Neutral Citation Number: [2019] EWCA Civ 2094

Case No: A3/2018/1928

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY, TRUSTS AND PROBATE LIST (ChD)
HIS HONOUR JUDGE HACON (Sitting as a High Court Judge)
[2018] EWHC 1904 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/11/2019

Before:

LORD JUSTICE FLOYD
LADY JUSTICE KING
and
LORD JUSTICE HENDERSON

- -

Between:

ALICE KAHRMANN **(As Administrator of the Estate of Rainer Christian Kahrmann)**	**Appellant**
- and -	
HILARY HARRISON-MORGAN	**Respondent**

- -
- -

Ms Penelope Reed QC and Mr Luke Harris (instructed by **Grosvenor Law**) for the **Appellant**
Mr Clifford Darton QC and Mr Faisel Sadiq (instructed by **WSM (Solicitors) LLP**) for the **Respondent**

Hearing dates: 16 &17 October 2019

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Approved Judgment

Lord Justice Henderson :

Introduction and background facts

1. On 3 July 2014 Dr Rainer Kahrmann, a German businessman, died unexpectedly in Cologne at the age of 71. He left no valid will, and therefore died intestate. At the date of his death he was resident and domiciled in Germany, having moved to live there permanently between 2003 and 2005. Before then, he had lived and made his home for much of the time in London, where he owned various residential properties, including long leasehold interests in two properties in Belgravia, SW1: a substantial terraced house at 38 Wilton Crescent, and a much smaller mews property adjoining it at the rear, 38 Belgrave Mews North ("38 BMN").

2. Dr Kahrmann did not own the freehold or upper-tier head leasehold interests in either property, which were vested in the Trustees of the Grosvenor Estate or connected entities ("Grosvenor"). But there were prospects of acquiring those interests by enfranchisement pursuant to the provisions of the Leasehold Reform Act 1967 ("the 1967 Act"), in the case of 38 BMN, and the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 ("the 1993 Act"), in the case of 38 Wilton Crescent, which was subdivided into three flats: Flat 1, comprising the lower ground and ground floors; Flat 2, on the first floor; and Flat 3, comprising the second and third floors.

3. The leasehold ownership structure of 38 Wilton Crescent and (to a lesser extent) 38 BMN was rather complex, but fortunately the details are not important. At this point it is enough to note that, by mid-2005, Dr Kahrmann evidently owned: (a) a long tenancy of 38 BMN at a low rent, which prima facie entitled him to exercise the right to acquire the freehold of that property pursuant to section 1(1) of the 1967 Act; and (b) qualifying residential tenancies under long sub-leases of Flats 1 and 2 at 38 Wilton Crescent, which would prima facie entitle him, through a nominee purchaser, to exercise the right to collective acquisition of the freehold of that property conferred by section 1(1) of the 1993 Act.

4. As the judge below (His Honour Judge Hacon, sitting as a High Court Judge) found in the judgment under appeal, Dr Kahrmann "became aware of the potential financial benefits of buying the freehold" of the two properties, with the idea of offering them "jointly onto a buoyant London property market": see [2018] EWHC 1904 (Ch), at [4].

5. Dr Kahrmann discussed with a business partner, Mr Kim Hawkins, how this might best be done. The judge found, at [36], that the matter appears to have been considered in stages, starting with 38 BMN. As the judge found, Dr Kahrmann and Mr Hawkins reached an agreement in relation to this property ("the BMN Agreement"), the terms of which were recorded in a letter dated 22 June 2005 on the headed notepaper of Marlin Securities Limited ("Marlin"), which was one of Mr Hawkins' companies, addressed to Dr Kahrmann and countersigned by him. The letter purported to set out "the final agreed terms" in respect of a loan of £75,000 to be made by Marlin to Dr Kahrmann, and in respect of 38 BMN. Apart from the terms relating to the loan, upon which nothing turns, Dr Kahrmann undertook to serve notice to enfranchise the freehold of 38 BMN without delay, and then to assign the benefit of "the notice of claim for the freehold" to

a new UK "off the shelf" company, which was in the event another of Mr Hawkins' companies called Themeplace Limited ("Themeplace"). It was expressly agreed that the "equitable interest of the property" would be owned as to 50% by Dr Kahrmann and 50% by Marlin (paragraph 5), and in the final paragraph (numbered 10) they were described, after the freehold had been purchased, as "the two equitable owners". It was also agreed that Marlin would take over all responsibility for management of the property from the date of service of the notice, and would deal with all enfranchisement matters (paragraph 8).

6. The letter envisaged that each party would sign a copy of it and have the signature witnessed, and that the copies would then be exchanged before Marlin made the loan of £75,000 to Dr Kahrmann. These formalities do not seem to have been followed, because the only version of the letter in evidence was signed by Dr Kahrmann alone and not witnessed. But it was common ground that Dr Kahrmann and Mr Hawkins had reached an agreement on these terms: see the judgment at [37].

7. The enfranchisement of 38 BMN must have gone ahead smoothly, because on 22 September 2006 Themeplace was duly registered as the transferee of the freehold. Thus the legal title to the property became vested in Themeplace, as envisaged by the BMN Agreement, but the parties had expressly agreed that they would then be equitable co-owners of the property in equal shares.

8. Meanwhile, the first steps towards a future enfranchisement of 38 Wilton Crescent appear to have been taken a year earlier on 22 September 2005, when Dr Kahrmann assigned to Mr Hawkins his "beneficial interest" in Flats 1 and 2, together with his beneficial interest in what was described as the "Head Lease" of that property (probably, in fact, a superior Underlease ("the Underlease") which he had bought in 2002 and which was due to expire on 26 March 2009). At the same time, Dr Kahrmann assigned to Mr Hawkins beneficial interests which he owned in adjoining properties at 37 and 39 Wilton Crescent. Each assignment was made by Dr Kahrmann in Cologne, duly notarised, and addressed "To whom it may concern". It effected the immediate transfer of the relevant beneficial interest to Mr Hawkins, and authorised him "to initiate and take all decisions and actions including hypothecation or sale concerning this property, as Mr Hawkins so decides". As a matter of English law, each assignment was clearly effective to transfer Dr Kahrmann's beneficial interest in the relevant property to Mr Hawkins, because his signature satisfied the formal requirements of section 53(1)(c) of the Law of Property Act 1925 (which states that "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same…"). Equally clearly, however, the assignments would not have been effective to convey Dr Kahrmann's legal estates in the properties to Mr Hawkins, because they were not made by deed: see section 52(1) of the 1925 Act. As a matter of English law, the effect of the assignments appears to have been equivalent to declarations of trust made by Dr Kahrmann, declaring that he would thenceforth hold the relevant leasehold legal estates on trust for Mr Hawkins beneficially.

9. The judge found, at [39], that "[t]he reason for these assignments was not made clear", but he rejected a suggestion that Dr Kahrmann had been "intent on divesting himself of assets" in response to an investigation into his financial affairs by the Swiss authorities. The judge said (ibid):

> "There was no documentary support for this and it makes no obvious sense. A more likely alternative reason is that the assignments were done so that Mr Hawkins could arrange (and pay for) the application for the freehold of 38 [*Wilton Crescent*], later done through his nominee company Cravecrest. Dr Kahrmann would be protected if there was also an agreement by which he retained an interest in the freehold once acquired and/or the proceeds derived from its sale."

10. Mr Hawkins subsequently assigned his beneficial interests in Flats 1 and 2 and the Underlease to Cravecrest, and on 13 March 2009 Mr Hawkins arranged for the service of an initial notice under section 13 of the 1993 Act claiming to exercise the right to collective enfranchisement in relation to 38 Wilton Crescent. The claim was then admitted by Grosvenor, in a counter-notice under section 21 served on 29 May 2009. Thereafter, as the judge recorded at [42], the matter "became bogged down over the price to be paid" to Grosvenor. The freehold value of the property, subject to all subsisting leasehold interests, was agreed, but there was a dispute about the value to be attributed to two intermediate head leasehold interests, one of which was vested in a Grosvenor entity and the other in a third party. The question, shortly stated, was whether the price payable by Cravecrest should reflect the development or "hope" value which could be realised by uniting those intermediate leases with the freehold, thereby enabling the nominee purchaser to sell the property with vacant possession or otherwise develop it for use other than as a building containing separate flats.

11. The dispute was referred to the Leasehold Valuation Tribunal for the London Rent Assessment Panel, which on 12 September 2010 determined that the price to be paid on enfranchisement for the two intermediate leases had to take into account the hope of realising the development value. Cravecrest's appeal against this determination to the Lands Chamber of the Upper Tribunal was dismissed on 28 June 2012: see [2012] UKUT 68 (LC). Cravecrest's further appeal to the Court of Appeal was in turn dismissed on 19 June 2013: see Cravecrest Ltd v Trustees of the Will of the Second Duke of Westminster and Another [2013] EWCA Civ 731, [2014] Ch 301.

12. The leading judgment in this court was delivered by Sir Terence Etherton C, with whom Rimer and McCombe LJJ agreed. As the Chancellor recorded at [14] and [15], the freehold values of the three Flats at 38 Wilton Crescent were agreed to amount, in aggregate, to £4.95 million, whereas the agreed freehold vacant possession value of the property as a whole for conversion to a house, including the potential to extend into a fourth floor, was agreed to be £7 million. There was accordingly a substantial potential development value of £2.05 million, and the main issue was whether that should properly be reflected in the price to be paid for either of the intermediate head leases.

13. The Court of Appeal refused permission to appeal to the Supreme Court, but on 9 January 2014 the Supreme Court allowed an application by Cravecrest for permission to appeal. As I shall explain, however, that hearing (which was fixed for January 2015) never took place.

14. It is convenient at this point to describe Dr Kahrmann's immediate family circumstances. In 1972 he married Christiane de Muller ("Christiane"), who was a Swiss national. There were two children of the marriage, Louise and (some two years her junior) Alice. They were both in their thirties by the time of their father's death in

2014. After some years, Dr Kahrmann and Christiane became estranged, and written terms of separation were agreed in September 1997, but they remained married until Dr Kahrmann's death. It follows that Christiane was his widow, after a marriage which had lasted for approximately 42 years.

15. In about 1991 Dr Kahrmann began a relationship with the defendant, Hilary Harrison-Morgan ("Hilary"). In 1991 the couple moved into Flat 2 at 38 Wilton Crescent, where they continued to live until the birth to them of twin sons, Maximilian and Frederick ("Max" and "Fred") on 19 October 2001. The four of them then continued to live together in Flat 2, but from 2003 Dr Kahrmann increasingly spent time in Germany, and as I have already said he went to live there permanently before the end of 2005. Although he was now separated from Hilary and the twins, the judge found at [35] that he continued to provide for them.

16. On 29 March 2011, Dr Kahrmann, apparently acting without legal advice, signed three purported wills to be governed respectively by German law, French law and "UK law". The so-called "English Will" purported to give "Two leases" at 38 Wilton Crescent and Dr Kahrmann's "interest in Mews House" (i.e. presumably 38 BMN) to "go undivided to Hilary Morgan on behalf of my children Fred and Max Kahrmann, Hilary Morgan having the usage." As the judge said at [48], it is unclear what Dr Kahrmann had in mind when he made this will, but as things turned out it did not matter because it is common ground that all three purported wills were invalid. No other testamentary documents have come to light, and it is therefore agreed that Dr Kahrmann died intestate.

17. The next important development occurred before, but probably not very long before, Dr Kahrmann's death on 3 July 2014. A prospective purchaser of 38 Wilton Crescent and 38 BMN was found, who wished to acquire the two properties together with vacant possession. The identity of the purchaser was not disclosed, but a nominee company was established called 38 Wilton Limited (initially also known as 38 Wilton Crescent Limited). The judge referred to this company as "38 WC Ltd", and it is convenient to adopt the same abbreviation. The judge found, at [49], that the intention was to draw up an agreement with Cravecrest and Themeplace as the vendors, 38 WC Ltd as the purchaser, and Dr Kahrmann also a party "apparently for reasons of ensuring vacant possession."

18. Soon after Dr Kahrmann's death, a draft sale agreement was prepared and dated 14 July 2014, but according to the judge it was never signed (although I note from the copy in our bundle that it does appear to have been signed on behalf of Cravecrest and Themeplace by Mr Hawkins). In any event, it is common ground that the agreement never became legally binding. I will refer to it as "the draft sale agreement". It is clear from the recitals that it was drafted at a time after permission to appeal to the Supreme Court in the Cravecrest case had been granted, and before agreement had been reached with Grosvenor on the enfranchisement price for 38 Wilton Crescent payable under the 1993 Act.

19. Although the draft sale agreement never had legal effect, its provisions are nevertheless of some interest. Recital (F) recorded the original intention of the parties that Dr Kahrmann would enter into the agreement, but because of his death "this Agreement makes provisions to deal with the consequences thereof". Although no grant of representation to Dr Kahrmann's estate had yet been taken out, there was a definition

of the "Kahrmann Estate" and the evident purpose was that it should become bound by the same obligations as it was originally proposed that Dr Kahrmann should undertake, with Cravecrest agreeing to use all reasonable endeavours to procure that the Kahrmann Estate should enter into those obligations "in a valid and binding form to the reasonable satisfaction of the Buyer" (clause 1A.1). There was then a warranty (in clause 1A.6) by Cravecrest and the Kahrmann Estate that they had no beneficial interest in 38 Wilton Crescent that would survive completion, and clause 1A.9 provided that the Kahrmann Estate "shall sign the Enfranchisement Contract and execute and deliver the Enfranchisement Transfer".

20. The proposed machinery for ensuring vacant possession was that tenancies of Flats 1 and 2 in favour of Hilary and expiring no later than 31 July 2015 should be granted in a specified form. This was a condition precedent to service of a completion notice by the Seller (defined as Cravecrest and Themeplace), unless in the alternative "Cravecrest confirms (and provides evidence to the reasonable satisfaction of the Buyer) that by completion the House will no longer be subject to any rights of occupation by Ms Harrison-Morgan (and if applicable her issue)": see clause 1A.10.3. The purchaser would also be entitled to rescind the agreement in various events, including if the necessary commitments from the Kahrmann Estate had not been obtained by 31 October 2015, and if, by the same date, the purchaser was not satisfied that 38 Wilton Crescent could be sold free of any rights of occupation by Hilary and her issue: clause 9.3. The purchase price was initially £16 million, split as to £14 million for 38 Wilton Crescent and £2 million for 38 BMN.

21. As the judge observed, at [53]:

> "The entirety of the payment by 38 WC Ltd was to be made to Mr Hawkins via his solicitors, Maxwell Winward. There was no provision in the draft for half the profit to go to Dr Kahrmann's estate. On the other hand, absent the Estate's commitments to 38 WC Ltd, 38 WC Ltd would have had the right to rescind. In effect, the Estate had the right to veto the proposed agreement. It is possible that at this stage Mr Hawkins expected to agree a split in the profits with the Estate before the Estate's approval was given. Of course, no approval could be forthcoming until letters of administration of the Estate had been granted."

22. Within three weeks of Dr Kahrmann's death, his daughter Louise was in contact with Mr Hawkins about properties which might be comprised in her father's estate, including in particular 38 Wilton Crescent. On 24 July 2014, Mr Hawkins sent an email to Louise saying that the sub-leases of Flats 1 and 2 at 38 Wilton Crescent had expired in March 2009, and adding:

> "As to the claim for the freehold at No. 38 Wilton Crescent, this is owned by my company through a nominee with a profit share agreement to your father's family as you know".

23. Mr Hawkins' reference in this email to "a profit share agreement" in relation to the claim to the freehold of 38 Wilton Crescent shows that at this date he clearly acknowledged the existence of an agreement between him and Dr Kahrmann to share the profit realised on a future sale of the freehold interest, after enfranchisement had

taken place. The fullest evidence of the terms of this agreement ("the Wilton Crescent Agreement") is to be found in a letter dated 6 March 2012 written by Mr Hawkins on the headed note paper of Marlin to Dr Kahrmann, which was later signed by each of them on 4 May 2012 (although with significant manuscript additions by Dr Kahrmann). It is important to note that this document does not appear to have been known to Louise, Alice or Christiane until it was disclosed in the course of the present action.

The letter of 6 March 2012

24. In view of its importance, I will set out the terms of the letter almost in full:

> "Dear Rainer,
>
> **Re No. 38 Wilton Crescent, London SW1**
>
> It appears sensible to notarise our verbal agreement of some long standing in respect of the above just in case one of us or even both of us get "run over by a bus".
>
> The agreement is as follows:
>
> 1. [*Marlin*] is to fund all legal and professional costs etc to enfranchise the property.
>
> 2. [*Marlin*] is to fully fund the purchase of the property subject to 50% bank finance.
>
> …
>
> 5. If the property is purchased and not "back to back" sold, on completion of the purchase a lease of flats 1 and 2 must be entered into by the current occupier, Hilary Harrison-Morgan and yourself, terminable on the sale of the property, the rent being a peppercorn.
>
> 6. To be clear, the profit God willing, is to be calculated as follows:
>
> The net profit is to be calculated by deducting the following from the gross Profit
>
> 1) All legal and valuation costs etc of the enfranchisement.
>
> 2) All bank financing costs including arrangement fees, interest and legal fees etc.
>
> 3) All interest charges on the equity provided by [*Marlin*].
>
> 4) All architectural and historic building reports, survey reports and planning costs etc.
>
> 5) All sales costs including estate agents, legal costs etc.

> The net profit is to be split 50-50 between [*Marlin*] and [*Dr Kahrmann*].
>
> Finally, for good order, this agreement must be read in conjunction with our agreement dated 22 June 2005 in respect of [*38 BMN*] as it is very possible both properties will be sold at the same time to the same purchaser.
>
> Please confirm the above represents our verbal agreement by signing and returning such."

25. Dr Kahrmann's signature on the second page of the letter was accompanied by a manuscript note which reads:

> "My signature underneath is subject to this letter, a further letter from Marlin dated 4 May [*2012*] enclosed plus a letter from Marlin dated 22 June 2005, enclosed.
>
> I agree to this on the basis that I, Rainer C. Kahrmann, have a prior veto right to any property agents to be mandated on the sale of the property 38, Wilton Crescent including the Mews and including the respective Commission structures.
>
> I shall have the right to audit through Paul Bastin the composition of the respective costs submitted by Marlin and their justification."

This note was itself signed and dated 4 May 2012 by Dr Kahrmann.

26. The "Paul Bastin" referred to in the note was an employee and assistant of Dr Kahrmann's. The letter of 4 May 2012 from Marlin to Dr Kahrmann was written after a meeting between him and Mr Hawkins in Cologne on 18 April 2012. In it, Mr Hawkins said:

> "It was agreed that I would arrange to provide £140,000 (pounds sterling) to be secured by your interest in [*38 BMN*]. The costs in respect of this loan will be covered by you in due course. It was further agreed that repayment would be made within six months out of the refinancing of your own properties in England and France.
>
> …
>
> It was also agreed that you would sign and return a letter containing heads of terms of our verbal agreement in respect of funding/profit share in respect of No. 38 Wilton Crescent which was provided to you some time back.
>
> Please let me know if you disagree with any of the above."

27. The "letter containing heads of terms" was clearly a reference to the letter of 6 March 2012, which Dr Kahrmann presumably signed on 4 May 2012 after receiving, by fax, Marlin's letter of the same date.

28. There is a further point of some significance which emerges from Marlin's letter of 4 May 2012. Part of the agreement reached between Dr Kahrmann and Mr Hawkins at their meeting on 18 April was that Mr Hawkins would lend Dr Kahrmann £140,000, to be secured by Dr Kahrmann's interest in 38 BMN. The contemplated security must therefore have been Dr Kahrmann's equitable proprietary interest as a 50% co-owner of 38 BMN pursuant to the BMN Agreement and the acquisition of the freehold of that property by Themeplace in September 2006.

29. The other manuscript addition made by Dr Kahrmann to the letter of 6 March 2012 is on the first page, and reads:

> "P.S. In case of my unlikely death or incapacity to act Paul Bastin shall be entitled to enforce this agreement."

Beneath that, there is Dr Kahrmann's signature and the date, immediately followed by these words in the right hand margin: "This shall still be detailed in a separate agreement." Those words are written opposite the first five lines of the substantive typed text of the letter, running from "It appears sensible…" to the end of numbered paragraph 1 of the agreement. The question therefore arises whether these final words were meant by Dr Kahrmann to refer to the manuscript postscript immediately above them, or to the typed text adjacent to them. The judge made no finding on this point, so we are free to draw our own conclusions. It seems to me more probable that the words in the margin were meant to go with the manuscript postscript above them, but even if that is wrong, and Dr Kahrmann contemplated the preparation of a separate agreement to set out the verbal agreement recorded in the main text of the letter, I would certainly not infer that he thereby intended the main text to be legally ineffective so far as he was concerned unless and until the separate agreement were concluded. Any such inference would be at odds with the stated purpose of the letter, which was to record the terms of the verbal agreement between Dr Kahrmann and Mr Hawkins so that there would be a record of it if either of them were to die unexpectedly. It would also be difficult to reconcile with the written postscript, in which Dr Kahrmann purportedly authorised Paul Bastin "to enforce this agreement". Those words indicate to me that Dr Kahrmann considered the agreement, as it stood, to be legally binding and enforceable.

30. The judge made an explicit finding of fact, at [100], that:

> "there was an agreement between Dr Kahrmann and Mr Hawkins regarding 38 [*Wilton Crescent*]. The terms are recorded in the letter dated 6 March 2012. The terms included the division of the net profit made from the sale of the freehold of 38 [*Wilton Crescent*], following its acquisition from Grosvenor. The net profit was to be divided equally between Dr Kahrmann and Mr Hawkins."

31. The judge appears, however, to have considered that an agreement to share the net profit from the sale of the freehold of 38 Wilton Crescent meant that Dr Kahrmann and Mr Hawkins never intended to become equitable co-owners of that property, as they were

of 38 BMN. Thus, in his earlier observations on the letter of 6 March 2012, the judge said at [45]:

> "So, unlike the agreement of 2005 in respect of 38 BMN, Dr Kahrmann and Mr Hawkins did not agree to share the equitable interest in the freehold of 38 [*Wilton Crescent*]. Instead, they agreed to share equally the profit made from the sale of the freehold, net after deducting Marlin's expenses. There was also express acknowledgment that the two agreements were to be read together, suggesting that they were intended to be compatible."

32. The inference that the two agreements were intended to be compatible is indeed a very strong one, given the parties' agreement in the letter of 6 March 2012 that the two agreements "must be read in conjunction" and their explicit contemplation of the real possibility that both properties would be sold at the same time to the same purchaser. It would therefore have made little sense for their agreement in relation to the ownership of 38 Wilton Crescent to have differed materially from their agreement in relation to the ownership of 38 BMN. But if, as the judge seems to have thought, the Wilton Crescent Agreement was no more than a contractual profit-sharing agreement, involving no equitable co-ownership of the property itself, that would appear to lead to an implausible distinction between the arrangements agreed between them for the two properties. They had been equitable co-owners of 38 BMN since completion of the enfranchisement of that property in September 2006, but, in the judge's view, the Wilton Crescent Agreement was a mere profit-sharing agreement with no proprietary underpinning.

The judge's finding that the BMN Agreement was varied

33. The judge's solution to this apparent problem was to find that the BMN Agreement had been varied so as to place it upon the same footing as his interpretation of the Wilton Crescent Agreement. In this way, the desired compatibility between the two agreements would be obtained, although at the expense of the proprietary interest which on any view Dr Kahrmann had originally been intended to have in relation to the freehold of 38 BMN. The judge's findings of fact on this critical issue are contained in [101] to [104], which I need to set out in full:

> "101. Fourth, Dr Kahrmann and Mr Hawkins decided to amend their agreement regarding 38 BMN. Instead of the equitable interest in the freehold of 38 BMN being held jointly by them, they would split the profit made from the sale of the freehold.
>
> 102. There are pointers to this change of arrangement. The freehold of 38 BMN was acquired by Themeplace on 22 September 2006. Dr Kahrmann and Mr Hawkins recognised the potential value in Themeplace selling to the same purchaser the freehold in 38 BMN jointly with the freehold in 38 [*Wilton Crescent*], once acquired. The letter of 6 March 2012 expressly records such a possibility and that the agreement relating to 38 [*Wilton Crescent*] should be read in conjunction with that

> relating to 38 BMN. The same arrangement for both freeholds made sense.
>
> 103. Dr Kahrmann assigned his interests in 38 [*Wilton Crescent*] and 38 BMN in September 2005. Neither side offered any explanation for these assignments, save for Ms Harrison-Morgan's implausible theory. The assignment of the interest in 38 BMN to Mr Hawkins is not consistent with an intention to own the beneficial interest in that property jointly. On the other hand, it makes sense if Dr Kahrmann and Mr Hawkins had agreed that Mr Hawkins would arrange for the purchase of both freeholds through Mr Hawkins' nominee companies (at Mr Hawkins' expense). It is not credible that Dr Kahrmann would seek to assign his interests in 38 [*Wilton Crescent*] and 38 BMN without consideration. He certainly received consideration in relation to 38 [*Wilton Crescent*]: a half share in the profit realised from the sale of that property. It seems to me likely that he and Mr Hawkins agreed that Dr Kahrmann would likewise receive half the profit from the sale of 38 BMN.
>
> 104. An alignment of the agreements relating to the two properties is also consistent with Mr Hawkins' apparent view that there had been an agreement to share the profit from the sale of both properties, reflected for instance in Maxwell Winward's letter of 28 May 2015."

34. I will have to return to the judge's reasoning in the passage which I have just quoted. For now, I would make the following observations. First, the judge nowhere explains when, or in what circumstances, or by what means Dr Kahrmann and Mr Hawkins decided to amend their agreement in relation to 38 BMN. Secondly, the judge reached this conclusion without the benefit of any evidence (written or oral) from either of the parties to the BMN Agreement. Dr Kahrmann was of course dead, and Mr Hawkins was not called by either side to give evidence at the trial. Thirdly, I have difficulty in understanding why the judge thought that the assignment by Dr Kahrmann in September 2005 of his leasehold interest in 38 BMN (i.e. his interest in the Underlease, which included both properties) to Mr Hawkins was inconsistent with an intention to own the beneficial interest in the freehold of that property (once acquired) in equal shares. As the judge had himself earlier said, at [39], after rejecting Hilary's "implausible theory" that the assignments were made as an asset-divestment measure:

> "A more likely alternative reason is that the assignments were done so that Mr Hawkins could arrange (and pay for) the application for the freehold of 38 [*Wilton Crescent*], later done through his nominee company Cravecrest. Dr Kahrmann would be protected if there was also an agreement by which he retained an interest in the freehold once acquired…"

Although the judge was there referring to the projected application to enfranchise the freehold of 38 Wilton Crescent, the same reasoning must obviously have applied to the more immediate prospect of enfranchising the freehold of 38 BMN, not least because

the June 2005 letter itself explicitly recorded the parties' agreement that the "equitable interest of the property" was to be owned equally by Dr Kahrmann and Marlin.

The history of events from Dr Kahrmann's death until the sale of 38 Wilton Crescent and 38 BMN

35. After this excursus, I can now pick up the history of events after Dr Kahrmann's death. The judge made detailed findings of fact, at [59] to [78], which record the increasingly fraught negotiations which took place between Mr Hawkins, Hilary, Louise and Alice from August 2014 until, on 3 December 2014, an agreement for the sale of 38 Wilton Crescent and 38 BMN ("the Sale Agreement") was entered into between Cravecrest and Themeplace as vendors, 38 WC Ltd as purchaser, Hilary, the Kahrmann Sisters (i.e. Alice and Louise), Mr Hawkins and Marlin.

36. The main stages in the negotiations may be summarised as follows:

(1) By late August 2014, Mr Hawkins was becoming increasingly frustrated by the legal expenses incurred in relation to the dispute with Grosvenor, and the lack of progress in obtaining Hilary's agreement to vacate 38 Wilton Crescent. A meeting took place at 38 Wilton Crescent, attended by Mr Hawkins, Hilary, Louise, Alice and Mr Bastin, at which Mr Hawkins tried unsuccessfully to persuade Hilary to sign tenancy documents. Alice described the meeting as "heated, nasty and confrontational".

(2) Shortly afterwards, Alice met Mr Hawkins at a café in Parsons Green. The judge made no explicit findings about what transpired at this meeting, although he recorded various allegations made by Alice. It seems that Mr Hawkins at least broached the possibility of a new agreement whereby a share of the profits from the sale would go to Hilary, Alice and Louise, instead of to Dr Kahrmann's estate.

(3) The pressure on Mr Hawkins to arrange a quick sale increased when it was announced that the Chancellor of the Exchequer was due to give his autumn statement on 3 December 2014. It was widely expected that from midnight on that day the stamp duty paid by purchasers of high value residential properties would significantly increase, as indeed happened.

(4) Another meeting took place on 24 October 2014, again attended by Mr Hawkins, Hilary, Alice, Louise and Mr Bastin. Again, the judge made no explicit findings, but recorded some of the evidence of Alice and Louise as to what took place. There was evidently a discussion about the legality of an agreement between Hilary, Alice and Louise as to how to take and split their father's share of the profits on a sale. The meeting did not go well, and according to Alice, Hilary "stormed out" when Alice suggested that any payment made to Hilary should be held on trust for Max and Fred.

(5) On 16 November 2014, Mr Hawkins informed Hilary by email that his deadline for her to reach an agreement with Alice and Louise was "first thing" the following morning (Monday 17 November). The email continued:

> "From that moment on we will continue to prepare for the Supreme Court case and I will insist that the "Kahrmann" half of the proceeds go into the "Kahrmann Estate" with the resultant consequences. There will be no going back."

(6) On 17 November 2014, Louise emailed Mr Hawkins with the news that "an amicable agreement has been reached with Hilary and we agree with 50/50." Mr Hawkins replied: "Sense has prevailed… Thank you", but he was concerned that there should be consideration for the share of profit going to Louise and Alice:

> "…what is the consideration for this? Hilary is providing consideration for her 50% by signing a tenancy agreement and vacating – our solicitor will wish to know what the consideration is."

(7) The judge then made an important finding, at [69]:

> "The fiction adopted was that Alice and Louise lived with [*Hilary*] in Flats 1 and 2 at 38 [*Wilton Crescent*] and in consideration of the money paid to them they would give vacant possession of 38 [*Wilton Crescent*]. This later appeared in recitals (H) and (I) of the Sale Agreement. In reality Alice and Louise never lived at 38 [*Wilton Crescent*]."

(8) At the end of November 2014, Mr Hawkins' solicitors drew up the proposed Sale Agreement. Hilary, Alice and Louise agreed to be parties. They instructed a solicitor to advise them on the draft, but the solicitor did not receive it until 1 December, and in the event neither Alice nor Louise consulted him about the proposed sale. Hilary apparently took independent advice of her own, but the judge said he did not know when or from whom, or what the advice may have been.

(9) On 3 December 2014, the Sale Agreement was signed "almost literally at the last minute" at 11.58pm.

37. The judge made explicit findings, at [106] to [109], to the effect that:

(1) The profit-sharing agreement between Dr Kahrmann and Mr Hawkins in relation to both properties was known to Louise, Alice and Hilary before they signed the Sale Agreement, and they were probably told by Mr Hawkins' solicitors, Maxwell Winward, that the Sale Agreement was lawful;

(2) In the months leading up to 3 December 2014, all three of them had been "under pressure, sometimes considerable pressure from Mr Hawkins to agree to the sale", but Louise and Alice had not lost the ability to seek independent legal advice had they wanted to, and instead they chose not to do so;

(3) Each of them also had a sufficient understanding of the terms of the Sale Agreement to know that "the Estate was not going to be paid any part of the profit from the sale… and that instead they were going to be paid half"; and

> (4) Louise and Alice "retained genuine misgivings about signing the Sale Agreement on the evening of 3 December 2014", but "they overcame their doubts, signed the Sale Agreement and took the money."

38. It is unnecessary to describe the terms of the Sale Agreement in any detail. They are summarised by the judge, in terms which appear broadly accurate, at [82] to [87]. In short, Cravecrest and Themeplace agreed to sell Flat 2 (legal title to which was evidently by now vested in Cravecrest) and 38 BMN respectively to 38 WC Ltd, and 38 WC Ltd also agreed to buy 38 Wilton Crescent on the terms of the enfranchisement contract which had by now been largely agreed with Grosvenor, for the combined purchase price of £16 million (apportioned, as in the earlier draft sale agreement, as to £14 million for 38 Wilton Crescent, including Flat 2, and as to £2 million for 38 BMN). The enfranchisement part of the bargain was to be completed by 6 March 2015, when the amounts defined as the Completion Sum had to be paid to the sellers' solicitors (Maxwell Winward). The Completion Sum consisted of the agreed enfranchisement price of £6 million, various expenses, and £425,000 to redeem a charge on 38 BMN. These were all sums which had to be paid in order to put the sellers in a position to transfer both properties with vacant possession and free of incumbrances to the purchaser. In order to ensure vacant possession, it was also agreed that upon completion of the enfranchisement 38 WC Ltd would grant a tenancy of Flats 1 and 2 to Hilary, Alice and Louise at a peppercorn rent expiring no later than 31 May 2015, in the form set out in an annexure to the Sale Agreement.

39. Payment of the remainder of the £16 million purchase price would then be made on the later of 31 May 2015 and the date when vacant possession was given of the two Flats. As the judge said, these remaining payments in effect represented the profit on the deal, which was in principle agreed to be split equally between Mr Hawkins' companies on the one hand and Hilary, Louise and Alice on the other hand in the proportions which they had previously agreed. The payment to be made to Hilary was therefore equal to the payment to be made to the two Kahrmann sisters, amounting in each case to £2,203,344.51.

40. No payment was to be made to the estate of Dr Kahrmann, apart from a nominal premium of £1 referred to in the Enfranchisement Transfer: see recital (N) to the Sale Agreement, where Hilary, Louise and Alice purported to acknowledge and agree "that to the best of their knowledge and belief the Kahrmann Estate has no legal or beneficial interest in any part of the House or Flat save the right to receive the premium of £1 referred to in the Enfranchisement Transfer".

41. In the event, no tenancy was ever granted to Hilary or the Kahrmann sisters, but Hilary vacated 38 Wilton Crescent on 29 May 2015, and Alice and Louise had of course never lived there, despite the "fiction" reflected in the Sale Agreement. Final completion of the deal therefore took place on 29 May, and in due course Hilary, Alice and Louise received their shares of the profit in the agreed proportions.

42. Although final completion of the Sale Agreement took place on 29 May 2015 as I have described, Alice and Louise clearly had misgivings about its terms and the way in which their father's estate had been excluded from any share in the profit on the sale. Together with their mother, Christiane, they finally took advice from the solicitors who have represented them throughout these proceedings, Grosvenor Law. On 27 May 2015, two days before the final completion of the Sale Agreement, Grosvenor Law wrote to

Maxwell Winward asserting a claim on behalf of Dr Kahrmann's estate, and informing them that an application for a grant of representation to the estate was already in hand. Appropriate undertakings to preserve the position in the meantime were sought. In their reply the next day, Maxwell Winward alleged, among other things, that Dr Kahrmann had failed to repay the loan of £140,000 made to him by Mr Hawkins in May 2012, with the result that "Mr Hawkins considered that he was not bound by any profit sharing agreement at the time of Dr Kahrmann's death". It is enough to say that the judge was later to describe this as an "improbable contention" which was not repeated at the trial. The letter also alleged that it was Alice and Louise, not Mr Hawkins or his companies, who had insisted that the Kahrmann family's share of the profits should not accrue to their father's estate, but instead should be divided equally between them and Hilary.

43. On 28 May 2015, Grosvenor Law also wrote to Hilary, enclosing a copy of their letter to Maxwell Winward of 27 May and asserting a claim on behalf of Dr Kahrmann's estate to the money which Hilary was about to receive from the sale.

44. On 21 July 2015, a grant of letters of administration *ad colligenda bona* was made to Christiane and Alice, thereby constituting them Dr Kahrmann's personal representatives in England and Wales for the purpose of getting in the assets of his estate in this jurisdiction. At an unspecified date, Louise and Alice also arranged for their shares of the sale proceeds to be held to the order of the administrators.

45. On 19 August 2016, the present action was begun in the Chancery Division of the High Court by Christiane and Alice as administrators, seeking recovery from Hilary of the £2.2 million (approximately) which she had received.

The pleadings

46. The claimants' particulars of claim were settled by leading and junior counsel, Penelope Reed QC and Jordan Holland. Ms Reed QC (now leading Luke Harris) has also appeared for the appellant, Alice, in this court. Alice is now the sole English administrator of her father's estate, Christiane having died on 8 January 2019. For an intermediate period, however, including the trial below, the claimants' counsel was Ulick Staunton, although the same solicitors (Grosvenor Law) have acted for the administrators throughout.

47. As amended at trial, with permission granted by the judge, the particulars of claim set out the terms of the BMN Agreement and the Wilton Crescent Agreement, as evidenced in particular by the two letters from Marlin to Dr Kahrmann dated 22 June 2005 and 6 March 2012. It was alleged that both agreements were entered into around the same time, that is to say on or about 22 June 2005. In reliance on paragraph 5 of the former letter, it was said to be an express term of the BMN Agreement that the equitable interest in the freehold of that property would be owned by Dr Kahrmann and Marlin in equal shares. In the light of the second letter, which as I have said only came to light during disclosure in the action, it was also said to be a term of the Wilton Crescent Agreement that the equitable interest in the freehold of that property was to be owned in the same way, with the proceeds of any subsequent sale of either or both of the properties to be held beneficially as to 50% for Dr Kahrmann and 50% for Marlin and/or Mr Hawkins.

48. The particulars of claim then set out the history of events, largely as it was subsequently found by the judge, down to the conclusion of the Sale Agreement and the distribution of the net proceeds of sale. It was then averred that Cravecrest held 50% of the beneficial interest in 38 Wilton Crescent on trust for Dr Kahrmann, and Themeplace held 50% of the beneficial interest in 38 BMN on trust for him. The trusts were said to arise from the express shared common intention of Mr Hawkins and/or Marlin and Dr Kahrmann that the beneficial interest in the two properties would be so held. In the alternative, if the shared common intention was not express, it should be imputed and/or inferred. The payments made from the net proceeds of sale were referable to the beneficial interest in the two properties, and Cravecrest and Themeplace acted in breach of trust by effecting a transaction which purportedly extinguished Dr Kahrmann's beneficial interest. Various alternative or ancillary claims were also made, on the footing that the money paid to Hilary was trust money, including a claim for knowing receipt by her in circumstances which would make it unconscionable for her to retain the money, and a claim to follow and/or trace the trust monies into her hands. Finally, there was a claim to recover the money as "money had and received", although the basis of this claim was not elaborated.

49. Hilary's defence and counterclaim were settled by her counsel, Clifford Darton (now QC) and Faisel Sadiq. I will again refer to this pleading in its amended form. For present purposes, it is enough to note the following points. First, the BMN Agreement and the Wilton Crescent Agreement, if entered into as alleged, were said to be agreements for the sale of land or an interest in land within section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, and to be void for failure to comply with the provisions of that Act, since all the terms which the parties had expressly agreed were not incorporated into one document which had been signed by or on behalf of each of them. Furthermore, in relation to the Wilton Crescent Agreement, it would not be possible to rely on the exception for constructive trusts contained in section 2(5) of the Act, because "the alleged agreement for 50/50 beneficial ownership did not give rise to an immediate trust but related to the future acquisition of property" (paragraph 10C).

50. Secondly, Hilary alleged that she and her two children had occupied Flats 1 and 2 at 38 Wilton Crescent as their home for several years, and if Dr Kahrmann enjoyed a beneficial share in those flats, they had rights of occupation or rights to apply to protect their occupation which they could have asserted against him under Part IV of the Family Law Act 1996 or the Children Act 1989 (paragraph 17A). Accordingly, she would have been able to prevent or seriously delay the sale of the properties by remaining in occupation of Flats 1 and 2 and/or by asserting a right of occupation over those flats, and this would have been known to Mr Hawkins (paragraph 24). Hilary then pleaded, at paragraph 25.2, that:

> "The sum to be received by her was in consideration of the rights she had acquired in 38 Wilton Crescent and/or the right to assert these rights and remain in occupation of the property."

She admitted, however, that Alice and Louise "did not at any time occupy any part of 38 Wilton Crescent": paragraph 25.3.

51. Thirdly, with regard to the alleged "common intention" of Dr Kahrmann and Mr Hawkins, no such intention could be imputed or inferred because any arrangement between them "would have been a purely commercial arrangement": paragraph 33A.

52. Fourthly, because Hilary was in occupation of the two Flats and agreed to vacate them in consideration for the payment that she received, the Sale Agreement could not be "struck down as a sham": paragraph 34A.

53. Fifthly, if there was a breach of trust, any cause of action on behalf of Dr Kahrmann's estate must lie against Mr Hawkins and/or his companies: paragraph 34B.

54. Sixthly, there was nothing unconscionable about Hilary's receipt of monies under the Sale Agreement, because she provided good consideration in the form of her agreement to vacate Flats 1 and 2: paragraph 34G.

55. Hilary also had a counterclaim, relating to (a) the sale in about 2010 of a property called "Kandili" at Le Cannet in the South of France, and (b) a sum of £200,000 which she said she lent to Dr Kahrmann in 2012, having re-mortgaged a property of her own at 37 Wilton Crescent (next door to number 38). As pleaded in paragraph 45, Hilary's counterclaim was conditional upon her *not* being entitled to retain the £2.2 million paid to her from the proceeds of sale of the two properties. In that event, she claimed to recover half of the net proceeds of sale of Kandili and the loan of £200,000.

56. The claimants' reply and defence to counterclaim was originally settled by Ms Reed and Mr Holland, but it was subsequently amended on three occasions by Mr Staunton. The passages introduced by way of amendment included four paragraphs in response to Hilary's reliance on section 2 of the 1989 Act. It was averred that neither the BMN Agreement nor the Wilton Crescent Agreement was a contract for the sale of an interest in land, the former being an agreement to assign a notice of enfranchisement of 38 BMN, and the latter being an agreement to serve notice of enfranchisement of 38 Wilton Crescent and then assign the notice to a new company controlled by Marlin and/or Mr Hawkins on terms that following enfranchisement the property would be sold and Dr Kahrmann would be entitled to 50% of the net proceeds: see paragraphs 20 and 21. Paragraphs 22 and 23 then averred that the Wilton Crescent Agreement "was a profit sharing agreement" and not a trust of 38 Wilton Crescent, nor was it a contract for the sale of land or of an interest in land.

57. In relation to Hilary's alleged rights of occupation, it was said (again by way of amendment) that the statutory provisions upon which she relied conferred no beneficial interest in property or any rights of occupation which had any value: paragraph 27. Hilary's occupation was "merely as a tenant at will": paragraph 30. In paragraph 34, it was expressly stated not to be part of the claimants' case "that the sale agreement was sham".

The trial and the judgment below

58. The trial took place over five days in April 2018 and the judge handed down his reserved judgment on 24 July 2018. The main witnesses from whom the judge heard oral evidence were Louise and Alice for the claimants, and Hilary, the defendant. The judge found that both Louise and Alice, but particularly Alice, "were quite often emotional in cross-examination, giving some long answers which were not always to the point", but he was satisfied "that each was doing her best to explain events as she saw them": [30]. Two other witnesses called for the claimants gave disobliging evidence about Hilary's character, to which the judge wisely attached no weight. However, the judge formed the view during Hilary's cross-examination that "her

evidence was not always reliable", and she was "sometimes reluctant to give a clear answer to a straightforward question": [32].

59. As I have already mentioned, the person who conspicuously did not give evidence was Mr Hawkins: see [34], where the judge described him as "a key player in the various events".

60. The judge made his main findings of fact at [35] to [109] of the judgment. Those findings are incorporated in the account of the background, which I have already given.

61. The judge then set out the claimants' arguments, as he understood them to be advanced:

> "110. The Estate's first argument was that there was an agreement between Dr Kahrmann and Mr Hawkins that they should share the beneficial interest in both 38 BMN and 38 [*Wilton Crescent*]. The arrangement for both was aligned, but in accordance with what had been agreed for 38 BMN. Equity imposed a constructive trust on the properties. Immediately prior to the Sale Agreement Cravecrest and Themeplace had held the properties on trust for the Estate and Mr Hawkins in equal shares. After the sale the profit retained was likewise held on constructive trust for the Estate and Mr Hawkins. In breach of trust, Cravecrest and Themeplace had paid half the proceeds to [*Hilary*], Alice and Louise, rather than to the Estate. [*Hilary*] knew or ought to have known that her share, along with the share paid to Louise and Alice, should have gone to the Estate. Consequently [*Hilary*] held the money on constructive trust for the Estate and should now be required to pay the money to the Estate together with interest.
>
> 111. The second and alternative argument was that Dr Kahrmann and Mr Hawkins had agreed to split the profit from the sale of the properties. The Estate's half share of the profit included the payment to [*Hilary*]. Accordingly she had no entitlement to receive the payment or any part of the profit. [*Hilary*] took £2.2m as money had and received without consideration. She should pay the money to the Estate."

62. The judge then proceeded to reject both arguments, in a fairly short section of his judgment headed "Discussion" which runs from [112] to [117]. His principal reason for rejecting the first argument was based on his prior finding that, by the time of Dr Kahrmann's death, the agreement between him and Mr Hawkins in relation to both properties was no more than a profit-sharing agreement. As the judge put it, at the end of [112]:

> "The properties were never held on trust by Cravecrest and Themeplace for the Estate. The sole interest the Estate could claim in relation to 38 [*Wilton Crescent*] and 38 BMN was a right to claim half the profit from their sale."

63. The judge continued:

"113. I also reject the second argument. The Estate's case rests on [*Hilary*] having no entitlement to the payment of £2.2m. The payment was made by 38 WC Ltd. As between those two parties there was plainly consideration for the payment, namely that [*Hilary*] guaranteed that by the completion date 38 WC Ltd would acquire 38 [*Wilton Crescent*] with vacant possession, at least so far as she was concerned. It is possible that [*Hilary*] had no right in law to remain living at 38 [*Wilton Crescent*], despite her claim to the contrary. Any doubt over that could only go to the value of the consideration she was providing. But as is well established, the law does not inquire into the adequacy of consideration.

114. The Estate argues that the payment came from its share of the profit from the sale of the properties. That in my view is to treat the profit as if it consisted of materials indelibly marked: half to go only to the Estate and the other half to go only to Mr Hawkins. The Estate's claim to half the £8.8m profit was not inconsistent with [*Hilary*] being paid £2.2m by 38 WC Ltd. Also, while it is true that [*Hilary*] could have vetoed the Sale Agreement, it does not follow that if she had, the Estate would then have received half the profit. This was a matter solely in the control of 38 WC Ltd and Mr Hawkins – in practice probably just Mr Hawkins since it is likely that 38 WC Ltd would have agreed to distribute the £16m in whichever way Mr Hawkins suggested.

115. I have found that [*Hilary*], like Louise and Alice, had a sufficient understanding of the Sale Agreement when it was signed on 3 December 2015 to know that the Estate was not going to be paid half the profit and that instead she, Louise and Alice would receive half the profit between them. In my view that does not assist the Estate. [*Hilary*] was not in a position to know whether a failure to pay sums to the Estate would result in a breach of an agreement between Dr Kahrmann and Mr Hawkins. But if there was such a breach, this was a matter for the Estate and Mr Hawkins, not [*Hilary*]. Either way, [*Hilary*] was entitled as a separate matter to agree to vacate 38 [*Wilton Crescent*] in return for a payment of a little over £2.2m by 38 WC Ltd.

116. The Estate's real complaint is that there was a binding profit share agreement between Dr Kahrmann and Mr Hawkins, to which the Estate had become party, yet it received none of the profit. The Estate may or may not have had a sound cause of action against Mr Hawkins for breach of contract. Mr Hawkins was not a defendant and I was not required to decide whether he was in breach of the agreement. I state no view.

117. There were satellite arguments from each side, but these were all based on the assumption that the Estate's two main

> arguments set out above had a sound basis in fact. There followed satellite counter-arguments. It is not necessary to explore these. For the reasons I have given, I take the view that the Estate's pleaded case has no foundation on the facts."

64. The judge then dealt with a claim by the Estate to recover certain chattels, resolving it substantially in the claimants' favour. There is no appeal by Hilary from that conclusion. As to the counterclaim, the judge held that it fell away because of the conditional way in which it had been pleaded: see [55] above. As the judge noted at [124], Hilary's pleaded position was that "if she kept the £2.2m she would feel herself to have been adequately compensated for her half share in Kandili and the loan of £200,000". The judge also said, at [127], that he was in any event not satisfied that Hilary "had established a binding contract with regard either to the funds from the sale of Kandili or the £200,000 provided to Dr Kahrmann."

65. The judge's conclusions were reflected in his order dated 24 July 2018. He ordered the claimants to pay 85% of Hilary's costs, with an interim payment of £252,000 to be made by 7 August 2018. He also refused the claimants permission to appeal.

66. The claimants now appeal to this court with permission granted by Floyd LJ on 25 October 2018.

Issues on the appeal

67. A large number of issues are canvassed in the grounds of appeal (which run to nine pages) and in Hilary's respondent's notice (of eight pages). It would not in my view be helpful to analyse or summarise those documents in detail, not least because many of the issues overlap or are contingent on the determination of other issues. Hilary also contends that some of the arguments upon which Alice now wishes to rely are not open to her, on the basis that they were never pleaded and/or were abandoned at trial in circumstances where it would be unfair to permit them to be resuscitated. This objection is raised with particular force in relation to an argument for the imposition of a constructive trust based on the principles derived from Pallant v Morgan [1953] Ch 43 and developed in subsequent case law. Not only was a claim of this nature never pleaded, says Hilary, but reliance on it was abandoned by the claimants' then counsel in his closing oral submissions at trial.

68. I propose to begin, instead, by examining the sustained attack which Alice makes on the judge's findings (a) that the Wilton Crescent Agreement was a mere profit-sharing agreement, which involved no agreement or common understanding as to the shared ownership of the freehold interest in 38 Wilton Crescent, and (b) that the BMN Agreement was varied by agreement between Dr Kahrmann and Mr Hawkins so as to place it on the same non-proprietary footing as the Wilton Crescent Agreement. This attack provides the foundation for the lengthy first ground of appeal, which is deployed over some four pages under the heading "Beneficial ownership of the freeholds". It is only when this question has been resolved, in my judgement, that the remaining issues can sensibly be addressed.

What was the agreement between Mr Hawkins/Marlin and Dr Kahrmann in relation to the freehold interests in 38 BMN and 38 Wilton Crescent?

69. I start by reminding myself that the question which I am now examining is in essence one of fact. This is not a case where either agreement was embodied in a single written document, the construction of which would be a matter of law. Mr Darton was therefore right to remind us of the strict principles which normally prevent an appellate court from interfering with findings of fact made by a trial judge. In short, in the absence of any material error of law or approach, a finding may only be successfully challenged if it is unsupported by any evidence, or if it is one that no reasonable judge could have reached.

70. Those principles are now very familiar, and supported by a great deal of authority at the highest level: see, for example, the judgment of Lord Reed JSC in Henderson v Foxworth Investments Ltd [2014] UKSC 41, [2014] 1 WLR 2600, at [62] and [67].

71. The appropriate starting point must in my view be the BMN Agreement, both because it probably came first chronologically, and because the judge clearly considered that the letter of 22 June 2005 contained an accurate record of its terms. It is material to note, in this connection, that although the full formalities of witnessed signatures and exchange of copies do not seem to have been complied with, the copy of the letter in evidence had been drafted by Mr Hawkins, and Dr Kahrmann was content to append his signature to it without amendment. Paragraph 5 of the terms provided explicitly that "the equitable interest of the property" was to be owned as to 50% by Dr Kahrmann and 50% by Marlin. Moreover, the words "the property" must have included, at least, the freehold of 38 BMN, because the first part of paragraph 5 obliged Dr Kahrmann to assign "the benefit of the notice of claim *for the freehold*" of 38 BMN to a new UK company. Any possible doubt on this point is removed by paragraph 10, which provided (again with my emphasis):

> "Marlin Securities Limited will deal with the eventual banking of the property *when the freehold is purchased*.
>
> *If at that point* more equity is required over the accrued rents and the Marlin Securities Limited loan of £75,000 then these further monies are to be provided on a 50/50 basis between the *two equitable owners*, Rainer Kahrmann and Marlin Securities Limited."

72. Thus it was clearly intended that Dr Kahrmann and Marlin were to be the equitable owners of the freehold once it was purchased. I also note at this point that it has always been common ground that no distinction is to be drawn in this context between Mr Hawkins personally and any of his companies.

73. It is also relevant to consider the "benefit of the notice of claim", which the parties agreed would be assigned by Dr Kahrmann to a new company. The effect of service of a notice of a tenant's claim under the 1967 Act is that the landlord and tenant become bound to grant and accept the freehold of the house and premises for an estate in fee simple absolute, subject to the tenancy and "tenant's incumbrances" (as defined), but otherwise free of incumbrances: see section 8(1). By virtue of section 5(1), the rights and obligations of the landlord and tenant arising from the notice "shall inure for the

benefit of and be enforceable against them, their executors, administrators and assigns to the like extent (but no further) as rights and obligations arising under a contract for a sale or lease freely entered into between the landlord and tenant…". It follows that the benefit of the notice is in principle transmissible and assignable in the same way as the benefit of a contract for the sale of land. However, subsection (2) then provides that:

> "Notwithstanding anything in subsection (1) above, the rights and obligations there referred to of a tenant shall be assignable with, but not capable of subsisting apart from, the tenancy of the entire house and premises; and if the tenancy is assigned without the benefit of the notice… the notice shall accordingly cease to have effect…"

It is therefore clear that the benefit of the notice may only be assigned with the tenancy, with the consequence that any purported assignment of the benefit of the claim separately from an assignment of the tenancy would be ineffective and (presumably) void.

74. We do not know what steps were in fact taken to effect the enfranchisement of 38 BMN, although it is common ground that the enfranchisement took place and the freehold of the property was vested in Themeplace. If there was a valid assignment by Dr Kahrmann of the benefit of the notice of claim to Themeplace, he must have assigned his existing long tenancy of 38 BMN to Themeplace at the same time so as to comply with section 5(2). Alternatively, it may be that the separate assignment of the benefit of the claim apparently contemplated by paragraph 5 of the BMN Agreement never took place, or that there was a purported assignment which was ineffective. The relevant point for present purposes, however, is that the benefit of the notice of claim, or (to put it differently) the benefit of the right to enfranchise once a notice of claim had been given, was clearly recognised by the 1967 Act as a proprietary interest akin to the benefit of a contract for the sale of the freehold by Grosvenor to Dr Kahrmann. This interest was in principle freely assignable, subject to the restriction in section 5(2). In those circumstances, it seems to me an inescapable inference that the parties must have intended the benefit of the claim to be held by Dr Kahrmann pending completion of the transaction upon the same trusts as they had agreed the freehold would be held, that is to say in trust for himself and Marlin in equal shares.

75. I now turn to the acquisition of the freehold of 38 Wilton Crescent and the Wilton Crescent Agreement. The acquisition was made pursuant to the provisions of the 1993 Act, Chapter I of which confers on qualifying tenants of flats contained in premises to which the Chapter applies the right "to have the freehold of those premises acquired on their behalf" by a nominee purchaser appointed on their behalf, at a price determined in accordance with Chapter I: see section 1(1) of the 1993 Act, which defines that right as "the right to collective enfranchisement". The statutory procedure is set in train by the giving of a notice under section 13(1), defined as "the initial notice", by the requisite number of qualifying tenants of flats contained in the premises. The initial notice has to contain the information specified in section 13, including details of any superior leasehold interests proposed to be acquired together with the freehold, the proposed purchase price for each of those interests, and the name of the nominee purchaser. By virtue of section 13(11):

> "Where a notice is given in accordance with this section, then for the purposes of this Chapter the notice continues in force as from the relevant date –
>
> > (a) until a binding contract is entered into in pursuance of the notice, or an order is made under [*specified provisions*] providing for the vesting of interests in the nominee purchaser;
>
> …"

76. The role of the nominee purchaser is set out in section 15(1):

> "The nominee purchaser shall conduct on behalf of the participating tenants all proceedings arising out of the initial notice, with a view to the eventual acquisition by him, on their behalf, of such freehold and other interests as fall to be so acquired under a contract entered into in pursuance of that notice."

It is clear from this provision (among others) that the giving of the initial notice, unlike the giving of a notice of claim under the 1967 Act, does not give rise to an immediate contract, but rather sets in train a statutory process designed to culminate in a contract entered into pursuant to the notice.

77. Section 21(1) of the 1993 Act obliges the reversioner (in the present case, Grosvenor) to give a counter-notice to the nominee purchaser by the date specified in the initial notice. The counter-notice must comply with one of the requirements in subsection (2), the first of which is to "state that the reversioner admits that the participating tenants were on the relevant date entitled to exercise the right to collective enfranchisement in relation to the specified premises". In that case, the counter-notice must also state (broadly) which of the proposals contained in the initial notice are not accepted, and make counter-proposals. The Act then lays down, as one would expect, detailed machinery for the resolution of any disputes which cannot be settled by agreement. It was this machinery which led to the Cravecrest litigation to which I have already referred.

78. It is common ground that the initial notice in the present case was given on 13 March 2009. The judge said, at [42], that the notice was given by Cravecrest, but with respect to him that cannot be right. The notice had to be given by the requisite number of qualifying tenants, who at that date were Dr Kahrmann in respect of Flat 1, a company associated with Dr Kahrmann called Jacamar Investments and Properties Limited ("Jacamar") in respect of Flat 2, and a company called Vowden Investments Limited ("Vowden") in respect of Flat 3. The participating tenants who served the notice were Dr Kahrmann and Jacamar. They were entitled to do so because they constituted a majority of the three qualifying tenancies. Cravecrest was the nominee purchaser designated to act on their behalf. Details of the relevant leasehold structure as at that date may conveniently be found in the decision of the Upper Tribunal in the Cravecrest case, *loc.cit.*, at [4] to [6].

79. It is also common ground, as I have said, that on 29 May 2009, a counter-notice under section 21 of the 1993 Act was given by Grosvenor admitting the right to collective enfranchisement of the participating tenants.

80. I have already set out the terms of the Wilton Crescent Agreement as evidenced by the letter dated 6 March 2012 from Mr Hawkins to Dr Kahrmann which was signed by both of them on 4 May 2012. The judge made no finding as to when the agreement was originally made, but the letter itself described it as "our verbal agreement of some long standing". The strong probability, in my view, is that it was made before Dr Kahrmann transferred his beneficial interest in Flats 1 and 2, and in the (superior) Underlease, to Mr Hawkins on 22 September 2005, or in other words at around the same time as the BMN Agreement (as pleaded by the claimants). I reach this conclusion for a number of reasons. First, the judge found, at [36], that the initial idea discussed between Dr Kahrmann and Mr Hawkins was to acquire the freeholds of both properties so that they could be offered to a purchaser as a combined unit. This plan must therefore have been formulated, at least in general terms, before the BMN Agreement was finalised on or before 22 June 2005. Secondly, the judge found that the probable reason for the assignments made by Dr Kahrmann to Mr Hawkins on 22 September 2005 was to enable Mr Hawkins to arrange, and pay for, the application for the freehold of 38 Wilton Crescent: see the judgment at [39]. The judge added (*ibid*) that "Dr Kahrmann would be protected if there was also an agreement by which he retained an interest in the freehold once acquired and/or the proceeds derived from its sale." Dr Kahrmann was an experienced businessman, and it seems to me implausible that he would have parted with the beneficial interest in Flats 1 and 2 and the Underlease to Mr Hawkins without the protection of such an agreement already being in place. If that is right, the only candidate for such an agreement, on the available evidence, is the Wilton Crescent Agreement. Indeed, this seems to have been the judge's own thinking at [103], where he said it was "not credible that Dr Kahrmann would seek to assign his interests in 38 [*Wilton Crescent*] and 38 BMN without consideration."

81. The next question is whether the judge was right to conclude that, unlike the BMN Agreement, the Wilton Crescent Agreement was no more than a profit-sharing agreement. To my mind, there are two obvious difficulties with this conclusion. The first is that an agreement between Mr Hawkins and Dr Kahrmann to share the profits made on a future sale of the freehold interest in 38 Wilton Crescent would not in any way be incompatible with an agreement, or common intention, that prior to the sale they should be beneficial owners of the freehold in equal shares. On the contrary, a right to share equally in the net proceeds of sale is one of the fundamental characteristics of beneficial ownership of land in equal shares. Indeed, before the abolition of the doctrine of conversion by the Trusts of Land and Appointment of Trustees Act 1996, the interests of beneficial co-owners of land could only take effect under a trust for sale as interests in the proceeds of sale of the relevant land: see sections 34 and 35 of the Law of Property Act 1925.

82. The second difficulty is that the parties explicitly intended the Wilton Crescent Agreement to be read in conjunction with the BMN Agreement, because of the likelihood that both properties would be sold together. In those circumstances, as the judge rightly recognised, it would make no sense for the ownership arrangements in relation to 38 Wilton Crescent to differ from those for 38 BMN, particularly as 38 Wilton Crescent was much the larger and more valuable of the two properties. The

judge nowhere explains why Dr Kahrmann might have been willing to content himself with only a contractual right to share equally in the proceeds of sale of 38 Wilton Crescent, when he already had a proprietary right to beneficial co-ownership of 38 BMN.

83. If the judge had taken these considerations fully into account, and if he had not wrongly perceived there to be some conflict between a right to share equally in the proceeds of sale and equitable co-ownership in equal shares, I am driven to the conclusion that the only finding he could reasonably have made is that Mr Hawkins and Dr Kahrmann intended their ownership arrangement to be the same for 38 Wilton Crescent as it already was for 38 BMN. Nothing in the letter of 6 March 2012 is incompatible with such a finding, while if that letter is read together with the earlier letter of 22 June 2005, as the parties explicitly intended it to be, the conclusion is to my mind inescapable.

84. It must also follow, in my judgment, that the judge's finding that the BMN Agreement had been varied in such a way as to make it conform to his mistaken view of the effect of the Wilton Crescent Agreement cannot be supported. I have already drawn attention to some of the difficulties inherent in the judge's reasoning in the judgment at [102] to [104]: see [34] above. These points were elaborated by counsel for Alice in their written and oral submissions to us, but I need not spend further time examining them. Once it is appreciated that the supposed variation was a contrived solution to a non-existent problem, any foundation for it falls away and the "pointers" relied upon by the judge can be seen to have little or no probative force. Indeed, one of the main factors relied upon by the judge, namely the desirability of aligning the agreements relating to the two properties, points strongly away from his own conclusion once it is recognised that a right to share equally in the net profits of land is a normal incident of equal ownership of the land.

85. If, as I would infer, the parties intended their proprietary rights under the Wilton Crescent Agreement to mirror as far as possible their proprietary rights under the 38 BMN Agreement, what was the position in relation to 38 Wilton Crescent before a contract to purchase the freehold and superior leasehold interests was made with Grosvenor? As I have pointed out, the position differs from that under the 1967 Act in that the giving of the initial notice under section 13 does not bring into existence an immediate statutory contract with the reversioner. On the other hand, the 1993 Act expressly states that "the right to collective enfranchisement" is conferred on the majority of qualifying tenants who give the notice, and that the notice will then continue in force until a binding contract is entered into in pursuance of it, or a vesting order is made, or the notice otherwise ceases to have effect: see section 13(11). Section 14(1) then defines "the participating tenants" as the qualifying tenants by whom the initial notice is given, and the remainder of section 14 contains provisions whereby (broadly speaking) assignees of the long lease of a participating tenant, including his personal representatives or trustee in bankruptcy, may elect to participate in the proposed acquisition, in which case an appropriate notice must be given by the nominee purchaser to the reversioner, and the existing arrangements made between the nominee purchaser and the participating tenants will then have effect with the necessary modifications.

86. In the light of these provisions, I would accept the submission of counsel for Alice that the right to collective enfranchisement is a form of statutory property which can be held in trust, and that the parties must have intended the benefit of that right to be held by

the participating tenants for the time being on the same trusts as it was agreed the freehold would be held, that is to say in trust for Dr Kahrmann and Mr Hawkins (or his companies) in equal shares. Whether or not that is correct, I see no reason to doubt that, once a contract was concluded between the nominee purchaser (Cravecrest) and Grosvenor, it must have been intended by Dr Kahrmann and Mr Hawkins that the benefit of the right to enfranchise would then be held by Cravecrest (on behalf of Mr Hawkins) upon those trusts. We do not know exactly when the enfranchisement contract was finally concluded between Cravecrest and Grosvenor, but I would infer that it must have been no later than 12 December 2014. By virtue of paragraph 14.7, the Sale Agreement was conditional upon Cravecrest entering into the enfranchisement contract by that date (defined as "the Deadline") and there is nothing to suggest that the Deadline was not adhered to. Furthermore, by the date of the Sale Agreement on 3 December 2014, the price payable upon enfranchisement had already been agreed in principle with Grosvenor: see recital (D).

The remaining issues

87. In view of the conclusions which I have reached about the two property agreements, the remaining issues seem to me to fall into place without undue difficulty. The principal stages in the analysis are in my opinion as follows.

88. The main basis upon which Alice puts her case is an express common intention constructive trust, founded upon the terms of the two agreements. In respectful disagreement with the judge, I have concluded that Dr Kahrmann and Mr Hawkins at all material times shared an express common intention that the freehold of each property would be owned by them in equal shares beneficially upon its acquisition from Grosvenor. I have also inferred that they intended the same arrangement to apply in the meantime to (a) the statutory contract brought about by the giving of the notice of claim for 38 BMN under the 1967 Act, and (b) the contract made between Cravecrest and Grosvenor for the purchase of the freehold and superior leasehold interests in 38 Wilton Crescent on or before 12 December 2014.

89. Dr Kahrmann acted to his detriment, in reliance on the express and inferred agreed common intention of Mr Hawkins and himself, by (a) permitting Mr Hawkins to negotiate the enfranchisement of the two properties, (b) assigning his beneficial interests in Flats 1 and 2 and the Underlease to Mr Hawkins on 22 September 2005, and (c) leaving it to Mr Hawkins to arrange the onward sale of the two properties with vacant possession by Themeplace and Cravecrest to an outside purchaser, 38 WC Ltd, for a combined price of £16 million.

90. The equitable proprietary interest of Dr Kahrmann in the statutory contract to acquire the freehold of 38 BMN may be traced into the freehold of that property when it was vested in Themeplace. Alternatively, and in any event, an express constructive trust of the freehold arose upon its acquisition by Themeplace. In either case, the equitable interest may then be traced into £2 million of the £16 million purchase price paid by 38 WC Ltd pursuant to the Sale Agreement.

91. In a similar way, Dr Kahrmann's equitable proprietary interest in the contract concluded between Cravecrest and Grosvenor for the enfranchisement of 38 Wilton Crescent on or before 12 December 2014 may be traced into the remaining £14 million of the purchase price paid by 38 WC Ltd pursuant to the Sale Agreement.

92. Finally, the £2.2 million eventually paid to Hilary itself forms a traceable part of the proceeds of sale under the Sale Agreement. It represents the share of the net profit from the sale which she had purported to agree with Louise, Alice and Mr Hawkins would be paid to her, ostensibly in return for giving vacant possession, instead of to Dr Kahrmann's estate. Dr Kahrmann's estate is entitled to assert his equitable right to that portion of the net proceeds of sale in Hilary's hands, because she cannot claim to be a bona fide purchaser for value without notice of the estate's proprietary claim to the money.

93. I must now explain in a little more detail how these stages in the analysis work, and deal with the objections to it which are made on Hilary's behalf.

(a) The common intention constructive trusts

94. In relation to 38 BMN, there was (as the judge found) an express agreement between Dr Kahrmann and Mr Hawkins relating to the future beneficial ownership of the freehold by them in equal shares. This agreement could not take effect as an immediate trust, because the freehold was future property which would be acquired only if and when a successful claim to enfranchise was made by Dr Kahrmann under the 1967 Act and the freehold became vested in Mr Hawkins or one of his companies. There was no existing property to which a trust could attach. Nor could the agreement take effect as a valid contract relating to the future ownership of the freehold when it was acquired, because any such contract would be void for failure to comply with the formal requirements of section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989. But there is no reason, as I shall explain (see [95] to [111] below), why the agreement could not give rise to an equitable interest in the form of a common intention constructive trust once Dr Kahrmann had relied and acted on it, and the freehold of the property had become vested in Themeplace on 22 September 2006. The constructive trust would be of the character described by Lord Bridge in Lloyds Bank Plc v Rosset [1991] 1 AC 107 at 132E-G. Thereafter, the court would have intervened, at the instance of Dr Kahrmann, if Mr Hawkins had (through Themeplace) sought to deny or act inconsistently with the trust during his lifetime. The trust is properly described as a constructive one, operating on the conscience of Mr Hawkins, because no formal declaration of trust of the freehold was ever executed by Themeplace. It may also be described as a common intention constructive trust, because its content reflects the common intention (express or inferred) of Dr Kahrmann and Mr Hawkins, as evidenced in particular by the letter of 22 June 2005.

95. As it is put by the authors of Lewin on Trusts, 19th edition, at paragraph 9-074:

> "The interest to be taken under an express agreement, arrangement or understanding by the party who is not the legal owner may be either defined or undefined. Where there is an express agreement that the claimant is to have some defined interest in the property, it will, of course, be necessary to have recourse to the law concerning common intention trusts only where the failure to comply with some formal requirement (section 53(1)(b) of the Law of Property Act 1925 in the case of land) prevents the agreement from taking effect as an express trust. If the parties agreed that the claimant should have some defined share, effect will be given to that agreement…"

96. In view of my conclusions on the first ground of appeal, the constructive trust of 38 BMN which I have described remained in place until Dr Kahrmann's death. Following the grant of administration to his English estate, his beneficial interest under the trust vested in his administrators, and following the death of Christiane it is now vested in Alice alone. Contrary to the judge's finding, there was never a variation of the 38 BMN Agreement which replaced Dr Kahrmann's beneficial interest in the property under the constructive trust with a mere contractual right to 50% of the net proceeds of sale.

97. The analysis in relation to 38 Wilton Crescent is similar, once it is appreciated that the judge ought to have found that the Wilton Crescent Agreement was not a mere profit-sharing agreement, but was intended to mirror the proprietary aspects of the 38 BMN Agreement. If, as I have inferred, the Wilton Crescent Agreement was made at around the same time as the 38 BMN Agreement and before Dr Kahrmann's assignments on 22 September 2005, there was again no property then in existence to which the agreement for beneficial co-ownership of the freehold could attach. But the express agreement between Dr Kahrmann and Mr Hawkins, which Dr Kahrmann acted upon to his detriment by making the assignments, gave rise to an equity in his favour which attached (at the latest) to the enfranchisement contract entered into between Cravecrest and Grosvenor on or before 12 December 2014. If necessary, I would also hold that the equity had previously attached to the statutory right of collective enfranchisement conferred on the participating tenants (Dr Kahrmann and Jacamar), and exercisable by them through the nominee purchaser Cravecrest, when the initial notice was given by them on 13 March 2009. In any event, once the enfranchisement contract with Grosvenor had been concluded in December 2014, Cravecrest held the benefit of that contract on trust as to 50% for Dr Kahrmann's estate. That beneficial interest can then be traced into the net proceeds of sale of 38 Wilton Crescent, and the share of those net proceeds eventually paid to Hilary.

(b) Is the constructive trust analysis available in a commercial context?

98. On behalf of Hilary, Mr Darton QC submits that an analysis of the kind which I have outlined is not available where the parties are in a commercial relationship. He relies on two strands of authority in support of this submission. The first strand relates to the development in modern times of the law of common intention constructive trusts in the domestic context, where in response to changing social and economic conditions the courts have developed new techniques for ascertaining the shared intentions of parties who acquire a property as a home to live in. This line of authority stems from the landmark decision of the House of Lords in Stack v Dowden [2007] UKHL 17, [2007] 2 AC 432, as subsequently clarified by the Supreme Court in Jones v Kernott [2011] UKSC 53, [2012] 1 AC 776. It is well established that the principles which the courts have developed in domestic contexts of that kind should not normally be applied to cases where property is jointly purchased as an investment: see, for example, Laskar v Laskar [2008] EWCA Civ 347, [2008] 1 WLR 2695, at [17] per Lord Neuberger MR.

99. I do not doubt that special considerations apply to the purchase of a home by co-habiting parties, and cognate transactions. But my analysis in the present case does not depend on any special features of such cases. The common understanding between Dr Kahrmann and Mr Hawkins was a matter of express agreement between them, at least in relation to the future ownership of the two freeholds. On the strength of that express agreement, I have been prepared to infer the existence of a similar understanding between them in relation to the contractual rights arising under the 1967 and 1993 Acts.

But that is very different from the inference or imputation of a common intention retrospectively ascertained by examination of the whole course of conduct between co-habiting parties over many years, of the kind now routinely undertaken by the courts in a domestic context. There is no reason why constructive trusts of a traditional kind may not arise in a commercial context. As the authors of Lewin observe at paragraph 9-064, citing the decision of this court in Agarwala v Agarwala [2013] EWCA Civ 1763, [2014] WTLR 373:

> "An express agreement, relied on to the detriment of the party claiming a beneficial interest, may found an interest under a common intention constructive trust outside the scope of the domestic consumer context."

100. I would also add that the present case is, in some respects, of an intermediate character. 38 Wilton Crescent was, of course, Dr Kahrmann's London home where he lived for many years, first with Christiane and her children and later with Hilary and the twins. Nor do I believe it to be disputed that Mr Hawkins was a neighbour of his in Wilton Crescent, as well as a business associate.

101. The second line of authority relied on by Mr Darton stems from the discussion of the doctrines of constructive trust and proprietary estoppel by the House of Lords in Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55, [2008] 1 WLR 1752. In a later case in the Court of Appeal raising similar issues, Herbert v Doyle [2010] EWCA Civ 1095, [2011] 1 EGLR 119, the leading judgment was given by Arden LJ (as she then was). After emphasising the need for "completeness of agreement with respect to an interest in property" where the doctrine of constructive trust is invoked in a commercial context, Arden LJ said, at [57], that there was a "common thread" running through the speeches of Lord Scott and Lord Walker in Cobbe, which she identified in these terms:

> "if the parties intend to make a formal agreement setting out the terms on which one or more of the parties is to acquire an interest in property, or, if further terms for that acquisition remain to be agreed between them so that the interest in property is not clearly identified, or if the parties did not expect their agreement to be immediately binding, neither party can rely on constructive trust as a means of enforcing their original agreement."

More recently, that passage has been endorsed by this court in the context of Pallant v Morgan equities: see Generator Developments v Lidl UK GMBH [2018] EWCA Civ 396, [2018] 2 P. & C. R. 7, at [69] per Lewison LJ.

102. Mr Darton argued that the present case is one of the type described by Arden LJ, because Dr Kahrmann's marginal addition to the letter of 6 March 2012 ("This shall still be detailed in a separate agreement") showed that, so far as he was concerned, the agreement recorded in the letter was not intended to be immediately binding, and was to be incorporated in a future formal agreement. I have already given my reasons for rejecting this contention: see [29] above. Even if those words are to be read as referring to the main text of the agreement, rather than the postscript immediately above them, it seems clear to me that Dr Kahrmann must have intended the main text to be immediately binding.

103. Once that argument falls away, any objection based on lack of certainty seems to me to be without substance. Each agreement related to the proposed enfranchisement of the relevant property to be undertaken by Mr Hawkins through his companies, and provided for the beneficial interest in the freehold, once acquired, to be owned by Dr Kahrmann and Mr Hawkins (or his companies) in equal shares. The minor matters raised by Dr Kahrmann in his manuscript addendum on the second page of the letter of 6 March 2012 did not in my view impinge on or qualify his assent to those key features of the deal relating to 38 Wilton Crescent, which (I would infer) he had agreed with Mr Hawkins some seven years previously, and which it was the purpose of the March 2012 letter to record in case either of them were to die or be incapacitated. None of this was incompatible with an intention that ancillary matters might remain to be dealt with in a separate agreement.

104. Similarly, while the parties may well have envisaged that their agreement should be notarised, as the opening words of the March 2012 letter suggest, I do not read the letter as negating any intention to enter into legal relations until that formality was complied with. On the contrary, the evident purpose was to have a written record, signed by both of them, of their long-standing oral agreement, so that its basic terms should not be in doubt if either of them were to die or be incapacitated.

(c) Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989

105. Section 2(1) of the 1989 Act provides that:

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

By virtue of subsection (5):

> "…nothing in this section affects the creation or operation of resulting, implied or constructive trusts."

106. I am prepared to accept, on the rather slender authority of Singh v Beggs (1996) 71 P. & C. R. 120, which was a decision of a two-judge Court of Appeal refusing an application for permission to appeal at a renewed oral hearing, that section 2(1) of the 1989 Act applies to a contract for the sale or other disposition of a future interest in land, at a time when neither party to the agreement has any proprietary interest in that land. The case concerned an oral agreement between two tenants of separate flats in a residential property on the price to be paid for the plaintiff's flat if negotiations then in progress for the purchase of the freehold interest in the property from the landlord came to fruition. The plaintiff said it was agreed she would be offered a long lease of her flat for £10,000, whereas after the acquisition of the freehold had been completed she was offered a lease of her flat for £24,000. The acquisition of the freehold, I should add, was negotiated on a commercial basis and did not involve the enfranchisement of any leasehold interests.

107. Mr Darton submits, on the strength of Singh v Beggs, that both the BMN Agreement and the 38 Wilton Crescent Agreement fall within the scope of section 2(1) with the consequence that they are prima facie void, because (as is common ground) neither agreement complies with the formal requirements of the section. I will assume that Mr Darton is correct in this submission. On the analysis which I favour, however, this would not matter, because in my view each agreement, and the constructive trust to which it gave rise, falls squarely within the saving in subsection (5) for "the creation or operation of… constructive trusts". I am unable to accept Mr Darton's further submission that, where a constructive trust relates to future-acquired property, it would be contrary to the public policy of the 1989 Act to permit the validity of the agreement upon which the constructive trust is founded to be saved by subsection (5). I would hold, on the contrary, that the clear intention of Parliament in enacting the 1989 Act, in order to implement three reports of the Law Commission, was to preserve the existing operation of the law of resulting, implied or constructive trusts.

108. This was clearly explained by Beldam LJ (a former Chairman of the Law Commission) in Yaxley v Gotts [2000] Ch. 162 at 188-193. As he said, at 191A:

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

109. Beldam LJ added at, 193C:

> "For my part I cannot see that there is any reason to qualify the plain words of section 2(5). They were included to preserve the equitable remedies to which the commission had referred. I do not think it inherent in a social policy of simplifying conveyancing by requiring the certainty of a written document that unconscionable conduct or equitable fraud should be allowed to prevail.
>
> In my view the provision that nothing in section 2 of the Act of 1989 is to affect the creation or operation of resulting, implied or constructive trusts effectively excludes from the operation of the section cases in which an interest in land might equally well be claimed by relying on constructive trust or proprietary estoppel."

110. Clarke LJ agreed with the judgment of Beldam LJ: see 180G and 182D. He also agreed with what Robert Walker LJ (who gave the leading judgment) had said about the saving in section 2(5), at 178 to 180. It is particularly instructive to note what Robert Walker LJ said at 180C-E:

> "To recapitulate briefly: the species of constructive trust based on "common intention" is established by what Lord Bridge in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 132, called an "agreement, arrangement or understanding" actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights. Section 2(5) expressly saves the creation and operation of a constructive trust.
>
> I cannot accept that the saving should be construed and applied as narrowly as Mr Laurence contends. To give it what I take to be its natural meaning, comparable to that of section 53(2) of the Law of Property Act 1925 in relation to section 53(1), would not create a huge and unexpected gap in section 2. It would allow a limited exception, expressly contemplated by Parliament, for those cases in which a supposed bargain has been so fully performed by one side, and the general circumstances of the matter are such, that it would be inequitable to disregard the claimant's expectations, and insufficient to grant him no more than a restitutionary remedy.
>
> To give the saving a narrow construction would not to my mind be a natural reading of its language."

111. For completeness, I should mention that in Stack v Dowden, *loc.cit.*, Lord Walker (as he had by then become) resiled from his virtual assimilation of constructive trusts and proprietary estoppel in the passage which I have quoted, at 180C: see [2007] 2 AC 432 at [37]. We were also referred by Mr Darton to the decision of this court in Kinane v Mackie-Conteh [2005] EWCA Civ 45, [2005] WTLR 345, where a common intention constructive trust was held to arise on the facts found by the trial judge, with the consequence that the claimant could rely on section 2(5) of the 1989 Act to enforce a security agreement which admittedly failed to comply with section 2(1). There are interesting passages in the judgments of Arden and Neuberger LJJ, but for present purposes they add little of substance to the principles which I have derived from the decision of this court in Yaxley v Gotts.

(d) Tracing

112. On the assumption that Dr Kahrmann had a valid proprietary interest in the freehold of 38 BMN, and that his estate had a valid proprietary interest in the contract to acquire the freehold of 38 Wilton Crescent, I do not understand it to be disputed by Hilary that those interests can be traced in equity into the proceeds of sale paid by the purchaser, 38 WC Ltd, under the Sale Agreement, and thence into the £2.2 million paid to Hilary, subject to two arguments which I will need to consider. The first argument is that the

£2.2 million was received by Hilary under a separate contract which she had made with 38 WC Ltd to give vacant possession of 38 Wilton Crescent in return for payment of that sum. The second argument, linked to the first, is that she was a bona fide purchaser of value in relation to the £2.2 million, and had no notice of the estate's equitable interest in the money.

113. As Lord Millett explained, with his customary lucidity, in Foskett v McKeown [2001] 1 AC 102 at 127B:

> "The process of ascertaining what happened to the plaintiffs' money involves both tracing and following. These are both exercises in locating assets which are or may be taken to represent an asset belonging to the plaintiffs and to which they assert ownership. The processes of following and tracing are, however, distinct. Following is the process of following the same asset as it moves from hand to hand. Tracing is the process of identifying a new asset as the substitute for the old. Where one asset is exchanged for another, a claimant can elect whether to follow the original asset into the hands of the new owner or to trace its value into the new asset in the hands of the same owner. In practice his choice is often dictated by the circumstances."

114. Lord Millett went on to say, at 128D:

> "Tracing is thus neither a claim nor a remedy. It is merely the process by which a claimant demonstrates what has happened to his property, identifies its proceeds and the persons who have handled or received them, and justifies his claim that the proceeds can properly be regarded as representing his property. Tracing is also distinct from claiming. It identifies the traceable proceeds of the claimant's property. It enables the claimant to substitute the traceable proceeds for the original asset as the subject matter of his claim. But it does not affect or establish his claim… The successful completion of a tracing exercise may be preliminary to a personal claim (as in *El Ajou v Dollar Land Holdings Plc* [1993] 3 All E.R. 717) or a proprietary one, to the enforcement of a legal right (as in *Trustees of the Property of F.C. Jones & Sons v Jones* [1997] Ch. 159) or an equitable one."

115. The tracing process in the present case is complicated by the fact that the Sale Agreement elided two separate transactions, namely the completion of Cravecrest's claim to enfranchise the freehold and superior leasehold interests in 38 Wilton Crescent, and the subsequent sale by Cravecrest and Themeplace of the freeholds of both 38 Wilton Crescent and 38 BMN to 38 WC Ltd. I do not understand it to be disputed, however, that if I am right in holding that Dr Kahrmann (and subsequently his estate) was entitled to a 50% beneficial interest in the right to enfranchise 38 Wilton Crescent and in the benefit of the contract entered into between Cravecrest and Grosvenor in December 2014, then that beneficial interest can be traced into Cravecrest's entitlement (upon enfranchisement) to the unencumbered freehold of that property, which was then sold on by Cravecrest to 38 WC Ltd on the terms of the Sale Agreement. The beneficial interest of the estate may then be further traced into the net proceeds of sale received

from 38 WC Ltd, after deduction of the £6 million and other sums which had to be paid in order to complete the enfranchisement process. Furthermore, the £2.2 million paid to Hilary clearly represents part of the 50% share of the net proceeds which would have been payable to Dr Kahrmann's estate, but for the agreement between Hilary, Louise Alice and Mr Hawkins that the £2.2 million was to be treated as a payment made to Hilary in return for giving vacant possession of the property on 29 May 2015.

(e) Was Hilary a bona fide purchaser without notice of the estate's claim, and was the £2.2 million paid to her under an enforceable agreement to give up vacant possession of the property?

116. It is convenient to consider these two questions together. I will begin with the question of notice. When she received the payment of £2.2 million after completion of the Sale Agreement, did Hilary have notice of the estate's interest in the money? In my judgment, for the reasons which follow, it is clear that she did.

117. In a commercial context, the relevant test of notice is described in Lewin at paragraph 41-134 in this way:

> "The doctrine of constructive notice, as described above, does not apply to commercial transactions… This does not mean that notice in the commercial context will necessarily be equated with actual knowledge, but the purchaser may be fixed with notice, in the absence of actual knowledge, only where in the particular commercial context involved he has failed to draw inferences which ought reasonably to have been drawn in that context or has been put upon inquiry by knowledge of suspicious circumstances indicative of wrongdoing on the part of the transferor, but has failed to make inquiries that are reasonable in the circumstances."

This passage was quoted with approval by the Privy Council in Papadimitriou v Crédit Agricole Corpn and Investment Bank [2015] UKPC 13, [2015] 1 WLR 4265, at [20] by Lord Clarke JSC. The test as formulated by Lord Clarke (ibid) was that:

> "The bank must make inquiries if there is a serious possibility of a third party having such a right [i.*e. a proprietary right to the money held by the bank*] or, put in another way, if the facts known to the bank would give a reasonable banker in the position of the particular banker serious cause to question the propriety of the transaction."

118. In a concurring judgment in the Papadimitriou case, Lord Sumption JSC emphasised that the question arises "in the realm of property rights" on "[t]he hypothesis… that the claimant has established a proprietary interest in the asset, and the question is whether the defendant has established such absence of notice as entitles him to assume that there are no adverse interests": [33]. Lord Sumption went on to say (ibid) that:

> "If even without inquiry or explanation the transaction appears to be a proper one, then there is no justification for requiring the defendant to make inquiries. He is without notice. But if there

> are features of the transaction such that if left unexplained they are indicative of wrongdoing, then an explanation must be sought before it can be assumed that there is none."

119. What, then, was Hilary's state of knowledge in relation to the payment to which she was ostensibly entitled under the Sale Agreement (defined as "the HHM Payment")? First, at the meeting on 24 October 2014 attended by Mr Hawkins, Hilary, Alice, Louise and Mr Bastin, the judge found, at [63], that when Mr Hawkins said that it was for Hilary, Alice and Louise to decide how to split Dr Kahrmann's share of the profits, and he told them that he had discussed this with his lawyers who confirmed that it was perfectly legitimate, "Louise, Alice and [*Hilary*] all queried the legality of taking and splitting their father's share of the profits." The judge also found (ibid) that Hilary "seemed to know about the profit sharing agreement between Dr Kahrmann and Mr Hawkins." Secondly, the judge explicitly found, at [106], that "the agreement between Dr Kahrmann and Mr Hawkins that they would share the profit from the sale of 38 [*Wilton Crescent*] and 38 BMN was known to Louise, Alice and [*Hilary*] before they signed the Sale Agreement." The judge added that none of them was in a position to know whether this had been an agreement binding in law, and that they were "probably told by Mr Hawkins' solicitors, Maxwell Winward, that the Sale Agreement was lawful." Thirdly, the judge found, at [108], that Hilary, Louise and Alice "all had a sufficient understanding of the terms of the Sale Agreement to know that the estate was not going to be paid any part of the profit from the sale of 38 [*Wilton Crescent*] and 38 BMN and that instead they were going to be paid half."

120. In my view, it is clear from these findings that the facts known to Hilary before she signed the Sale Agreement would have given a reasonable person in her position serious cause to question the propriety of the proposed payment to her of approximately £2.2 million. She was thereby put on inquiry, but failed to make such inquiries as would have been reasonable in the circumstances to satisfy herself that Dr Kahrmann's estate had no proprietary right to the £2.2 million.

121. Furthermore, whatever the position may have been before the Sale Agreement was entered into, Hilary was given the clearest possible notice of the estate's interest in the money by Grosvenor Law's letter of 27 May 2015. This letter was addressed to Maxwell Winward, who acted for Mr Hawkins and his companies, but the nub of the claim advanced by Grosvenor Law on behalf of the estate clearly came to Hilary's notice on the same day. This is apparent from an email from Alice to Mr Bastin, Mr Hawkins and Hilary, which Hilary must have received because she forwarded it (presumably by accident) to Alice at 5.27pm on the same day. Alice's email to Hilary included the following:

> "We are told that the sale agreement may be a fraud on my father's creditors and the estate generally. We are told that we may all have personal liabilities in this respect and that these liabilities may be monetary or criminal. This seems to be confirmed by your comments made last week.
>
> ….
>
> Our solicitors have said that it is imperative that we do not allow money to be taken out of my father's estate without the probate

> being granted and a full account being made of creditors before monies are distributed. They have written to ask that the proceeds of sale are ring-fenced for a short period whilst we get a grant of probate and then sort out the estate properly. A copy of their letter is attached."

122. The attached letter can only have been Grosvenor Law's letter of the same date to Maxwell Winward, which included the following passage:

> "It is extraordinary that the apparent effect of the [*Sale*] Agreement is that extremely valuable property interests which were ultimately held in part for the Deceased's benefit during his lifetime are now seemingly to be sold without the Deceased's estate taking any part in the transaction or acquiring any beneficial interest in the significant sums which are being paid for those properties.
>
> The above circumstances lead us and our clients to the conclusion that the purported effect of the Agreement may be to deprive the Deceased's estate of assets to which it would otherwise be entitled…"

For good measure, Grosvenor Law also wrote directly (by email) to Hilary on 28 May 2015, claiming that the money she was to receive from the sale "belongs to the estate of Dr Kahrmann", and enclosing a further copy of their letter of 27 May to Maxwell Winward.

123. It is important to note that these letters, and Alice's email to Hilary on 27 May 2015, came to Hilary's attention before she gave vacant possession of 38 Wilton Crescent on 29 May, and before the subsequent payment to her of the £2.2 million. The judge did not consider the question of notice in a proprietary context, because of his mistaken view that the estate was entitled to no more than a contractual share of the net profit from the sale. That is what led the judge to his conclusion, at [115], that if there had been a breach of that contract, this was a matter for the estate and Mr Hawkins, and not for Hilary. If the judge had correctly appreciated the proprietary nature of the estate's interest in the money, I do not see how he could reasonably have concluded that Hilary had no notice of that interest. It follows that Hilary could not defeat the estate's claim to recover the money paid to her on the basis that she was a bona fide purchaser without notice, even assuming in her favour that her ostensible agreement to vacate the property in return for payment of the £2.2 million could properly be characterised as a purchase by her in good faith.

124. The judge seems to have felt no difficulty in viewing Hilary's agreement to vacate the property in return for the payment in that light. He said, in [113], that the £2.2 million was a payment made by 38 WC Ltd in consideration for Hilary's promise to guarantee vacant possession. He thought it possible that Hilary had no right in law to remain living at 38 Wilton Crescent, but any doubt on that score could only go to the value of the consideration she was providing, and it was well established that "the law does not inquire into the adequacy of consideration." To similar effect, the judge said at the end of [115] that Hilary "was entitled as a separate matter to agree to vacate 38 [*Wilton Crescent*] in return for a payment of little over £2.2m by 38 WC Ltd."

125. The insuperable difficulty with that analysis, in my judgment, is that the £2.2 million cannot on any reasonable basis be regarded as a payment made by 38 WC Ltd to Hilary under a collateral contract requiring her to give vacant possession on completion of the Sale Agreement. To the contrary, the Sale Agreement (to which Hilary, Louise and Alice were all parties) expressly envisaged that they would give vacant possession of Flats 1 and 2 by 31 May 2015, and provided that if they failed to do so the HHM Payment and the payment to the Kahrmann Sisters would each be reduced by £10,000 per day from 31 May 2015 until the actual date on which vacant possession was obtained, together with any reasonable costs incurred by 38 WC Ltd in taking and enforcing possession proceedings in the County Court: see clauses 8.11, 8.12 and 8.15 of the Sale Agreement. This was the machinery expressly agreed between the parties for obtaining vacant possession and for adjusting the shares of the purchase price payable to Hilary, Louise and Alice if vacant possession were not given by 31 May 2015. The judge does not begin to explain how this agreement was somehow transformed into a separate agreement between 38 WC Ltd and Hilary under which she agreed to give vacant possession by 31 May 2015 in consideration of the entire sum of £2.2 million. Furthermore, the logic of Hilary's contention would appear to be that the entire £2.2 million would be deductible from the gross proceeds of sale as a cost of obtaining vacant possession before distribution of the net profit realised from the sale, whereas the general structure of the Sale Agreement, as the judge rightly recognised, was to divide the net profit equally between Mr Hawkins' companies on the one hand, and Hilary, Louise and Alice (to the exclusion of Dr Kahrmann's estate) on the other hand.

126. In the circumstances, it is unnecessary to explore what rights of occupation (if any) Hilary and/or her children might have been able to assert had she refused to give vacant possession by 31 May 2015. The judge made no findings on the point, beyond the expression of doubt which I have noted in [113]. It is enough to say that I have difficulty in understanding what claim she might have been able to assert in her own right, given that Dr Kahrmann died domiciled in Germany and she could therefore have made no claim under the Inheritance (Provision for Family and Dependants) Act 1975; while any claim on behalf of her children under Schedule 1 to the Children Act 1989 would have been dependent on her showing that Flats 1 and/or 2 were property to which Dr Kahrmann was entitled, in contradiction of her pleaded case that his only entitlement was to a share of the proceeds of sale.

(f) Conclusion

127. For all these reasons, I conclude that Alice's appeal based on an express common intention constructive trust succeeds. This conclusion makes it unnecessary to consider the alternative grounds upon which Alice relies in support of her appeal. In particular, I do not think it would be helpful to embark on a detailed discussion of her alternative argument based on the doctrine of Pallant v Morgan, which (at least as currently understood) differs in some significant respects from express common intention constructive trusts of the kind I have discussed: see Lewin at paragraphs 9-091 and 9-092. For example, there appears to be no requirement for an agreement that the claimant participator in the relevant joint venture will acquire a direct proprietary interest in the land. Not only was a claim based on Pallant v Morgan never pleaded, but (as I have already indicated) there are live issues as to whether the argument was abandoned by the claimants' then counsel at trial, and whether (in any event) it would be fair to Hilary

to permit the argument to be run in this court. Nor was the issue dealt with by the judge in his judgment. Quite apart from that, the correct legal basis of the doctrine is controversial, as the detailed review of the case law by Lewison LJ in the Generator case at [34] to [74] makes very clear. The whole subject is ripe for consideration by the Supreme Court, but that consideration should be given in a case where the claim has been properly pleaded, the findings of the trial judge are directed to it, and its resolution is necessary for disposal of the case. None of those conditions is satisfied in the present case.

128. Alice also advanced a proprietary argument based on knowing receipt of trust property, but this seems to me to add nothing of substance to the claim based on a common intention constructive trust. As to her claim in restitution, which would arise only in the absence of a sound proprietary claim, it is enough to say that it would in my view face a number of severe, and probably insuperable, difficulties. Not the least of these would be to explain how, in the absence of a proprietary claim, it could be said that Hilary was enriched at the expense of Dr Kahrmann's estate when the payment to her was made by and came directly from 38 WC Ltd: see the decision of the Supreme Court in Investment Trust Companies v Revenue and Customs Commissioners [2017] UKSC 29, [2018] AC 275, at [51] per Lord Reed JSC.

Overall conclusion

129. For the reasons which I have given, I would allow the appeal and declare that Hilary is in principle liable to account to Dr Kahrmann's estate for the sums paid to her by 38 WC Ltd on completion of the Sale Agreement, together with appropriate interest. If the other members of the court agree with my conclusion, I would invite the parties to make written submissions on interest and other consequential matters after this judgment has been circulated in draft and before it is handed down. One consequential matter will be whether there should now be a trial of the remaining live issues in Hilary's counterclaim, bearing in mind that the pleaded pre-condition to her pursuing it is now satisfied, because she is not entitled to retain the £2.2 million paid to her from the proceeds of sale of the properties, but the judge has found (even though it was unnecessary for him to do so) that he was not satisfied that Hilary had established the existence of a binding contract between her and Dr Kahrmann in relation to either the proceeds of sale of Kandili or the £200,000 which she provided to him: see the judgment at [127].

King LJ:

130. I agree.

Floyd LJ:

131. I also agree.

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