that D3 and D4 have paid (wholly or in part) for the purchase of property which is vested in D1 and D2 alone , and there is no intention that D3 and D4 intended the transaction to be a gift. Such a presumption can be rebutted by the counter presumption of advancement, or direct evidence of an outright transfer. A loan cannot lead to the creation of a Resulting Trust. The burden of proof falls to the party seeking to displace the legal position.

39. Following *Stack* and *Jones*, it is much more common to see arguments about the creation of a Common Intention Constructive Trust. The burden again is on the party who wishes to displace the presumption that equity follows the law, to show what the actual shared intentions of the parties was. The intention may be express intention or may be objectively inferred from the conduct and dealings between the parties, and in light of their whole course of conduct in relation to the property. The intentions must be supported by some detriment. Where it is not possible to infer an actual intention as to respective shares then the court is entitled to impute an intention as to shares which the court considers fair having regard to the whole course of dealings. Financial contributions are relevant but there may be other factors that may enable a decision as to what was intended or fair.

40. I have considered the cases and provisions I have been referred to by Counsel in the authorities bundle. I have considered in particular *Pankhania v Chandegra* [2012] EWCA Civ 1438; [2013] 1 P&CR 16, along with *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 and *Re Sharpe (a bankrupt*) [1980] 1 WLR 219, and I have considered all other matters referred to by Counsel.

41. The burden of proving the Counterclaim falls on D3 and D4, on the balance of probability.

42. Analysis and findings

43. The first matter for me to determine is whether D3 and D4 through conduct or intention have any beneficial interest in 145 Grovehurst Road. Whilst the Counter claim refers only to a Resulting Trust, I am satisfied that the factual matters thereafter pleaded apply to a Constructive Trust as much as a Resulting Trust, and that the issues for me to consider are broadly similar. I shall therefore consider both.

44. I accept that D3 and D4 have been in a committed relationship for at least 45 years, and that they are D2's parents. There are bank statements from an account in D3's sole name, and a joint account in both their names. There is evidence of a payment to what appears to be a sole account in D4's name, but no statements. I have seen and heard no evidence of how D3 and D4 managed their finances, whether jointly or otherwise.

45. There are essentially 3 parts to the counterclaim. The first is the initial gift or loan towards the purchase of 145 Grovehurst of £69,000. I accept that this money was paid by D3 towards the purchase price of 145 Grovehurst, by her mortgaging her own property. I accept that D1 and D2 paid the interest only mortgage until it was redeemed on the sale of 23 Windmill Road. I have read the transcript of the hearing before Master McQuail. At p.72 of the bundle D3 describes this as a gift, and when clarification is sought, she repeats it was a gift. At p.78 D1 says he and D2 asked D3 for a gift when she remortgaged her house to allow a substantial deposit. Both now deny this was a gift and say it was a loan. In cross examination D3 said that she had lost her mother-in-law that morning and she did not know what she was saying, and D1 said that he did the work on the annex to pay off the loan. Of course I do not have the conveyancing file, but I can take judicial note from my experience of possession and financial remedy cases of the fact that many mortgage companies will not lend to borrowers unless any deposit provided by a third party is defined as a gift, although this is not determinative of my decision. I do not consider that the fact D1 and D2 paid interest on the mortgage is inconsistent with it being a gift, as D3's generosity in providing this sum was only possible by her taking out a mortgage. However, there is no evidence that there was ever any intention for D1 and D2 to pay back the money, and indeed in the meantime before 2016 they had re-mortgaged the property again and not repaid D3. It is also not inconsistent with D1 carrying out labouring works at a time he says he was not working for anyone else. I am satisfied that this was a gift and not a loan and so cannot fall within a trust. However, if I am wrong in that, then *Westdeutsche* and *Re Sharpe* confirm that where money is advanced by way of a loan, a Resulting Trust will not arise as there is a contractual right to call for repayment of the sums. Further if I am wrong and it was a loan, on the evidence of both live witnesses this loan has been repaid, and so no beneficial interest could remain in place. This part of the counterclaim, whether by D3 alone or D3 and D4 together, must fail.

46. The second part of the counterclaim relates to the purchase of the strip of land in 2016. It is claimed that D3 paid £19,254.20 which appears to be the purchase price and costs.

Again, I do not have the conveyancing file. The only documentation is a bank statement which is in the name of D3 showing 2 payments totalling the above sum. The payment is made to "Botrill's client" in September 2016. This is a firm of solicitors which carries out conveyancing work. The statement does not reference the sale and purchase of the adjoining land and no other documentation is provided other than the TP1. The TP1 within the bundle expressly states that D1 and D2 are acquiring the legal title to the adjoining land and expressly declares that they hold this on trust for themselves as joint tenants. There is no reference on the TP1 that D3 or D4 contributed to the acquisition of the adjoining land or were intended to hold any beneficial interest. I am satisfied that the timing of this payment is around the same time that the purchase of the land was made, despite D3's oral evidence that she thought the payment was for the building of the annex. The TP1 is dated 28th September 2016, and so the timing matches. I have said above that I found D1's explanation of why there is no beneficial interest in favour of D3 and D4 to be unsatisfactory. It would be surprising if a conveyancing solicitor who had received purchase funds from a third party would choose to register the legal and beneficial title to that land in the name of someone else, without instructions. Indeed, if this is not the intention, the parties have had 8 years to correct it. In cross examination D1 questioned why money would be spent on legal advice when he and D2 would inherit the land anyway. I am satisfied that thought was given to this by the Defendants and that a decision was taken to register the legal and beneficial title of the adjacent land in the names of D1 and D2 by way of an advanced inheritance. This is supported by the pleaded counterclaim. I am satisfied that there was never any intention for D3 and D4 to have any beneficial interest in this plot of land. If I am wrong in respect of that then further to the cases of *Stack* and *Pankhania*, the express Declaration of Trust is conclusive as to the beneficial interest in the land, and I should not displace it. In the circumstances, this element of the counter claim must fail, whether by D3 or D3 and D4 together.

47. The third part of the counterclaim is whether a trust has arisen from the building of the annex. I have said above that I have not been helped in my task by the paucity of relevant evidence, and sheer volume of irrelevant documentation.

48. In the evidence before me it was accepted by D1 and D3 that the annex has been built at the back of 145 Grovehurst Road, on the existing plot of land. D1 said that the construction used up most of the garden, so they were able to buy the adjoining plot of land to essentially become the garden. The construction however took place on the existing plot. In my view, this amounts to a post-acquisition improvement to the property, to make it suitable for D3 and D4 to live in. As the works were carried out some 17 years after purchase, even if D3 and D4 did fund the building works, it could not create a Resulting Trust. Even if I am wrong, then I am satisfied that this is an advancement on inheritance as confirmed by D3 in her oral evidence.

49. I said above that I would consider whether a Common Intention Constructive Trust had arisen. I have dealt above with the adjoining land, and I am entirely satisfied that there

was no common intention whatsoever that D3 and D4 should hold a beneficial interest, nor that there is any basis to go behind the express Declaration of Trust. That leaves us with financial contribution towards the annex.

50. There is no evidence of a recorded agreement demonstrating a common intention to create a trust. On the contrary, both D1 and D3 have said that no such agreement was necessary. Both said in their evidence that there was no point in changing ownership or creating a Declaration of Trust because D1 and D2 would inherit the asset in any event. D3 specifically agreed that it was a means to accelerate the inheritance for D2. She further specifically agreed that the intention was to live with D2 in her old age, not to have a beneficial interest in the property. I am mindful that all 4 Defendants were planning to purchase Grovehurst Farmhouse together to live in. However, that in itself is not evidence of what they intended the legal and beneficial title to be. It is clear from the evidence, that D3 was keen for D2 to either have or retain legal and beneficial ownership. There is a clear absence of any express common intention for D3 and D4 to hold a beneficial interest.

51. Considering whether there is an inferred common intention is not straightforward. It was clear however from the live evidence that neither D1 nor D3 considered that any sums spent by D3 and D4 involved buying an interest in the property, and that it was to make the property suitable for D3 and D4 to live in. The Counter claim pleads a cost of £141,000 for the build cost. In his evidence, D1 thought this closer to £300,000. It is utterly unclear to me how either sum has been reached. From the receipts provided, there is evidence of at least 6 debit cards being used, whether buying building materials or not. There is no evidence to whom these accounts relate, or even if they are cards held by one of the Defendants. There are perilously few receipts or invoices which clearly relate to building materials and could not relate to something else. D1 and D3 refer to the Building Fund account, but have been unable to tell me which of the debit cards relates to this account. The bank statements have been provided within the last month, and these are incomplete. The Lloyds account appears to be the building fund account. Those statements run from March 2016 when the account opens with £86,363.69 to February 2017, by when the account has £1578.10 remaining. I can see that a proportion of the sums have been paid to what I would recognise to be building or construction enterprises (i.e. Screwfix / Homebase), but some of these are for very small amounts and may have been spent on anything related to construction. There are then no bank statements at all until the HSBC statements (the joint account of D3 and D4) start from October 2019 and end in August 2024. In the second statement of Mr Kelly, he exhibits 2 schedules. The first is a schedule of transactions on the Lloyds statements, not including the Botrills payments. The second is a schedule of the payments on the HSBC statements, which have been highlighted as relevant by D1. He sets out his calculation of the maximum sums which can be shown from these accounts to be payable in relation to building works. There has been no similar work carried out on behalf of the Defendants at any point. Both D1 and D3 accept that there are numerous items which are not relevant to building works. D1 was asked how we are supposed to know which are the relevant highlighted items and which are not. He flippantly replied that "*it was obvious".*

52. It is not obvious at all. Nowhere in the evidence has he or any other Defendant set out what work was actually involved or when, or what the cost was or was likely to be. I have seen no plans, no building regulations requirements, no surveyors report. I accept the evidence of D3 that an annex was built, but I have no information at all to tell me what that involved or when or what the cost was. If receipts are unavailable, such explanation ought to have come in witness evidence. The Court is being invited to guess, when it is for the Defendants to prove. I am not assisted at all by the receipts or invoices.

53. The building works were sufficiently completed by mid-2020 as D3 and D4 moved to the annex. I am satisfied that sums after then would not relate to the actual construction of the annex. Plainly fixtures and fittings cannot relate to construction of the annex and can be removed in any event. For the avoidance of doubt this would include a hot tub. I found D1's evidence to be unhelpful in trying to determine what the relevant payments are, notably suggestions that grass seed should be included.

54. Certainly, by the time we are looking at the HSBC account, there is no evidence at all that any of the payments went towards the annex. In his evidence, D1 said that he did not work for anyone else from 2015 and it was not until around 2020 that he began to work and invoice other people. It was clear from D3's evidence that she allowed her account to be used by D1 and D2 when they needed money, in particular the van part. She also explained that the payment by D2 for the kitchen had been repayment of a loan by D2 which D3 had made earlier. The money appears to have been used by all of the Defendants for a multitude of reasons. I said above that I thought D3 had very little insight into the evidence, and I am satisfied that her accounts were generally used by all, when necessary (albeit with her consent), but that she retained little knowledge or control over what was being spent on her card or cards throughout this period. She clearly never asked for receipts. It is not possible on the evidence before me to be satisfied on the balance of probability what of D3's money was spent on the construction of the annex.

55. I am not satisfied that it is the appropriate course to use the valuations and try to infer an increase in value. For reasons I set out below, I do not consider that I am helped to any great extent by the valuations. Even if the value was increased by the annex, I cannot be certain what contribution D3 and/or D4 made to this. It is for the Defendants to prove, on the balance of probability, what the financial contribution was, and they have failed to do so.

56. In my view, the difficulty for D3 and D4 in inviting the Court to find an inferred constructive trust goes beyond there being no evidence of an express common intention and no evidence of specific payments. In fact, the opposite is true. I have set out above

in my judgment that there is evidence that the Defendants actively had no intention to create any constructive trusts. There was an understanding between the Defendants that all payments were in effect an advance on D2's future inheritance. I have the utmost sympathy for D3 and D4. They may have acted to their detriment in spending an unidentifiable amount of money on the annex, but they never intended that they should have any beneficial interest in the property. It was always intended as an advance inheritance to D2, and by extension D1. It is clear that D3 simply wanted to live there and to be cared for. I am not satisfied that there is evidence to create a CICT, nor to create any life interest. I am unable to infer a CICT.

57. Even if I am wrong, I am simply unable to quantify what the financial contribution might have been for the reasons set out above.

58. The counterclaim should be dismissed.

59. So far as the valuations are concerned, as I said above no permission has ever been sought or given for a Part 35 compliant surveyors report. The Claimant's valuations are for obvious reasons desktop valuations. The most recent one is incorrect about all of the relevant permissions being approved, as Building Regulations have not been signed off yet. It also applies a rather unusual quantification by using square footage. I accept that the Claimant's expert is hindered by being unable to inspect the property, but I cannot be certain how accurate either of their valuations are. The Defendants' valuation was obtained a few weeks ago. Their valuer has had the opportunity of visiting the property, and indeed highlights a number of issues with it. However, I note that the report was prepared by SW Surveyors Ltd. There is an invoice from them in D1's disclosure, as they carried out the survey on Grovehurst Farmhouse in 2016. It is clearly a firm known to D1, and they are not independent. However, absent a Part 35 compliant report, and doing the best I can with the evidence before me, taking into account the problem with the lack of building regulations and the 2 kitchens, I adopt the sum of £580,000 as the value of 125 Grovehurst Road as this seems more realistic.

60. I have found that D3 and D4 do not hold a beneficial interest in the property, and accordingly D1 and D2 are the legal and beneficial owners of both the property and plot of land subject to the charging orders. The Acknowledgement of Service filed by D1 and D2 does not raise any matters which have been argued before me this week. Neither of D1's statements set out any form of defence to the primary claim, and D2 has not filed a statement. I have no information about their income and expenses nor what hardship they would specifically face if the order were made. D1 said in evidence that it would be difficult to rent with their credit history, and to house all of the adults. I understand that both D1 and D2 are working and on the face of it can afford to rent. I accept it would be difficult to rent a property to house 6 adults, but the need to house D1 and D2's adult children was raised for the first time in cross examination. I have no information whatsoever about these people, and certainly not what hardship may face them in

having to house themselves. There is no evidence that they actually live in the property. I accept it may be difficult for D1 and D2 to obtain private rental accommodation with their credit history, and if so, they would need to avail themselves of their Local Authority. It would be I am sure a significant drop in lifestyle, but one which could be managed.

61. D3 and D4 have also not provided any information about hardship to them or issues specific to welfare if the sale proceeds, although it is not difficult to envisage what that would be. They would lose their home in which they thought they would see out their days. To be reduced to renting property would be a significant change in circumstances for them, leaving them with much less security and no doubt significant worry. I do not have information about their current assets although I am aware that they are in receipt of pensions. The disclosed bank statements end in August 2024, and it seems there is an account held by D4 which has not been disclosed into which £20,000 was transferred earlier this year. If they do not have the funds to buy another property, it may well be that they have funds to rent privately and that this would provide a means for all of the Defendants to continue to live together. I have not seen photographs of the annex, save for the outside. I have no evidence to show me that it has been adapted to their needs other than being advised that it is on one floor.

62. D4 has not attended Court and I take no account of his statement. D3 explained to me that he suffers from diabetes, high blood pressure and that there was a recent hospital attendance. I have no further evidence than this to illuminate what specific medical or other needs D3 and D4 may have. D3 agreed that she is currently in good health. I have no doubt that the loss of 145 Grovehurst Road will cause considerable sadness, inconvenience, worry and a fall in standard of living. There is no evidence of an agreement that D3 and D4 could live at the property for life, but an agreement that they would live together. This can still happen, but somewhere else.

63. I have said that I find the current value of the property to be £580,000. Net of interest and costs the Judgment debt stands at £497,480.43 net of interest and costs. There are 2 priority charges roughly in the sum of £239,000 although the figures are significantly out of date. Neither of those creditors opposes sale so long as their charges are discharged. Allowing for costs of sale at 2%, this leaves an approximate sum of equity of £330,000. This is just over 66% of the judgment debt and would wipe out all of the equity.

64. The 2 money judgment orders were made in May and November 2021, 3 years ago. These are for very significant sums. D1 said that in the last few months his solicitors have sought to negotiate with C1, but denied that this was no more than a token effort in the run up to this hearing. However, other parts of his evidence were troubling. He was absolutely clear that he does not accept the judgments and said that he is thinking about an application for permission to appeal out of time. I do not accept that the reason he has not made such an application, or an application to set aside orders before

now is because he was unable to marshall his case. I have no doubt that the years of litigation would take a huge toll on a person, but no evidence has been provided of a lack of capacity to engage in proceedings and indeed he has engaged with these proceedings for 2 years. The email he sent to Elizabeth O'Brien, even if he was drunk, displayed contempt for the parties and professionals involved in the civil and enforcement proceedings. It is sadly clear to me that D1 does not accept he owes the money, and I do not consider that he has any intention of trying to settle any or all of the judgment debt. In his evidence he said that he could not raise any further mortgage against the property, and so on his evidence there is no means of the judgment debt being settled either in whole or in part without the sale of the property. It is in the public interest for orders to be enforce. I have seen no evidence to suggest that any of the Defendants do not have an average life expectancy, and I do not consider it is fair or reasonable to expect the Judgment debtors to wait an indefinite amount of time for payment. There is no other means of enforcement open to the debtors. There is no evidence of circumstances which would justify requiring the debtors to remain unable to enforce such a large judgment for an unknown period of time. Even though the entire judgement cannot be satisfied, it is a significant proportion which can be.

65. This case is very sad. However, having considered the evidence before me, the findings I have made, and Article 8 I am satisfied that it is proportionate to make the order for sale. However, I have identified that there will be significant hardship to the Defendants from such an order and that they will need more time than usual to make arrangements to move. It may also be that D1 and D2 wish to give more thought to how monies might be raised without selling the property. I shall therefore suspend the order for a period of 3 months, so long as the Defendants cooperate with the Claimants in preparation for the sale.

66. I shall therefore make order that the Charging orders dated 10th December 2021 and 15th March 2022 do be enforced by sale of the property known as 145 Grovehurst Road, Kemsley, Sittingbourne, ME10 2TA and the land adjoining that property; the Defendants will join with the Claimants in effecting the sales; the Defendants will give possession of the property and land by 4pm [28 days] suspended until [3 months from the date of the order] so long as the Defendants cooperate with the Claimants in preparing the property for sale; the Claimant's solicitors, Freeths LLP, do have conduct of the sale and conveyancing and do account to the Defendants for the proceeds of sale after deducting the sum representing the debt, interest and costs as well as any prior ranking charges; the Defendants do pay the Claimants' costs of these proceedings to be subject to Detailed Assessment in default of agreement.

67. I thank Counsel for the helpful way in which they sought to assist me throughout the hearing. I invite them to endeavour to agree an order for approval, and I shall liaise with them in respect of a date to hand down judgment.

DJ Wright 4.12.2024