



Neutral Citation Number: [2021] EWCA Civ 1429

Case No: A3/2021/0656
A3/2021/0698

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
HHJ JARMAN QC
[2021] EWHC 140 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/10/2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE NEWEY
and
SIR CHRISTOPHER FLOYD

Between :

(1) LA MICRO GROUP (UK) LIMITED
(2) DAVID BELL

- and -

(1) LA MICRO GROUP, INC
(2) ROMAN FRENKEL
(3) ARKADIY LYAMPERT

Claimants/
First and Second Respondents

First Defendant/Appellant
Second Defendant/Appellant
Third Defendant/Respondent

**William Buck and William Hooper (instructed by Fladgate LLP) for the First Defendant/
Appellant**

Alex Barden (instructed by Schofield Sweeney) for the Second Defendant/Appellant
Andrew Twigger QC, Paul Strelitz and Oliver Hyams (instructed by Owen White Limited)
for the First and Second Respondents

**Alexander Polley (instructed by O'Melveny & Myers LLP) for the Third Defendant/
Respondent**

Hearing dates: 27-28 July 2021

Approved Judgment

Sir Christopher Floyd:

1. The three main individual protagonists in these appeals, Mr Roman Frenkel, Mr Arkadiy Lyampert and Mr David Bell, have a history of hard-fought litigation in this country and in the United States going back to 2010. Before that time the three men had been business partners and friends. The first appellant, LA Micro Group Inc (“Inc”), is a Californian company which was owned and controlled by Mr Frenkel and Mr Lyampert. The first respondent, LA Micro Group (UK) Limited (“UK”), is an English company in which Mr Bell is a director and shareholder. These proceedings concern a dispute over the current beneficial ownership of the shares of UK following the falling out between Mr Frenkel and Mr Lyampert. The issue is whether Inc has a 51% beneficial interest in those shares, as Inc and Mr Frenkel contend, or whether the shares are beneficially owned by Mr Bell and Mr Lyampert, as they contend. The appeals are from the order of HHJ Jarman QC sitting as a deputy High Court Judge dated 4 March 2021. He granted declarations that the shares in UK were owned by Mr Bell and Mr Lyampert; that it was they who were entitled to UK’s distributable profits; and that Inc was not a beneficial owner of any of the shares in UK, or entitled to any share of its distributable profits. Inc now accepts following the judgment of HHJ Jarman that it is not entitled to claim a share in UK’s distributable profits, but Inc and Mr Frenkel appeal against the refusal of the declaration as to the beneficial ownership of the shares.
2. In the course of this judgment I will need to refer to three first instance judgments which have had to consider the facts giving rise to this dispute, albeit for different purposes. The first in time is a judgment of Miss Amanda Tipples QC (as she then was), sitting as a deputy High Court Judge, dated 13 September 2017 (“the 2017 judgment”): *Frenkel v Lyampert and others* [2017] EWHC 2223 (Ch). The 2017 judgment was given in proceedings (“the 2015 proceedings”) brought by Mr Frenkel against Mr Lyampert, Mr Bell and UK for a declaration that Mr Frenkel was entitled, in his personal capacity and independent of Inc, to a 25.5% shareholding in UK. The second judgment (“the jurisdiction judgment”) was given by Nugee J (as he then was) at an interim stage in the present proceedings on 3 June 2020: [2020] EWHC 1405 (Ch). The jurisdiction judgment was given on an unsuccessful challenge by Inc and Mr Frenkel to the jurisdiction of this court to try the present claim. The third judgment is the judgment of HHJ Jarman under appeal: [2020] EWHC 1405 (Ch). In referring to the 2017 judgment I have to bear in mind that Inc was not a party to the 2015 proceedings. Although Inc accepts that it is not in a position to challenge some of the facts found by Miss Tipples, it is not bound by her findings and conclusions. In any event, the present case raises some different issues.
3. Mr Lyampert and Mr Frenkel met in California in 1998 and together ran a small business buying and selling computer equipment. That did not last, but in 2001 Mr Lyampert established a new company, namely Inc, got back in touch with Mr Frenkel, and agreed to go into business with him again through Inc. Mr Frenkel and Mr Lyampert each owned 50% of the shares in Inc. Inc’s business was the purchase and resale of high-end computer parts.
4. Shortly after Inc was set up in 2001, it started trading with an English company called Bstock, owned by Mr Bell. That led to discussions about a joint venture between Mr Bell on the one hand, and Mr Frenkel and Mr Lyampert (and also Mr Alex Gorban, a senior employee of Inc) on the other hand. By July 2004 there was an agreement in principle for the setting up of a new UK company, and on 1 July 2004 Mr Bell’s accountants acquired an off-the-shelf company for this purpose, which changed its

name to LA Micro Group (UK) Ltd on 11 August 2004. This was UK. Mr Bell was appointed director and secretary and became the sole shareholder, holding the one issued share. On 3 August 2004 Mr Lyampert was appointed as a second director.

5. In August 2004 Mr Lyampert, accompanied by Mr Gorban (but not by Mr Frenkel), came to the UK to finalise matters. In the course of those discussions it was orally agreed that the company should be owned 49% by Mr Bell. The dispute in the 2015 proceedings was about who was to own the other 51%. Mr Frenkel's case was that he and Mr Lyampert were each to own 25.5% personally; Mr Lyampert's case was that the 51% was to be owned by him alone. Mr Bell's case was that Inc was to hold 51% of the shares. Miss Tipples decided in the 2017 judgment that the agreement was that 51% of the share capital of UK was to be owned by Inc.
6. Agreement was also reached at the same time about trading arrangements between UK and Inc. In essence, each company would supply the other with equipment and hardware without any mark-up (i.e. at or near cost). If Inc sold hardware to UK at cost and UK made a profit, the profits would remain with UK; but it was agreed that UK's profits would be split between the parties, with 50% going to Mr Bell. There was a dispute in the 2015 proceedings as to who was to be entitled to the other 50% of the profits. Mr Frenkel's case was that it was agreed that they should be paid 50% to Mr Bell, and 25% each to him and Mr Lyampert or their nominees; Mr Bell's case was that it was agreed that dividends or profits should be split between himself and Inc. The 2017 judgment decided that it was agreed that the profits would be split equally between Mr Bell and Inc. In practice, although the first payments were made to Inc, thereafter 25% of profits were paid into an investment vehicle owned by Mr Frenkel and 25% into an investment vehicle owned by Mr Lyampert. I will refer to all the arrangements agreed at this time as "the 2004 agreement".
7. In 2008 or 2009 a second share in UK was issued to Mr Lyampert. Mr Bell's evidence was that he was told by his accountant that another share had to be issued; that he did not take any steps to issue shares in the proportion 49/51 as he simply did what was requested of him. He thought 50/50 would be close enough; and that he could not recall why it was issued to Mr Lyampert rather than Inc, although it appears that he thought it may have been something to do with the fact that Mr Lyampert was the other director of UK.
8. One of the many issues debated before us was how, as a result of the 2004 agreement, the shares in UK were intended to be held. One possibility is that the agreement provided that shares would be issued to Inc and Mr Bell so as to establish a shareholding in the agreed proportion (e.g. a total of 100 shares with 51 going to Inc and 49 going to Mr Bell). This never happened, but the agreement to issue shares in that proportion, being a specifically enforceable contract, could create a constructive trust of the shares of which Inc and Mr Bell were the beneficiaries. Another possibility is that the agreement created an express trust of the two individual shares which had been issued, so that each share was held by its respective owners in the proportions 51% for Inc and 49% for Mr Bell. Which of these analyses is correct is relevant to some of the arguments concerning the effect of the events of 2010.
9. In early 2010 Mr Frenkel and Mr Lyampert fell out. On 8 February 2010 Mr Frenkel took steps to dissolve Inc by giving notice to Mr Lyampert. The next day Mr Lyampert spoke to Mr Bell on the telephone and told him that Mr Frenkel had closed down Inc and taken the staff with him to a new company; he (Mr Lyampert) would try and carry on with Inc as best he could. Mr Frenkel also telephoned Mr Bell. Mr

Bell's evidence was that Mr Frenkel said to him (of UK): "*It's your business and I want nothing to do with it*". Mr Bell flew to California in March 2010 and met both Mr Lyampert and Mr Frenkel. Mr Lyampert told him that Inc would get over this damaging time and Mr Bell agreed that he would continue to trade with Inc. Mr Frenkel, according to Mr Bell, repeated to him "*The company [i.e. UK] is yours. I want nothing to do with it.*" Miss Tipples accepted that Mr Frenkel told Mr Bell that UK was "yours"; and that from then on Mr Bell understood and proceeded on the basis that Mr Frenkel was not interested in any way in UK. Mr Bell and UK contended before HHJ Jarman that these words ("the Frenkel disavowal" as I shall call them) amounted to an irrevocable disclaimer of Inc's beneficial interest in the shares of UK. HHJ Jarman accepted that the Frenkel disavowal had been uttered and had this effect.

10. In 2010 Mr Bell and Mr Lyampert also set up new trading arrangements between the two companies. Instead of supplying each other at cost, they would apply the usual margins; they would also be free to compete with each other. So far as the profits of UK were concerned, there had never been any dispute that Mr Bell was entitled to 50% of the profits, but Mr Lyampert now pressed him to pay the other 50% to him. Mr Bell took advice from UK's then solicitors and was advised that he had to pay dividends to the legal shareholder, which was Mr Lyampert, and so felt comfortable paying 50% to him (although he clawed back from this 50% a significant debt owed by Inc to UK). I will refer to the parties' trading and profit-sharing arrangements after 2010 as "the 2010 arrangements".
11. Miss Tipples accepted (at [109] of the 2017 judgment) that from 2010 Mr Bell understood that Mr Lyampert was entitled to 50% of the profits of UK as he was a 50% shareholder, and that he (Mr Bell) was entitled to the other 50% as he owned the other 50% of the shares.
12. Mr Bell also gave evidence in the 2015 proceedings that he thought that, as Mr Frenkel had said that he did not want anything to do with UK, it was fine just to continue with the existing shareholders; and that if Mr Frenkel had asserted a claim in spring 2010, he would probably have folded the business because he would not want to have two warring parties as shareholders, UK not being at the time as big as it later became. Miss Tipples accepted that if Mr Bell had known that Mr Frenkel claimed an interest in UK, he would have wound the company up and set up a new one (see [123] of the 2017 judgment). By the time Mr Frenkel issued the 2015 proceedings, however, UK had become very profitable. For the period ended 30 April 2009 its turnover was some £1.2m and its net profit before tax a little over £100,000, whereas draft accounts for the period ended 30 April 2015 showed its turnover as having increased to some £13m and its net profit to over £850,000.
13. The disputes between Mr Frenkel and Mr Lyampert in 2010 led to Mr Frenkel and some of Inc's other employees, including Mr Gorban, leaving Inc and starting a competing business called IT Creations, Inc ("ITC"). Many lawsuits followed. A more detailed account of these various actions is to be found at [25] to [28] of the jurisdiction judgment. In short, in March 2010 Mr Frenkel brought an action against Inc and Mr Lyampert requesting dissolution of Inc and making claims against Mr Lyampert for breach of fiduciary duty, conversion of corporate assets, fraud and unjust enrichment ("the Fiduciary Duty action"). The essential allegation was that Mr Lyampert had been using the company's money for his personal expenditure. In the Fiduciary Duty action Mr Frenkel succeeded in establishing that Mr Lyampert was liable to Inc in restitution for some \$4.305m. Judge Kleinfeld ordered Mr Lyampert to

pay some \$2.042m to Mr Frenkel. Both sides appealed on numerous grounds but in July 2019 the Court of Appeal of California affirmed the judgment. The judgment sum has not been paid.

14. Second, in May 2016 Mr Frenkel brought an action against Mr Lyampert for concealing assets that could be used to satisfy the judgment debt (“the Fraudulent Conveyance action”). This action has not yet come to trial. Mr Frenkel’s pleaded case (following amendments allowed in early 2020) includes a claim that Inc is a 51% owner of UK, and that Mr Frenkel, as 50% owner of Inc, is entitled to half of any distributions UK has made or continues to make. Judge Alarcon denied UK’s motion seeking a modification of the preliminary injunction to permit it to buy back Mr Lyampert’s share at a price of £1.9m. The grounds for refusal were that it had not been established that £1.9m was a fair price.
15. Third, in December 2019, a judgment creditor of Inc, Design Creator Inc (“DCI”), issued a petition requesting court supervision of the winding up and dissolution of Inc (“the Judicial Supervision petition”). The petition in particular alleged that Mr Lyampert held his interest in UK on behalf of Inc, and sought an order for it to be transferred to Inc and liquidated for the benefit of creditors and shareholders. Mr Frenkel has cross-petitioned seeking similar relief. On 16 March 2020 Judge Beckloff granted a motion by Mr Frenkel for the appointment of a provisional director of Inc, and appointed Mr Vahan Yepremayn as independent provisional director. Mr Yepremayn is a US lawyer.
16. In 2012, in the course of a deposition in the Fiduciary Duty action, Mr Bell was asked who the owners of UK were. He replied “The owners, so far as I understand it, are myself, Mr Lyampert and Mr Frenkel”. In the 2015 proceedings Mr Bell was asked about that statement, and he corrected it, but only to the extent of explaining that he should have said that Mr Frenkel and Mr Lyampert were owners “via Inc”. In closing submissions on behalf of Mr Bell in the 2015 proceedings it was submitted that, at the time the statement in the US deposition was made, Mr Frenkel and Mr Lyampert were still the owners of Inc “and as a result it was still arguably correct to say that the owners of [UK] were [Mr Bell, Mr Lyampert and Mr Frenkel], since ultimately that was the case, albeit through their corporate vehicle of Inc.”
17. In a letter dated 31 August 2016 (that is in the course of the 2015 proceedings but before the trial), Mr Bell’s and UK’s then solicitors wrote to Mr Frenkel’s solicitors responding to a request for the resumption of payments:

“Mr Bell believes that LA Micro Inc is the correct legal and beneficial owner of 51% of the shares and entitled to 50% of the dividends.”

Ground 1: estoppel by conduct

18. Inc and Mr Frenkel submitted before the judge that Mr Bell and UK were estopped by their conduct from bringing this claim for declaratory relief because of a change of position by Mr Bell from the stance he (and thus UK) adopted in the 2015 proceedings.
19. The possibility that an estoppel arises from the conduct of a party in litigation was recognised in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993, where Viscount Radcliffe said:

“A litigant may be shown to have acted positively in the face of the court, making an election and procuring from it an order affecting others apart from himself, in such circumstances that the court has no option but to hold him to his conduct and refuse to start again on the basis that he has abandoned.”

20. That doctrine was applied in *Gandy v Gandy* (1884) 30 Ch D 57. The husband had covenanted in a deed of separation from his wife to pay to trustees an annuity and to pay expenses of education of his two youngest daughters. The wife’s application for increased alimony was rejected by the Court of Appeal (on appeal from Sir James Hannen) on the basis that the husband remained liable under the deed of separation. The husband subsequently argued that the covenant had been brought to an end by the grant of custody of the youngest daughters to the wife. The court did not allow him to do so. Cotton LJ said at 80:

“The decision on the appeal from Sir James Hannen was in favour of Mr Gandy, on the ground that this was a continuing provision for the maintenance of the children. He contends now that this is not the true construction of the deed. It would be wrong in my opinion to allow him to take advantage of a decision given on one construction, whether accepted by him or argued by him, and to give another decision in his favour on the ground that this was not the true construction.”

21. Bowen LJ said at 82:

“I am not certain that this is not *res judicata* within the view which has been taken of *res judicata* when the same questions arise between the same parties litigating similar subject matter. But whether it is *res judicata* or not, it seems to me that there would be monstrous injustice if the husband, having suggested one construction of the deed in the old suit and succeeded on that footing, were allowed to turn round and win the new suit upon a diametrically opposite construction of the same deed. It would be playing fast and loose with justice if the court allowed that.”

22. The phrases used in these cases suggest that it is not every change of position by a party or a witness which will create this form of estoppel. In *Kok Hoong*, Viscount Radcliffe’s formulation requires (a) that the party’s stance in the earlier proceedings was the means by which he procured an order, and (b) the circumstances must be such that the court has no option but to hold him to his former stance. In *Gandy*, Cotton LJ says that the earlier decision was in favour of the husband “on the ground that” the deed provided a continuing obligation. Bowen LJ said that the husband had succeeded “on the footing” of that construction of the deed. These phrases suggest that it must be apparent from the earlier judgment that the stance taken by the party was a reason for the judgment which he obtained, and that it would in all the circumstances be unjust to allow the party to resile from the stance taken earlier.

23. A similar doctrine has been recognised by the law of the United States. In *New Hampshire v Maine* 532 US 742 (2001) the boundary between the States of Maine and New Hampshire had been fixed by a decree of George II in 1740. Disputes in 1977 about the marine boundary in connection with lobster fishing rights terminated

in a consent judgment based on a construction of the 1740 decree in which the term “the middle of the [Piscataqua] River” used in the 1740 decree was interpreted as “the middle of the main navigable channel” and a judgment of the US Supreme Court was entered on that basis. In later proceedings brought by New Hampshire to settle the inland river boundary it sought to rely on a different construction, under which the boundary was to run along the Maine river shore so that the whole river belonged to New Hampshire. Justice Ginsburg, giving the judgment of a unanimous court, approved an earlier statement in *Davis v Wakelee* 156 US 680, 689 (1895):

“Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.”

24. The purpose of the rule was said to be to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment and preventing parties “from playing fast and loose with the court”. Whilst observing that the equitable doctrine was not “reducible to any general formulation of principle”, Justice Ginsburg identified a number of factors which typically inform a court’s decision as to whether to apply the doctrine in any individual case. First, a party’s later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party’s earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.
25. The authors of *Spencer Bower and Handley: Res Judicata* 5th Edition, 2019 paragraph 9.46 consider that there is no reason to suppose that the law of England is different from that held to be the law of the United States in *New Hampshire v Maine*. No party to these appeals suggested that this was wrong and I agree.
26. It is clear, therefore, that this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Justice Ginsburg in the *New Hampshire* case. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute.
27. Inc, supported by Mr Frenkel, contends, based on this principle of estoppel, that Mr Bell and UK should not be allowed to resile from the stance which they adopted in the 2015 proceedings that Inc remained the legal and beneficial owner of 51% of the shares in UK after 2010. HHJ Jarman rejected this argument at [72] on the basis that Mr Bell’s position in the 2015 proceedings was not a clear and consistent one, because Mr Bell had been confused. In some respects he recognised that Mr Bell’s evidence was unreliable, but there was no estoppel.

28. Mr William Buck, who appeared for Inc with Mr William Hooper, and Mr Alex Barden who appeared for Mr Frenkel, submitted that the judge had been in error to allow Mr Bell to depart from the stance he had adopted in the 2015 proceedings leading to the 2017 judgment. They accepted that the issue in the 2015 proceedings was not the same as the issue in the present proceedings. The issue in the 2015 proceedings had been what agreement was reached in 2004, and in particular whether it was agreed at that time that Mr Frenkel and Mr Lyampert were to hold their interests in UK directly or only as shareholders in Inc. Identity of issue was, however, not a requirement for this form of estoppel. The abuse lay in the fact that, in order to explain matters such as his statement in the 2012 US deposition, which appeared to attribute ownership to Mr Frenkel and Mr Lyampert personally, Mr Bell had positively relied on the fact that Inc had a continuing ownership interest in UK after 2010. Mr Bell had further relied on statements, such as the 2016 letter, as supporting his claim as to the position in 2004. It is fundamentally inconsistent now to contend that the position changed in 2010, and that the statements made by Mr Bell had been the product of confusion. Moreover, Mr Bell had gained an advantage from his reliance on the continued ownership of Inc. Absent that reliance he would not have been able to give the explanation which he did about his 2012 deposition, and his credibility would have been damaged. Mr Barden went so far as to submit that, but for Mr Bell's stance on continued ownership, Mr Frenkel would have succeeded in establishing his personal claim.
29. I am unable to accept these submissions. Mr Bell and UK certainly took the position in the 2015 proceedings that Inc was the beneficial owner of 51% of the shares under the agreement reached in 2004. That was all they needed to establish to defeat the claim that that agreement provided for personal interests for Mr Frenkel and Mr Lyampert. The events of 2010 were not directly in issue in the 2015 proceedings and Mr Bell and UK did not have to establish anything about those events in order to succeed in those proceedings. Moreover, although Mr Bell's credibility may have been enhanced by the position he took, it is not possible to say with anything approaching confidence that he won before Miss Tipples on the footing of or because of the position he took in relation to continued ownership by Inc.
30. Mr Bell and UK won, and Mr Frenkel and Mr Lyampert lost the 2015 proceedings on more solid ground than a mere assessment of Mr Bell's credibility. Mr Frenkel was not present when the 2004 agreement was made and so was reliant on what he said that Mr Lyampert had told him about what had been agreed. Miss Tipples did not believe his evidence as to what he said he was told. She said he was not a witness who was trying to assist the court with the answers he gave ([36]). She held that much of what Mr Frenkel said had happened in 2004 in relation to the establishment of UK was what he would have liked to have happened and could not be true ([40]). At [79] Miss Tipples examined the inherent probabilities concerning the parties to the 2004 agreement:

“In cross-examination Mr Bell was asked whether it was explicitly discussed that Inc would be the shareholder. His answer to that was that “there was hardly any discussion of who was going to be the legal shareholder” although “there was definite discussion about the shareholding, ie the figure, but not about the person or the nominee on the shareholding certificate because there was nothing issued”. I do not find this very surprising. Mr Bell had been doing business with Inc, and had built up a business relationship with Mr Lyampert and Mr

Gorban as representatives of Inc. Mr Lyampert and Mr Gorban were in the UK to get the joint venture they had been discussing for many months under way and the obvious inference is that, in order to establish the UK Company and get it trading, that joint venture was between Mr Bell and Inc. Mr Lyampert and Mr Gorban came to the UK on behalf of Inc, who paid their expenses for the trip. It seems to me that it is simply unbelievable that they were attending in any other capacity. Indeed, in cross-examination, Mr Lyampert's own evidence was that he was conducting the negotiations with Mr Bell on behalf of Inc. He was not acting on his own behalf, or indeed on behalf of Mr Frenkel. Rather, he was representing Inc, the American company which they co-owned."

31. Mr Frenkel explained his absence from the meeting in the UK because he claimed it was essential for him to remain in the US to run Inc. Miss Tipples rejected this explanation. She held that the real reason Mr Frenkel did not travel to the UK was that it was unnecessary for him to do so as Mr Lyampert and Mr Gorban were perfectly capable of representing the interests of Inc in their discussions with Mr Bell.
32. Mr Lyampert's evidence was held by Miss Tipples to be unsatisfactory in a number of ways which she explained at [47] to [55]. She held nevertheless that he "did, on the whole, try to answer the questions he was asked" ([56]). As Miss Tipples explained at [56] – [57] the evidence he gave in relation to the events of 2004 "did not support his own case, but corresponded with the evidence of Mr Bell and the case of the other defendants". Asked specifically about who were the owners of UK in 2004/2005 he explained that there was a verbal agreement that the votes would be 49 to 51 in the company and that the 51 belonged to Inc.
33. In these circumstances, the suggestion that Mr Bell and UK succeeded in the 2015 proceedings in relation to the terms of the 2004 agreement because of the stance which Mr Bell took on the continued ownership of UK *after* 2010 seems to me to be far-fetched.
34. Once all the circumstances of the change of position are taken into account, I do not think that it presents an affront to the administration of justice. Whilst the change of position called for an explanation (which Mr Bell gave and HHJ Jarman accepted) it was not such as to give rise to an estoppel of the kind contended for.
35. I would reject Ground 1.

Ground 2: Disclaimer

36. HHJ Jarman recorded at [64] that UK, Mr Bell and Mr Lyampert put the effect in law of what occurred in 2010 in a number of ways which he listed as "waiver, abandonment, disclaimer, proprietary estoppel and promissory estoppel." He decided that disclaimer was the appropriate categorisation, and held, for the reasons he gave at [65] – [69], that a valid disclaimer of Inc's interest had occurred in 2010.
37. It has been held that it is possible to disclaim an interest in property before it is accepted and to do so without the formality of writing which a disposition of an equitable interest would otherwise require: see *re Paradise Motor Co. Ltd* [1968] 1 WLR 1125 at 1143 A-C per Danckwerts LJ. Once accepted, however, a disclaimer of an equitable interest without writing is no longer possible. A valid disclaimer requires

sufficient knowledge of the interest alleged to be disclaimed. In *Lady Naas v Westminster Bank Ltd*. [1940] AC 366 the person alleged to have disclaimed had been led to believe she had no interest to disclaim. Lord Russell said at 396:

“Disclaimer can only be made with knowledge of the interest alleged to be disclaimed, and with an intention to disclaim it.”

38. Lord Wright said:

“Disclaimer of a deed has been rightly described as a solemn irrevocable act. If it is alleged, the court must be satisfied that it is fully proved by the party alleging it, who must also establish that it was made with full knowledge and with full intention.”

39. In ground 2 of the appeals Inc and Mr Frenkel focused in particular on the requirement for full knowledge and intention. They questioned how Inc can have had the requisite knowledge when neither of its prime movers, Mr Frenkel and Mr Lyampert, knew that Inc had an interest to disclaim, believing as they did that their interest in UK was a personal one. At the outset of his submissions on this ground, however, the court put to Mr Buck a simpler route to the destination he was seeking to reach. On the basis of the facts found by the judge, Inc acquired its interest in UK in 2004. There was no suggestion that Inc had not accepted that interest. In 2010 Inc could not disclaim an interest it had accepted in 2004. Mr Buck adopted that argument and Mr Twigger did not strenuously oppose its introduction into the appeals. As it is a pure point of law, and no party objected to it being run, we allowed Inc and Mr Frenkel to run it. When it came to the turn of Mr Twigger QC for UK and Mr Bell, he conceded, correctly in my judgment, that the judge’s decision on disclaimer could not be supported for this reason. It follows that if the judgment is to be upheld, it must be on one the grounds put forward in the respondent’s notice.

Respondent’s Notice ground 1: Abuse of process by Inc

40. UK and Mr Bell contend that it would be an abuse of the court’s process to allow Inc to contend that it has a 51% beneficial interest in the shares of UK in two ways. First, they contend that the point is one which could and should have been raised by Inc in the 2015 proceedings, and that it would be manifestly unfair to UK and Mr Bell for Inc to be allowed to raise it in these proceedings. Secondly, they contend that, as a matter of substance, the present claim is an abusive attempt by Mr Frenkel to use Inc to make a collateral attack on findings made in the 2017 judgment.

41. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, Lord Diplock described the power to prevent abuse of process at page 536 as:

“... the inherent power which any court of justice must possess to prevent the misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.”

42. *Hunter* was concerned (per Lord Diplock at 541 B-C) with:

“the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.”

43. Abuse of process may also be found where a party seeks to raise in later proceedings a claim or defence which “should have been raised in the earlier proceedings if it was to be raised at all”: per Lord Bingham in *Johnson v Gore Wood & Co* [2002] 2 AC 1, at 31 B-C. The fact that the claim or defence could have been raised does not automatically render any such case abusive. As Lord Bingham went on to explain at 31 D-E, what was required was:

“... a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.”

44. An authoritative summary of certain themes which emerge in the law of abuse of process is to be found in the judgment of Simon LJ in *Michael Wilson & Partners* [2017] EWCA Civ 3; [2017] 1 WLR 2646 at 48:

“48. The following themes emerge from these cases that are relevant to the present appeal.

- (1) In cases where there is no *res judicata* or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in *Hunter v. Chief Constable*, Lord Hoffmann in the *Arthur Hall* case and Lord Bingham in *Johnson v. Gore Wood*. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in *Hunter v. Chief Constable*. Both or either interest may be engaged.
- (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no *prima facie* assumption that such proceedings amount to an abuse, see *Bragg v. Oceanus*; and the court’s power is only used where justice and public policy demand it, see Lord Hoffmann in the *Arthur Hall* case.
- (3) To determine whether proceedings are abusive the Court must engage in a close ‘merits based’ analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the

court's process, see Lord Bingham in *Johnson v. Gore Wood* and Buxton LJ in *Taylor Walton v. Laing*.

- (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the *Arthur Hall* case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the *Bairstow* case; or, as Lord Hobhouse put it in the *Arthur Hall* case, if there is an element of vexation in the use of litigation for an improper purpose.
- (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in *In re Norris*.
- (6) To which one further point may be added.

An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2014] AC 160 at [17] as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the *Taylor Walton* case, at [13]."

45. Mr Twigger QC argued that Inc was plainly aware of the 2015 proceedings. In those proceedings Mr Bell was contending that Inc had a 51% interest in UK, but Mr Frenkel and Mr Lyampert were contending that it did not, because they owned the beneficial interest in their personal capacities. Although it is true that Inc was deadlocked because of the dispute between Mr Frenkel and Mr Lyampert, an independent director could have been appointed in 2015, just as one has been for the present proceedings, and could have advanced the case which Inc now wishes to run.
46. Basing himself on these facts (or inferences) Mr Twigger went on to point out that Inc's case in the present proceedings had to be based on the findings in the 2017 judgment. The directors of Inc were not able to give evidence in support of Inc's claim because they had claimed their personal interests. Yet Inc was picking and choosing those parts of the 2017 judgment, together with the evidence and submissions at the trial of the 2015 proceedings, by which it contended Mr Bell and UK were bound, whilst at the same time claiming to be free to reject those parts of the 2017 judgment which were contrary to its case. He referred to this as "a lack of mutuality". Those circumstances made it manifestly unfair for Mr Bell and UK to be "vexed twice" in relation to ownership of the shares in UK.

47. Mr Twigger sought to illustrate his point by reference to the findings as to Inc's knowledge. Inc contends in these proceedings that it had no knowledge of its ownership of the shares because neither Mr Frenkel nor Mr Lyampert ever thought it did, and they were the relevant persons for determining its knowledge. He argues that Miss Tipples came close to deciding, if she did not actually decide, that Inc did know through Mr Frenkel and Mr Lyampert that it had been agreed that it was to hold 51% of the shares. On the other hand it appeared from certain passages in the judgment of HHJ Jarman that he had accepted that Mr Frenkel did not know that Inc had an interest (for example at [66]). There were other examples of this, but this one is sufficient to illustrate the point.
48. Applying the broad merits-based test to this limb of Mr Twigger's argument, I reject it. First, it ignores the circumstances within Inc at the time of the 2015 proceedings. Not only was the company in deadlock, but both its directors (Mr Frenkel and Mr Lyampert) were arguing in the 2015 proceedings that Inc did not have any interest in UK. In those circumstances it is unreal to suppose that Inc could somehow have decided to apply to be joined in the 2015 proceedings. Secondly, the suggestion that there could have been then (as there has been now) the appointment of an independent director to advance the claim ignores the practicalities of how that could have been achieved. The question would have arisen, for example, as to how the costs of the independent director were to be met. Neither director would have been enthusiastic about meeting them himself, when the result would have been that Inc would be advancing a case against his personal interest. Thirdly, a review of the 2015 proceedings by the independent director (even assuming one could have been appointed) would not have caused him or her to see a pressing need to intervene when all relevant individuals were going to be before the court, and he or she could have no additional evidence to give. The case that it had been agreed in 2004 that Inc was the owner of 51% of the shares in UK was being pressed by Mr Bell and UK, and the court was not being asked to decide that that position had changed in 2010. It would not have been at all plain to the independent director that any purpose would have been served by applying to join the proceedings in those circumstances.
49. I would add that there is force in the point that if one applies the same high standard which Mr Bell and UK seek to apply to what Inc could and should have done in the 2015 proceedings, then it is legitimate to ask why Mr Bell and UK did not themselves raise directly for decision in the 2015 proceedings the questions which they now seek to raise in the present proceedings. They certainly could have done so, but chose instead to focus attention on the ownership consequences of the 2004 agreement. I think that consideration is relevant to whether it would be manifestly unfair to allow Inc to raise its case as to the present beneficial ownership position in these proceedings.
50. Against that background I did not find UK's case of manifest unfairness through lack of mutuality to be a compelling one. Whenever there is repeated litigation over similar subject matter there is a risk of inconsistent findings, but that does not of itself mean that there is manifest unfairness. Mr Twigger's example as to "findings" about lack of knowledge on the part of Inc did not seem to me, in any event, to show manifest unfairness in circumstances where neither Miss Tipples nor HHJ Jarman can be said to have come to very clear conclusions on the point.
51. I can deal with the second way in which Mr Twigger advances Mr Bell's and UK's case of abuse more briefly. It is said that Inc's case in the present proceedings is a

collateral attack by Mr Frenkel on the findings of Miss Tipples in the 2017 judgment of the kind which would bring the administration of justice into disrepute.

52. In the 2017 judgment, after she had stated her conclusions on the issues before her, Miss Tipples referred to an application which had been made by Mr Barden, counsel for Mr Frenkel, to raise an alternative claim to the claim which he was advancing up to that point. The suggestion was that if Mr Frenkel's personal claim was to be rejected, then the court should grant Mr Frenkel a declaration that Inc was the beneficial owner of 51% of the shares. Her attention was drawn to CPR Part 16.2(5) which allows the court to grant any remedy even if that remedy has not been specified in the claim form. Miss Tipples dealt with this last-minute application as follows:

“123. Mr Frenkel owned Inc 50/50 with Mr Lyampert and Inc was dissolved in February 2010, an event which gave rise to the Californian Claims. Following the breakdown of the relationship between Mr Lyampert and Mr Frenkel, Mr Frenkel disavowed any interest in the UK Company in what he said to Mr Bell in March 2010. Mr Bell accepted what he was told by Mr Frenkel, in person and over the telephone at that time, and I accept that if Mr Bell had known that Mr Frenkel claimed an interest in the UK Company, then Mr Bell would have wound the UK Company up, and would have set up a new company. It was over five and a half years later, in November 2015, that Mr Frenkel issued this claim and, in the meantime, the UK Company had become, and continues to be, very profitable. I accept what Miss Ansell QC has said in her closing submissions at para 60:

“As a result of Mr Frenkel walking away from the [UK] Company and participation in its trade, Messrs Bell and Lyampert (believing themselves to be the undisputed sole two shareholders in the Company) used the [UK] Company to engage in further extensive trade, putting time and resources into making in a success. This trade would have been carried out through a completely different vehicle if Mr Frenkel had made his position clear. To allow Mr Frenkel now to re-enter the scene and take 50% of Mr Lyampert's shareholding, past and future dividends would thus cause the latter substantial injustice and lost capital and income”.

124. In these circumstances, I do not see that Mr Frenkel, as the claimant, is entitled to any relief in respect of Inc, particularly in circumstances where I have found, as a matter of fact, that he disavowed any interest in the UK Company in March 2010, and Mr Bell continued the UK Company's business in reliance on what he was told by Mr Frenkel in this regard. If, as Mr Frenkel now says, he can claim relief in respect of Inc, then his claim in this regard should have been set out in his statement of case and properly pleaded. That, of course, is so that Mr Lyampert and the other defendants would have the opportunity to consider, and meet the case advanced on behalf of Inc. It is not a claim that can be introduced by Mr Frenkel as an afterthought under CPR Part 16.2(5). Further, for what it is

worth, I do not consider that it is a claim that is likely to succeed, given the very substantial delay in the bringing of this claim, what Mr Frenkel told Mr Bell in March 2010, and the continued operation of the UK Company in the light of that representation.”

53. Mr Twigger points out that it was Mr Frenkel who applied to the Californian court for the appointment of an independent director in 2020, and it is he who is funding Inc’s pursuit of these proceedings by a loan and promissory note. In substance therefore Mr Frenkel is simply having a second bite at obtaining the relief which was refused to him in 2017. The correct course for Mr Frenkel to have pursued would have been to appeal the findings in paragraphs 123 and 124 of the 2017 judgment, not assert the same claim in these proceedings through Inc.
54. There are, of course, difficulties in treating Inc as the outward manifestation of Mr Frenkel alone. It is no longer contended that Mr Frenkel and Inc were in privity of interest, and, although Mr Twigger had some answers to this, the existence of other creditors of Inc might suggest that it is not only Mr Frenkel’s interests that Inc represents. Be that as it may, the fundamental difficulty with Mr Twigger’s argument is that I do not read Miss Tipples’ observations at [123] and [124] of the 2017 judgment as a final decision that a claim by either Mr Frenkel or by Inc for a declaration as to Inc’s 51% beneficial ownership of the shares in UK could not succeed. Rather, I read those paragraphs as justification for not permitting Mr Frenkel to raise what was in substance a new claim at a late stage in the proceedings. Even if Mr Frenkel could have sought to appeal from the conclusions in [123] and [124], it would have been on the basis that the judge was wrong as a matter of case management to have refused him permission to raise and argue such a claim at the stage of the proceedings at which he tried to do so. Miss Tipples did not dismiss Mr Frenkel’s substantive claim on its merits.
55. So understood, even if Inc’s case in the present proceedings is to be treated as being for and on behalf of Mr Frenkel alone (which I am not to be regarded as accepting) I do not see it as a collateral attack on any final decision made by Miss Tipples. For Inc (with Mr Frenkel’s support) to raise it in the present proceedings does not amount to an affront to the proper administration of justice.
56. Abuse of process does not therefore provide an alternative basis for upholding the judge’s judgment.

Respondent’s Notice para 2: contractual surrender of Inc’s interest

57. The next basis on which Mr Bell, Mr Lyampert and UK contend that the judgment should be upheld is in summary as follows:
 - i) For the reasons expanded on below, the effect of the Frenkel disavowal and the 2010 arrangements was that there was a binding agreement between Inc, Mr Bell and Mr Lyampert pursuant to which, amongst other matters, Inc was to surrender its beneficial interest in the shares in UK and/or to release Mr Bell and Mr Lyampert as trustees.
 - ii) The 2004 agreement had been a collaborative commercial agreement between Mr Bell and Inc involving (a) 49/51 beneficial ownership of shares; (b) 50/50 share of profits; and (c) preferential trading between Inc and UK. This was a coherent package: Inc was entitled to proprietary rights and a profit share

because it was contributing to UK through the preferential trading arrangement.

- iii) It is now common ground that by the 2010 arrangements (a) Inc was released from its debt to UK, (b) the profit-sharing arrangement with Inc was brought to an end, and (c) the preferential trading arrangement was brought to an end.
 - iv) In those circumstances the judge ought to have held that the 2010 arrangements included the surrender by Inc of its beneficial interest in the share of UK and/or the release of Mr Lyampert and Mr Bell as trustees because (a) it made no commercial sense for Inc to retain a controlling interest in UK; (b) Mr Lyampert and Mr Bell agreed to split the shareholding in UK 50:50 at a time when Mr Lyampert had authority to act and was acting for Inc, and it was implicit in that arrangement that Inc would surrender its beneficial interest and/or that Mr Bell and Mr Lyampert would no longer be trustees; and (c) Mr Frenkel, who also had authority to act and was acting on behalf of Inc had said that he wanted nothing to do with UK. Those words were clear enough to bring all three elements of the 2004 agreement to an end.
58. Mr Buck and Mr Barden contended that this argument was not open to Mr Bell, Mr Lyampert and UK because it had not been pleaded in these terms, and accordingly had not been before the court at trial. There had been no cross-examination directed to these points and they had not been evaluated by HHJ Jarman or been made the subject of findings by him. In those circumstances this court should not entertain the argument on appeal.
59. Mr Buck pointed to Mr Bell's and UK's Particulars of Claim. At paragraphs 18 to 20, under the heading "Disposal", they pleaded the actions of, and statements made by, Mr Frenkel which I have called the Frenkel disavowal. At paragraph 20 they said that Mr Bell and UK understood that thenceforth neither Mr Frenkel personally nor Inc had or would assert any interest in UK, and that was the basis on which Mr Bell as a director and shareholder of UK proceeded thereafter "in the manner set out below". At paragraph 23 it was asserted that those matters thus far pleaded (a) were sufficient to and did dispose of Inc's beneficial interest in the shares of UK and/or (b) were sufficient to and did amount to a disclaimer, release or surrender of that beneficial interest. The pleading then goes on to make allegations under a new heading "New working relationship and [UK]'s ownership". It recites the visit of Mr Bell to Los Angeles to discuss and understand the breakdown. It then says at paragraph 25 that Mr Bell discussed with Mr Lyampert how Inc, or more particularly its successor operations under Mr Lyampert, and UK might trade with each other on the basis that Mr Frenkel had disavowed his interest in Inc. These discussions are said to have resulted in agreement in principle that UK should continue trading with Inc (rather than being wound up) with the shareholding to be owned by Mr Lyampert and Mr Bell, but with Mr Lyampert discharging Inc's debt to UK personally from his share of the profits made by UK. Paragraph 26 alleges that, after further discussion, it was agreed that if Inc and UK were to continue trading (a) Inc and UK would supply each other on their usual margins, (b) Inc and UK would be free to compete, and (c) there would no longer be any pooling of profits. This was referred to as "the New Arrangement". Paragraph 27 then pleads:

"The New Arrangement was reached, on the common understanding between [UK] Mr Bell and Mr Lyampert that Mr Bell and Mr Lyampert were the two undisputed sole

shareholders in [UK], or more particularly the sole two legal and beneficial owners of the two issued shares in [UK] in equal proportions, and that Inc had no interest in [UK].”

60. What is said by Mr Buck is that the common understanding was only said to have arisen out of the matters pleaded at paragraphs 18 to 22 under the heading “Disposal”. There is no pleaded express or implied term of the New Arrangement which is said to have transferred the beneficial interest or released the trustees.
61. Inc’s defence took issue (at paragraph 28.2) with the alleged common understanding that Inc had no interest in UK. Mr Bell’s and UK’s reply alleged, for the avoidance of doubt:
- “the Claimants will say that, during the discussions between Mr Bell and Mr Lyampert described in paragraphs 25 to 27 of the Particulars of Claim, Mr Lyampert, in his capacity as a director of [Inc], disavowed [Inc]’s interest in [UK] (if Mr Frenkel had not already done so) and he had authority and/or apparent authority to bind [Inc] in such disavowal.”
62. As Mr Twigger was inclined to accept, this falls some way short of a clear assertion that it was a term of the 2010 arrangements that Inc would surrender its interest or release the trustees. We were also told that Inc had objected to paragraph 28.2 being raised by way of Reply. He contended, however, that this pleading gave Inc and Mr Frenkel adequate notice of the facts on which reliance would be placed.
63. The appeal bundles included the closing notes provided to the judge below at the conclusion of the evidence. We were not, however, provided with all the parties’ opening skeleton arguments. At the conclusion of the hearing we asked to be provided with these so that we could see how, if at all, this point was developed at trial. We were provided with a bundle of skeleton arguments, from which the following emerges:
- i) Mr Bell’s and UK’s opening skeleton contains this at paragraph 7.1: “The Claimants say that: (i) ...; (ii) Mr Frenkel disavowed [Inc]’s interest in [UK] in February/March 2010; and/or (iii) Mr Lyampert did likewise when he and Mr Bell reached the New Arrangement; ...”. Then, at paragraph 9.2, in setting out the content of the skeleton it says: “Second, it explores the circumstances in which [Inc] lost its beneficial interest in the shareholding in [UK] and a right to its profits in February/March 2010 or thereafter by Mr Frenkel’s disavowal, or Mr Bell/Mr Lyampert’s entry into the New Agreement” (my emphasis). At paragraph 26.9 it is alleged that in June 2010 Mr Lyampert and Mr Bell reached the New Arrangement “namely that: (i) Mr Lyampert would pay the debts owed by [Inc]; (ii) that Mr Bell and Mr Lyampert would personally own [UK] 50/50; and (iii) the parties would trade on ordinary commercial terms.” There is a footnoted reference to paragraph 49 of Mr Bell’s second witness statement which broadly supports this account of the New Arrangement. Finally, there are sections of the skeleton directed to “What was the effect of Mr Frenkel’s words and actions? ...” and then, “What was the effect of Mr Lyampert’s words and actions? Were they sufficient to dispose of, disclaim, waive, abandon, release or surrender [Inc]’s interest in [UK], including any beneficial interest in its shareholding or to its dividends?” After asserting that Mr Lyampert had authority to achieve this for Inc, paragraph 36 asserts that

“The purpose and effect of Mr Lyampert’s actions in entering into the New Arrangement, was to bring the existing arrangements to an end; a point which he mounted and pursued in the 2015 Claim. Indeed it would be difficult to see it in any other way”.

- ii) Inc’s opening skeleton put their understanding of Mr Bell’s and UK’s case at paragraph 3.1.2 as being a contention that ownership of UK was “by legal mechanism” restructured in 2010, such that UK became beneficially owned 50/50 as between Mr Bell and Mr Lyampert. At paragraph 23 Inc takes a point that it was not open to Mr Bell and UK to say that the 2004 agreement had been terminated. They referred to correspondence in which Mr Bell and UK had refused to amend their pleading to make this averment, saying that it was implicit. At paragraph 40.1.1 Inc say that Mr Bell’s case was different from his case in 2015 and was now “40.1.1 The 2004 Agreement somehow came to an end in 2010 and that, also in 2010, via [Mr Frenkel] and/or Mr [Lyampert], [Inc] disavowed and disposed of both its ownership of [UK] and its entitlement to profits in return for nothing;”. At paragraph 40.2 they asserted that the Claimant’s case involved the transfer of a beneficial interest “without any apparent agreement or actual transfer”. At paragraph 78 Inc points out that Mr Bell and UK did not plead that what they alleged took place amounted to a waiver of a contractual right and/or variation and/or termination of the contractual arrangement under the 2004 agreement under which Inc would be entitled to 50% of the distributable profits of UK. It appears from paragraph 80 that Inc was alerted by a solicitors’ letter that Mr Bell and UK did assert that the 2004 agreement was terminated by the arrangement pleaded at paragraph 27 of the Particulars of Claim. They go on to say that although this “may conceivably be the case” as regards the trading relations it did not have anything to do with the underlying ownership.
- iii) Mr Frenkel’s opening skeleton does not add anything on this issue.
- iv) Mr Lyampert’s opening skeleton says at 12.3: “The interest of [Inc] was, in the alternative, lost through the reaching of a new agreement through the words and actions of Mr Lyampert on its behalf with Mr Bell in 2010”. One of the four principal issues is identified in 15.3 as “**The New Agreement**: Whether, through the words and actions of Mr Lyampert, [Inc] lost its interest in [UK] (“**the New Agreement**”)”. In the section of the skeleton dedicated to the New Agreement, Mr Lyampert argues at [60]: “It *must* be common ground that the 2004 Agreement is no longer subsisting: since that agreement comprised a joint venture to profit from mutual trade on beneficial terms, and since LA Inc and LA UK stopped trading on such terms from 2010 and LA Inc stopped trading at all from 2012 (and is now dissolved in all but name), there can be no question that the 2004 Agreement is ongoing.” Then at [64] “Thus, to the extent that Mr Frenkel did not bind LA Inc by way of the Disavowal, it is clear that, objectively construed, it became bound by the New Agreement. In this regard, it was agreed that: 64.1. The existing venture under the 2004 Agreement was at an end, the previous business relationship having disintegrated. The preferential trading relationship would cease; 64.2. Mr Lyampert would stand personally liable for, and would satisfy, LA Inc’s outstanding debts owed to LA UK. It is common ground that LA Inc had such liabilities; and 64.3. Mr Lyampert and Mr Bell would proceed as the sole co-owners of LA UK (i.e. legally and beneficially).” (my emphasis).

64. The closing notes supplied by Mr Bell and UK broadly support what was said in their opening skeleton. At paragraph 5.3 they say that the note will explain why the Frenkel disavowal caused Inc to lose its interest “and/or the New Agreement with Mr Lyampert did likewise”. At paragraph 26 the note adopts paragraphs 60 to 65 of Mr Lyampert’s skeleton which I have summarised above.
65. Mr Lyampert’s closing notes drew attention to the fact that it was the evidence of both Mr Bell and Mr Lyampert that the New Agreement (as Mr Lyampert referred to it) contained a term that UK would continue on the basis that Mr Bell and Mr Lyampert were its sole directors and shareholders, and that there had been no challenge to that evidence either by Inc or Mr Frenkel.
66. I would accept straight away that the case of contractual surrender is laid out much more clearly in the respondent’s notice than it ever was in any pleading or skeleton argument. It seems to me, nevertheless, that what Mr Bell, Mr Lyampert and UK were arguing was tolerably clear from the pleadings, evidence, skeletons and closing notes to which I have referred. The lack of clarity seems to me to lie more in the intricacies of the legal mechanism by which the surrender was effected, rather than in a failure to plead material facts. I do not therefore think that Mr Bell, Mr Lyampert and UK are precluded from arguing the case presented in their respondent’s notices.
67. Mr Twigger advances compelling arguments as to why the judge should have found that the arrangements in 2010 covered all three strands of the agreement, including ownership. First, the 2004 agreement was a collaborative commercial venture and its three components formed a single indivisible bargain. It was therefore implicit that on the termination of the preferential trading and profit-sharing components, the ownership component would come to an end, with the effect that the beneficial ownership interests in the shares in UK would thereafter follow the legal interests and be owned 50:50 by Mr Bell and Mr Lyampert. Secondly, a share in profits goes hand in hand with a share in ownership. If Inc continues to own 51% of UK it would now be entitled to a greater share of the profits than it was entitled to under the profit-sharing component of the 2004 agreement i.e. 51% rather than 50%, despite no longer contributing to those profits in the way contemplated by the preferential trading component. The parties are not likely to have intended that. Thirdly, Inc’s 51% share under the 2004 agreement gave it a controlling interest in UK, which was necessary given that Inc was subsidising the growth of UK. The ownership component was therefore, in a non-technical sense, a form of security for Inc in circumstances where Mr Bell had day-to-day control of UK. There was no justification for that control to continue once Inc stopped contributing in any way to UK’s business or profits. Fourthly, the background to the 2010 arrangements was that Mr Frenkel had taken steps to dissolve Inc and speaking with the authority of Inc had told Mr Bell that UK was his company and that he wanted no more to do with it. The judge found that Mr Bell and Mr Lyampert agreed to work together to carry on UK’s business, and it was subsequently developed in accordance with that agreement. It was a necessary corollary of that agreement that Inc no longer had any control or interest in UK. Fifthly, Mr Lyampert had authority to agree to the termination of the ownership component of the 2004 agreement and surrender Inc’s interest, and Mr Frenkel plainly consented by the Frenkel disavowal. Finally, there was evidence before the judge that Mr Lyampert expressly agreed to split the shareholding of UK 50:50. An agreement in those terms was inconsistent with the ownership component of the 2004 agreement continuing.

68. Against this, Mr Buck contends that there are many pointers in the other direction. Mr Bell's and UK's case in the 2015 proceedings was not that the 2004 agreement was a single indivisible agreement, but that the ownership component was separate. Moreover, such an arrangement was not reflected in statements made by and on behalf of Mr Bell after 2010, such as the Bell US deposition in 2012 and his solicitors' letter in 2016. Whilst these are powerful points as well, this court is not well suited to adjudicating on matters of primary fact. The content and effect of the 2010 arrangements was a matter for the judge to determine based on the words and actions of the protagonists, and the evidence before him. If the argument is otherwise sustainable on the facts as they are contended to be by Mr Twigger, then I would refer the issue to the judge for him to determine the relevant facts and reach a conclusion on this question of contractual surrender, pursuant to CPR 52.20(2)(b).
69. The remaining difficulty faced by Mr Twigger's argument (if he persuades the judge that the evidence establishes the facts necessary to support it) concerns whether the transfer by the 2010 arrangements of Inc's beneficial interest in the shares to Mr Bell and Mr Lyampert falls foul of section 53(1)(c) of the Law of Property Act 1925 which requires the disposition of an equitable interest to be in writing (unless saved by the provisions of section 53(2)):
- “53(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—...
- (c) 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, or by his agent thereunto lawfully authorised in writing or by will.
- (2) This section does not affect the creation or operation of resulting, implied or constructive trusts.”
70. Mr Twigger advances two separate analyses depending on whether the 2004 agreement created a specifically enforceable agreement to issue shares in the proportions 51:49, or whether it amounted to an express declaration of trust. It seems to me that there is a further underlying question of fact to be resolved as to the terms of the 2004 agreement. Was it in fact envisaged that shares would be issued in the identified proportions, or were the two shares simply to be held on trust in those proportions? Miss Tipples did not resolve this question (she did not have to) although she said at [80] that Mr Bell was not able to explain why shares in UK were not issued in those proportions. She said that the explanation was that no one paid any attention at the time to this or gave it any thought. Mr Bell said paperwork was “not particularly one of our strong points”. HHJ Jarman did not make any finding about whether it was agreed that shares would be issued. Mr Buck's closing notes before HHJ Jarman included a suggestion (in connection with an argument about limitation) that the shares were held on a constructive trust. A constructive trust would not be necessary if (as he now says is the position) the two issued shares were held on an express trust. It would, however, be unfair to hold Inc to that formulation in the light of the clarification of Mr Bell's, Mr Lyampert's and UK's case advanced on these appeals.
71. In the case of a specifically enforceable agreement to issue shares in the proportions 51:49, Mr Twigger says that a constructive trust is created for so long as the agreement remains in force or is specifically enforceable. On the termination of the

2004 agreement, therefore, the constructive trust, which is entirely parasitic on the contractual agreement, comes to an end. The position then reverts to that which applied in the absence of the agreement, namely that Mr Bell and Mr Lyampert are each the legal owner of one share, and are the beneficial owners of it. They are released from their position as trustees. There is no disposition of an interest at all: the constructive trust simply falls away.

72. The notion that a trust arising under a specifically enforceable contract may simply come to an end with the contract is not a new one. In *Jerome v Kelly* [2004] UKHL 25; [2004] 1 WLR 1409 Lord Walker explained the role of the trust created in the context of a specifically enforceable sale of land:

“29. The Court of Appeal took the view that Park J had wrongly ignored the general law of England as to sales of land, and in particular the significance of a contract for the sale of land being (in general) enforceable by the equitable remedy of specific performance. If and so long as the contract is enforceable in that way, the seller becomes in some sense a trustee for the buyer; the buyer has an equitable interest of some sort in the subject-matter of the contract; and the contract (if protected by the machinery appropriate to registered or unregistered titles, as the case may be) is enforceable (by specific performance) against a third party who becomes owner of the property. ”

73. Lord Walker went on to explain that the trusteeship created in these circumstances was “not an ordinary trusteeship”. He cited what he described as a useful summary in the judgment of Mason J in *Chang v Registrar of Titles* (1976) 137 CLR 177, 184, and noted the observation of Jacob J in the same case at pp189-190, who concluded that,

“Where there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties”.

74. Lord Walker continued at [32]:

“It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the Court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and

accepted and as the purchase price is paid in full.” (emphasis supplied).

75. A similar expression of the way in which a trust may be parasitic on a contract is in the judgment of Mummery LJ in *Patel v Shah* [2005] EWCA Civ 157. The argument in that case was that the equitable doctrine of laches could not bar the enforcement of an express trust in relation to property in the possession of the trustee. Whilst that was the case in the context of trusts created by gift, Mummery LJ explained that the commercial context of the resulting trusts involved, which arose out of contributions to the purchase price of commercial transactions in land, called for a different approach. He said at [34] (with the agreement of Keen LJ and Sullivan J):

“The trusts were a by-product or incidental equitable consequence, a vehicle for accomplishing the commercial aim.”

76. The *creation* of the constructive trust by the 2004 agreement would not fall foul of the requirements of section 53(1)(c) because of section 53(2): see e.g. *Neville v Wilson* [1997] Ch 144. There is a separate question of whether the extinction of Inc’s interest on termination of that agreement escapes section 53(1)(c) because it is not a disposition of an equitable interest, or, if it is, because the disposition is part of the “operation” of a constructive trust. Section 205(1)(ii) of the Law of Property Act 1925 provides that unless the context otherwise requires:

““Conveyance” includes a disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will; ... and “disposition” includes a conveyance ...;”

77. On this basis, putting the two definitions together, a “disposition” includes a disclaimer, release and every other assurance of property or an interest therein except by will. That would appear to suggest a wide meaning for “disposition”, but in *re Vandervell’s Trusts (No 2)* [1974] Ch 269 the Court of Appeal (Lord Denning MR, Stephenson and Lawton LJJ) held that the extinction of a resulting trust in favour of nominees by the exercise of an option did not amount to a disposition of an equitable interest: see per Lord Denning at 320, and per Lawton LJ at 326. If that is correct, then the statute does not apply. If it is not correct then the transaction, on this analysis, will fall foul of section 53(1)(c) unless the disposition can be described as part of the operation of a constructive trust. Is the disappearance, discharge or extinction of a constructive trust to be treated as part of its operation?
78. It might be said that the words “creation or operation” do not easily lend themselves to an interpretation which includes “discharge” or “termination”. If it was necessary to provide specifically for “creation”, which presumably is not part of the “operation”, why has the draughtsman omitted to mention discharge or termination? I see the force, however, of the argument that the bringing to an end of the constructive trust can be described as part of the operation of the trust. The obvious purpose of the subsection is to take constructive trusts out of the formalities requirement of section 53(1)(c) altogether. It would be strange, as well as a trap for the unwary, if the creation of the constructive trust were exempt from the requirement for writing but its termination was not. Suppose a constructive trust was to be regarded as coming to an end on a particular date. It would be a surprising result if such an incident were held to be ineffective for the absence of writing when no writing had been necessary to create the trust in the first place.

79. A further difficulty with Mr Twigger's first analysis, which Newey LJ remarked on in the course of argument, lies in the identification of the property subject to the constructive trust. At the time of the 2004 agreement there was only one issued share. Inc could not have called for the transfer of 51% of that share, only for a further 99 shares to be issued and 51 transferred to it. In those circumstances, to what property does the constructive trust attach?
80. We did not hear full argument on the points which I have thus far identified. Having identified them, I consider that they should be decided, if indeed they arise, on the basis of actual rather than assumed facts, and after more extensive legal argument than we have heard. I am however satisfied that Mr Twigger's first analysis has sufficient prospects of success to be referred to the judge for determination.
81. On Mr Twigger's express trust analysis, he suggests that the 2010 arrangements created a specifically enforceable agreement under which Inc was required to surrender its interest under the trust. That created a constructive trust of Inc's interest in favour of UK and again escapes section 53(1)(c) because of section 53(2).
82. We did not hear full argument on this question either. There may be difficulties in its way because the legal and beneficial interests in the shares had already separated under the express trust created by the 2004 agreement, with Inc already enjoying a 51% beneficial interest in the shares by the time of the 2010 agreement. Whilst the constructive trust created by the 2010 agreement was no doubt a new constructive trust, the beneficial interest the subject of the new trust was a subsisting equitable interest which effectively revested in the legal owners as a result of the agreement. It may be arguable that this transaction is saved by section 53(2) but it is impossible to reach a concluded view on that issue on the basis of the limited argument which we heard.
83. I am, however, satisfied that Mr Twigger's express trust analysis has sufficient prospects of success for it to be referred to the judge for determination.
84. I would therefore refer the issue of contractual surrender of Inc's interest in the shares of UK to the judge to enable him to make the necessary findings and to hear proper argument on the law.

Respondent's Notice para 3: laches

85. In *Fisher v Brooker* [2009] UKHL 4; [2009] 1 WLR 1764 Lord Neuberger described laches as "an equitable doctrine, under which delay can bar a claim to equitable relief". He went on to hold that, whilst it was not an immutable requirement, "some sort of detrimental reliance is usually an ingredient of laches." The doctrine has been applied in the context of commercial partnerships and joint ventures to deny a remedy to a party who has waited to see whether there was value in claiming an equitable interest while allowing another to take the commercial risks involved. In *Patel v Shah* [2005] EWCA Civ 157 properties were purchased as part of a joint venture between the claimants' predecessors in title (Greetflow) and the defendant so that Greetflow acquired equitable interests pursuant to resulting trusts by reason of contribution to the purchase price. Greetflow assigned its interests to the claimants, following which it was dissolved. The property market stagnated and many of the properties entered negative equity, requiring the defendants to take the burden of keeping the venture afloat. When the property market recovered the claimants asserted an interest in the properties. The claimants argued that a claim to an interest in property could not be defeated by laches. As to that argument, Mummery LJ said at [30]:

“I do not doubt that, in the general run of claims by a beneficiary against a trustee for the recovery of a beneficial interest in trust property, [counsel for the claimant's] analysis is apposite. The key question is whether it applies to the trusts affecting the properties in this case, bearing in mind that these trusts arose, and are sought to be enforced, in a commercial context, not in the donative context of orthodox *inter vivos* and testamentary trusts, in which a beneficiary is not expected by anyone to do anything other than to receive the gift.”

86. Then at [34] Mummery LJ said:

“The general commercial setting of the particular facts of this case make it, in my view, a different kind of case from that of a beneficiary under a gift trust. As Lord Justice Keene pointed out in the course of argument, the persons investing in the purchase of the various properties held from time to time by the defendants were in substance trading in land. They were buying and selling properties with a view to making a quick profit. It was a collaborative commercial venture, in which those participating in it were expected to work together in making their contributions to achieve the aim of the joint ventures, the aim in the case of each acquisition being the same. The creation of resulting trusts arising on the purchases by the defendants of properties in their name, with contributions made by predecessors of the claimants and others, was, as Mr Justice Sullivan pointed out in oral argument, not the aim of the joint ventures. The trusts were a by-product or incidental equitable consequence, a vehicle for accomplishing the commercial aim.”

87. At [38] to [39] Mummery LJ continued:

“38. In my judgment, the deputy judge was right to regard the conduct of the claimants as conduct on which he was entitled to dismiss the claim as unconscionable and barred by laches. The fact that the claimants were seeking to recover capital beneficial interest from the defendants as trustees does not, in my view, make it any the less unconscionable. ...

39. In my judgment, the venture ceased to be joint, as it was originally intended, when, as a result of Greetflow assigning its interest to the claimants and then being struck off and dissolved, no further contributions were made to the joint venture. Everything was left for the defendants to deal with, including financing shortfalls from their own pockets. The claimants and their predecessors had departed from the commercial arrangements. They had ceased to bear any of the risk or the expense. Such conduct on their part falls within the principle stated in *Frawley v Neill*, as well as the principle applicable to partnerships enunciated by Lord Lindley.”

88. Mr Twigger (supported by Mr Polley) contended that the facts of the present case made it unconscionable for Inc now to assert a beneficial interest in the shares of UK.

The 2004 agreement was a collaborative commercial venture, which contemplated Inc contributing to the growth of UK through the preferential trading component with a view to profit-sharing. That venture came to an end in 2010 and it is common ground that the 2010 arrangements put an end to the preferential trading and profit-sharing components. In 2010, by the Frenkel disavowal, Inc made it clear that it no longer intended to contribute to the joint venture. Although Mr Lyampert tried to revive Inc after 2010, it ceased to operate altogether after 2012 and Inc and UK rarely traded in the interval between 2010 and 2012; when they did it was not on preferential terms. Thus, from 2010 to date, Inc had ceased to bear any commercial risk or expense associated with UK's business, and made no contribution to UK's profits. The debt it owed to UK was repaid, but by Mr Lyampert personally and not by Inc.

89. Mr Twigger continues that after 2010 Inc took no steps to assert its interest until after the issue of these proceedings. It is true that Mr Frenkel did, in the 2015 proceedings, make an attempt to seek a declaration as to Inc's interest. However the attempt was rejected by Miss Tipples, and thereafter Inc made no attempt itself to assert the claim. In the meantime, UK has prospered since 2010. Its turnover in 2010 was just under £2 million and profits just under £100,000. By 2018 its annual turnover had increased to £36 million and its profits to around £1 million, and the turnover and profits have continued to grow thereafter. In such circumstances the balance of justice requires the refusal of a remedy to Inc. The grant of such a remedy would result in it taking control of UK from Mr Bell and Mr Lyampert.
90. Against these arguments, Mr Buck (supported by Mr Barden) contends, first, that Inc was not in a position to assert its rights until it was sued by UK and Mr Bell in these proceedings. Until that point (or possibly until November 2019 when Mr Bell stated in evidence filed in the US that UK was currently owned 50/50 as between him and Mr Lyampert) it was entitled to assume that it retained its interest in the light of Mr Bell's and UK's position in the 2015 claim. The fact that Inc did not contribute to the growth of UK after 2010 *might* have a bearing on whether it would be barred by laches from asserting an equitable money claim, but its claim in the present proceedings is simply for recognition of an ownership right which UK/Mr Bell have (until now) recognised.
91. Secondly, Mr Buck contends that, if UK and Mr Bell thought ownership had changed in 2010, they should have asserted that in the 2015 proceedings. In the light of that, Inc cannot be criticised for not asserting its right.
92. Thirdly, Mr Buck contends that none of the respondents has placed reliance on the lack of an assertion of an interest by Inc, because Mr Bell and UK thought that Inc did have an interest and Mr Lyampert cannot have thought that Inc had lost its interest because his position was that Inc never had such an interest in the first place.
93. As to Mr Lyampert, Mr Buck submitted in addition that he did not come to equity with clean hands.
94. These arguments are not addressed at all by HHJ Jarman, and I shall say straight away that I would propose to take the same course on the issue of laches as that which I have proposed on the issue of contractual surrender, namely to refer the issue to the judge for him to make the necessary findings and reach a conclusion on it. For present purposes, therefore, it is sufficient if I explain why I do not regard any of Mr Buck's points as necessarily providing an answer to the defence of laches.

95. As to the first point, I would not, as presently advised, accept that Inc was not in a position to assert its rights until the present proceedings (or November 2019). As I understand it, it is asserted that Inc must be taken to understand that Mr Bell and UK did not oppose the assertion of Inc's beneficial interest, and that there would therefore have been no purpose in taking proceedings.
96. In the period 2010 to 2015, Inc's failure to take steps to enforce its rights was not due to any stance taken by Mr Bell/UK in the 2015 proceedings, nor could it have been. Mr Bell's statement in his 2012 US deposition could not have provided any comfort either, as that statement did not make it clear that Mr Bell accepted that Inc was beneficially entitled to anything. In that period Mr Frenkel had disavowed any interest in UK and done so with the authority of Inc. Whilst I have accepted that it is unrealistic to suppose that Inc could have taken action in this period (because it was deadlocked and its directors were asserting personal interests) its inaction in this period is nevertheless part of the background to the subsequent delay.
97. In the course of the 2015 proceedings, between 2015 and 2017, it is true that Mr Bell made statements (such as the 2016 letter) suggesting that Inc continued to have a beneficial interest after 2010. There was also evidence, however, which Miss Tipples accepted, relating to the basis on which UK had continued trading after 2010. This led to Miss Tipples' reasons for refusing Mr Frenkel declaratory relief as to Inc's rights in 2015, which I have quoted above. Inc must be taken to be aware of those reasons. In the light of those reasons, it seems to me to be well arguable that Inc must have known that its claim to enforce a beneficial interest in the shares of UK would be firmly resisted by UK and Mr Bell. Instead of taking action, it chose to do nothing from 2015 onwards, on the back of its inactivity from 2010 to 2015.
98. I am also not at present persuaded that the distinction which Mr Buck seeks to draw between an equitable money claim and a claim to recognition of ownership of the shares is a good one. In *Patel v Shah* Mummery LJ described the claim there as a claim to beneficial interests in property. It was nonetheless barred by laches.
99. Mr Buck's second point seems to be premised on the suggestion that UK and Mr Bell did not think that ownership had changed in 2010. That, however, is not the basis on which the defence of laches is asserted. The defence is that, as time has passed, it has become unconscionable for Inc to seek relief in respect of its beneficial interest. For this purpose, it is not necessary for UK and Mr Bell to have a belief that ownership formally changed in 2010. As to the third point, reliance, it is sufficient again to point to Miss Tipples' reasoning. Although not binding on Inc, she accepted that Mr Bell would have developed UK through a different vehicle if they had believed that Inc, at the instigation of Mr Frenkel, would re-enter the scene. That seems to me to provide an arguable basis for detrimental reliance.
100. As to the suggestion that Mr Lyampert does not come to equity with clean hands, this was largely based on his failure to pay the sums outstanding under the US judgment. That point can of course be pursued before the judge, and it is preferable that I say no more about it.
101. I would therefore refer the issue of laches to HHJ Jarman as explained above.

Respondent's Notice para 4: proprietary estoppel

102. As Lord Walker noted in *Thorner v Major* [2000] 1 WLR 776 at [29], there is no universal and comprehensive definition of proprietary estoppel, but most authors agree that it consists of three main (albeit overlapping) elements:
- i) a representation or assurance made to the claimant;
 - ii) reliance on it by the claimant; and
 - iii) detriment to the claimant in consequence of his reasonable reliance.
103. Mr Twigger (supported by Mr Polley) founds his argument of proprietary estoppel on the Frenkel disavowal in 2010 which he submitted was a representation or assurance that Inc was giving up its beneficial interest in the shares in UK. He went on to submit that it was reasonable for Mr Bell to understand the Frenkel disavowal to be seriously intended as a promise on which he could rely, and he did so understand it. In consequence Mr Bell decided not to wind up UK and conduct its business through another commercial vehicle, but instead continued to operate on the basis of the 2010 arrangements. If Inc is allowed to go back on the Frenkel disavowal Mr Bell will suffer a detriment because Inc will become the controlling shareholder of UK. It would therefore be unconscionable for Inc to deny that it gave up its interest in 2010.
104. Mr Twigger notes that although HHJ Jarman did not make the necessary findings to support this argument, Miss Tipples did so in the 2017 judgment: see in particular [103], [109] and [123] - [124]. He submits that the evidence before HHJ Jarman on these matters was not materially different to that before Miss Tipples, and that there was accordingly a real prospect that the judge would make the necessary findings to support a proprietary estoppel.
105. Mr Buck submitted that the Frenkel disavowal lacked the requisite clarity to be capable of being understood in the manner contended. Mr Bell could not have thought that Mr Frenkel was disavowing all of Inc's interest in UK. Mr Bell could not have relied on the disavowal, as he saw Inc and Mr Lyampert as interchangeable.
106. I do not, as presently advised, think that the Frenkel disavowal lacked clarity. It is, moreover, important to have in mind that it was not what Mr Frenkel or Inc actually intended which is determinative but rather how the words spoken were reasonably understood. As to this, the findings in Miss Tipples' judgment on which Mr Twigger relied seem to me to demonstrate that the respondents have a real prospect of establishing that Mr Bell understood the disavowal in the manner contended, and that he relied on it to his detriment.
107. I would therefore refer the issue of proprietary estoppel, along with the other issues, to the judge.

Conclusion and directions

108. For the above reasons, if my Lords agree, I would allow the appeals to the extent of referring the issues of contractual surrender, laches and proprietary estoppel to the judge pursuant to CPR 52.20(2)(b). It will be a matter of case management for the judge as to whether to allow further evidence, but he should bear in mind that there has already been a trial of these issues, and the parties have had a full opportunity to advance their cases.

Lord Justice Newey:

109. I agree.

Lord Justice Lewison

110. I also agree.