Neutral Citation Number: [2022] EWHC 1572 (Ch)

Case No: PT-2020-000355

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20/06/2022

Before :

CAROLINE SHEA QC
(sitting as a Deputy Judge of the High Court)

- -

Between :

(1) ALI ROJOB
(2) RABEA ROJOB

Claimants

- and -

RONABIR DEB

Defendant

- -
- -

John Clargo (instructed by **Allan Janes LLP**) for the **Claimants**
Simon McLoughlin (instructed by **Ingram Winter Green LLP**) for the **Defendant**

Hearing dates: 28 March – 1 April 2022

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Approved Judgment

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This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Monday 20 June 2022 at 10:00am.

Caroline Shea QC :

Introduction

1. The Claimants are a husband and wife who have been married since 1974. The First Claimant is a restaurateur, and the Second Claimant is a housewife managing the domestic affairs of the family. In 1986 the Claimants jointly bought a family home at 59 Cardigan Road, Oxford ("the Property"), into which they moved with their five children. The Defendant had, until this dispute arose, been a close family friend of the Claimants from his childhood, and came to their rescue when, in 2007, they found themselves in dire financial circumstances. Trustees in bankruptcy appointed in relation to an earlier bankruptcy of the First Claimant ("the New Trustees") were threatening to enforce historic bankruptcy debts by means of a possession order against the Property. The enforced sale of the Property, then worth between £290,000 and £300,000, would have left the Claimants with nowhere to live, and without sufficient resources to buy any other property. The Claimants' applications to obtain a mortgage were meeting with repeated rejections, and they had no other means of raising the necessary funds. The Defendant was willing to help the Claimants, by taking a transfer of the Property, against which he was able to raise of a mortgage of £205,000, which sum he gave to the Claimants. The Claimants were then able to discharge the bankruptcy debts (and satisfy other smaller debts) using the monies paid to them by the Defendant. The Property was transferred to the Defendant on 25 September 2008, and the possession proceedings were discontinued.

2. The intention of the parties was that the Claimants would continue to live in the Property, and that they would be responsible for the mortgage repayments (which they have duly paid ever since). It was also agreed that the Claimants would be able to purchase back the Property at a price of £205,000 when they (or their family) were in a position to raise the money to do so ("the Buy Back Agreement"). That much is uncontentious. The Defendant's case is that it was agreed that the period during which the Claimants could exercise the Buy Back Agreement was from the outset expressly limited to two years, albeit that that period was subsequently extended to three years, he says at the request of the Claimants' eldest son, Kawsar Shah ("Kawsar"). The Claimants' case is that at no point was there any reference, much less agreement, to any time limitation on their ability to exercise the Buy Back Agreement.

3. In 2015 the Claimants (through their sons) wanted to buy the Property back. Kawsar, who had been heavily involved in the discussions with the Defendant in 2008, contacted him to commence the process of buying the Property back at the price of £205,000. The Defendant resisted, and continues to resist, the call to sell back the Property at that price, now relying on the alleged time limit on the ability of the Claimants to exercise the Buy Back Agreement. Discussions between the Defendant and Kawsar, involving some calls with the Second Claimant, and subsequently between the Defendant and another son of the Claimants ("Dildar"), failed to produce an agreement.

4. The Claimants have brought this claim to resolve the continuing dispute. They rely on the doctrine of proprietary estoppel and also on a constructive trust. In opening, Mr Clargo, counsel appearing on behalf of the Claimants, indicated that, if the Claimants were forced to elect, their primary case would be based on constructive trust, but

submitted that the two bases of claim largely overlap, and that in any event the application of each doctrine would lead to the same result.

5. It is accepted on behalf of the Claimants that their claim will fail if the Defendant succeeds in establishing that the Buy Back Agreement was subject to the time limit as he alleges. The Defendant does not accept that any equity that the Claimants succeed in establishing should be satisfied by the transfer of the Property back to the Claimants. However, no positive case was advanced on behalf of the Defendant as to how the Court should satisfy any equity.

6. There are key points in the history of the events leading to this claim on which the evidence of the parties differs sharply. That evidence will require to be explored in some detail. Before doing so, I set out the relevant background, and the correct approach to assessing the evidence bearing on the factual issues, the majority of which is based on the memories of the witnesses.

The Rojob family

7. The First Claimant came to the United Kingdom in 1962, aged nine years old. He lived above his uncle's restaurant in Oxford, and it was there that he first started work aged 16. It was the Defendant's uncle, Fotik, who looked after the First Claimant generally and made sure he went to school. The First Claimant described Fotik as being like a brother. In 1972, in partnership with Fotik and Mintoo, also an uncle of the Defendant, the First Claimant started a restaurant business at the Standard Tandoori in Oxford. In the late 1970s the First Claimant bought out the other two partners and became sole owner of the Standard Tandoori restaurant business.

8. The Claimants were married in Bangladesh in 1974. The Second Claimant arrived in the United Kingdom in 1979, together with the Claimants' first child and the First Claimant's niece. Initially they lived in accommodation above the Standard Tandoori. By 1986, the Claimants had five children, one daughter and four sons, and needed more space. They bought and moved into the Property, with the assistance of a mortgage.

9. The Second Claimant can understand limited spoken English, but cannot read English at all. She gave both written and oral evidence through a certified interpreter. Of the Claimants' five children, two sons feature and give evidence in this case. At his parents' request, and on their behalf, Kawsar was heavily (the Defendant says exclusively) involved in reaching the agreement between the parties as to the transfer of the Property in 2008. Further, it was Kawsar who, on his parents' behalf, approached and subsequently dealt with the Defendant in 2015 and 2016 when the Claimants sought to buy back the Property for £205,000 under the Buy Back Agreement. Dildar, their youngest son, stepped in after negotiations between Kawsar and the Defendant had broken down in 2016, and again in 2018. That intervention did not yield any agreement.

The Defendant

10. Having started life as a restaurateur, the Defendant is now, and has been since the events in question, principally a property developer and investor. At one time has acted as a mentor to others starting out in the property development sector, including,

for a short time, Kawsar. He has been familiar with and close to the Claimants and their family from a very young age. He moved away from Oxford, first to Cheltenham and then to India, for a few years, before returning to England. He married in the early 2000s, and together with his wife some time later started a family.

The relationship between the Claimants and the Defendant

11. The Claimants' and the Defendant's families once lived in the same village in Bangladesh, and the First Claimant and the Defendant's father and uncles were friends from a very young age. That friendship endured after the arrival of the First Claimant in the United Kingdom in 1962. There was, as the Defendant accepted when giving evidence, an "extraordinarily close bond" between the families. Fotik and Mintoo were like brothers to the First Claimant. When the Second Claimant came to the United Kingdom she became good friends with the Defendant's family, especially his mother. The Claimants knew the Defendant as a child and treated him like a son. For a few years the Defendant's family moved away, first to Cheltenham and then to India, but the Defendant was and remained very close to the Claimants. He looked up to the First Claimant, who in turn treated the Defendant like a "little brother". After his marriage, the Defendant saw less of the Claimants, but stayed in touch, meeting with them a couple of times a year, and continued to regard them with the same closeness and affection.

12. The undisputed evidence, readily accepted by the Defendant, is that the Defendant and the Claimants regarded each other with great affection, almost as extended family. The strength and closeness of the relationship between the parties is important because it provides background to the Defendant's involvement in assisting the Claimants when they faced the prospect of losing the Property.

13. I note at the outset an unusual feature of the case. The underlying agreement is not at issue. It is agreed that under the Buy Back Agreement the Claimants would be able to buy the Property back at the same price as the Defendant had paid for it. The only issue is whether the Buy Back Agreement was expressly agreed to be subject to a time limit of two years, extended at the request of Kawsar to three years, as the Defendant contends. The parties do not agree in a number of respects as to how and when the underlying scheme, of which the Buy Back Agreement was part, was reached. Notwithstanding the parties' agreement as to the main elements of that underlying agreement, those factual disputes fall to be decided, partly because they form part of the factual case on which each party relies, and much of the evidence was devoted to them; partly because exploring that evidence in detail provides important context within which the disputed facts fall to be assessed and the principal issues will be decided; and partly because exploring those issues will assist in deciding where necessary whether a witness is telling the truth.

Approach to assessing witness evidence based on memory

14. Before making the factual findings necessary to determine this dispute, I note that much of the critical evidence is based primarily on the memories of the witnesses. I assess that evidence in the light of recent authority on the reliability of memory in the context of disputed facts. Those authorities have been summarised by Warby J. in *R (o.a.o. Dutta) v General Medical Council* [2020] EWHC 1974 (Admin) at [39], a case which was referred to in the Defendant's skeleton argument but which did not feature

in either party's opening or closing submissions at trial. When assessing the parties' evidence I adopt the observations and follow the law as set out in the following passage from the judgment of Warby J in *Dutta*:

> "39. There is now a considerable body of authority setting out the lessons of experience and of science in relation to the judicial determination of facts. Recent first instance authorities include *Gestmin SGPS SA v Credit Suisse (UK) Ltd [2013] EWHC 3650 (Comm)* (Leggatt J, as he then was) and two decisions of Mostyn J: *Lachaux v Lachaux [2017] EWHC 385 (Fam) [2017] 4 WLR 57* and *Carmarthenshire County Council v Y [2017] EWFC 36 [2017] 4 WLR 136*. Key aspects of this learning were distilled by Stewart J in *Kimathi v Foreign and Commonwealth Office [2018] EWHC 2066 (QB)* [96]:
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> "i) *Gestmin* :
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> • We believe memories to be more faithful than they are. Two common errors are to suppose (1) that the stronger and more vivid the recollection, the more likely it is to be accurate; (2) *the more confident another person is in their recollection, the more likely it is to be accurate*.
>
> • Memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is even true of "flash bulb" memories (a misleading term), i.e. memories of experiencing or learning of a particularly shocking or traumatic event.
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> • *Events can come to be recalled as memories which did not happen at all or which happened to somebody else*.
>
> • The process of civil litigation itself subjects the memories of witnesses to powerful biases.
>
> • Considerable interference with memory is introduced in civil litigation by the procedure of preparing for trial. Statements are often taken a long time after relevant events and drafted by a lawyer who is conscious of the significance for the issues in the case of what the witness does or does not say.
>
> • *The best approach from a judge is to base factual findings on inferences drawn from documentary evidence and known or probable facts. "This does not mean that oral testimony serves no useful purpose… But its value lies largely… in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny* and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. *Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in*

his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth".

"ii) *Lachaux* :

• Mostyn J cited extensively from *Gestmin* and referred to two passages in earlier authorities. I extract from those citations, and from Mostyn J's judgment, the following:

• "Witnesses, especially those who are emotional, who think they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that *with every day that passes the memory becomes fainter and the imagination becomes more active.* For that reason, a witness, however honest, rarely persuades a judge that his present recollection is preferable to that which was taken down in writing immediately after the incident occurred. Therefore, *contemporary documents are always of the utmost importance…* "

• "…I have found it essential in cases of fraud, *when considering the credibility of witnesses, always to test their veracity by reference to the objective fact proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities*…"

• Mostyn J said of the latter quotation, "these wise words are surely of general application and are not confined to fraud cases… it is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Bingham J that *the demeanour of a witness is not a reliable pointer to his or her honesty."*

"iii) *Carmarthenshire County Council* :

• The general rule is that oral evidence given under cross-examination is the gold standard because it reflects the long-established common law consensus that the best way of assessing the reliability of evidence is by confronting the witness.

• However, oral evidence under cross-examination is far from the be all and end all of forensic proof. Referring to paragraph 22 of *Gestmin* , Mostyn J said: *"... this approach applies equally to all fact-finding exercises, especially where the facts in issue are in the distant past.* This approach does not dilute the importance that the law places on cross-examination as a vital component of due process, but it does place it in its correct context.

> "I have emphasised passages that have particular resonance in this case.
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> "40. This is not all new thinking, as the dates of the cases cited in the footnote make clear. *Armagas v Mundogas* otherwise known as *The Ocean Frost*, has been routinely cited over the past 35 years. Lord Bingham's paper on "The Judge as Juror" (Chapter 1 of *The Business of Judging*) is also familiar to many. Of the five methods of appraising a witness's evidence, he identified the primary method as analysing the consistency of the evidence with what is agreed or clearly shown by other evidence to have occurred. The witness's demeanour was listed last, and least of all."

15. Bearing this guidance in mind, I note that Kawsar, the Defendant, and Dildar each presented as having clear and reasonably confident memories of the events in question. The Second Claimant also appeared (through the translator) to have a clear memory of those events. It was obvious that emotions were running high as their respective roles in the dispute between these erstwhile close friends were subjected to detailed examination, each side apparently feeling betrayed by the other. Kawsar and the Defendant in particular often appeared to be arguing their respective cases, rather than simply answering the question, an understandable, if unhelpful, reaction to the tense and distressing dispute in which they were embroiled. Witnesses on both sides were impassioned, and convinced of the rightness of their respective cases, unwilling to admit anything which might, in their perception, undermine that case. Accordingly in assessing their evidence I have sought to focus as much as possible on any relevant documents, inherent likelihood, and consistency with other related evidence given by the same witness, and by other witnesses.

16. The First Claimant's evidence suffered from somewhat different problems. He was often unable to follow the question, even when asked several times, in increasingly simple formulations. He would leave long pauses after a question was asked, and many times failed to give any response at all until reminded that an answer was required. The response when it came often failed to answer the question he had been asked. On other occasions he said that he had forgotten or that he did not recognise documents to which he was referred; and on several occasions he refused to confirm quite obvious facts, such as that a particular letter he was looking at was written to the trustees in bankruptcy by Kawsar; or that he had ever instructed a particular solicitor who had made an attendance note of a call from him; or that he then instructed other solicitors to act for him on the transfer of the Property to the Defendant.

17. At one stage the First Claimant referred to a period around the time of the events in question, when he suffered from anxiety and depression, and he seemed to suggest that mental health problems may yet be afflicting him. Certainly, when giving evidence at the trial his ability to focus, understand, and remember, seemed inconsistent and impaired, and it is not possible to judge whether that was deliberate or the function of poor health. It does however lead me to treat his evidence with particular caution, and to be wary of accepting his account in the absence of relevant consistent documents, or inherent likelihood, or consistency with the evidence of other witnesses.

The First Claimant's bankruptcy

18. In 1984 the First Claimant established a partnership with four other partners ("the Reading Partnership"). Together they opened a restaurant in Reading. The First Claimant's role was advisory only; he was not involved in the day to day running of the Reading restaurant. On 10 August 1993 he was adjudged bankrupt following the petition of Her Majesty's Customs and Excise in respect of unpaid tax, interest and penalties totalling £150,780.33 arising from the affairs of the Reading Partnership. On 7 June 1994 a caution was registered against the title to the Property by the First Claimant's then trustee in bankruptcy ("the Original Trustee") in order to protect the interests of the First Claimant's creditors. It appears that the Original Trustee took no steps to sell the Property at that stage, at least partly because it was in negative equity, and so there would have been no surplus funds from any sale to distribute to creditors.

19. On 10 August 1996 the First Claimant was discharged from his bankruptcy. It appears that the First Claimant believed, wrongly, that being discharged from bankruptcy effectively nullified any remaining debts, and wiped the slate clean. The caution remained registered against the Property title, but no further enforcement steps were taken until the events arising in 2005, to which I now turn.

The reactivation of the bankruptcy debt

20. In or around early 2005, the First Claimant wished to raise finance, to be secured against the Property (his interest in the Property was by then subject to further charges registered to secure earlier borrowings: those borrowings/charges are not relevant to the issues in this case). The First Claimant consulted a Mr Hanif, a mortgage advisor/broker, recommended to him by the Defendant. The Defendant accepts that it was he who recommended Mr Hanif to the First Claimant, but his written evidence was that he did so at the end of 2006 or the beginning of 2007. When cross-examined he accepted that his memory was hazy, and that he could not recall whether the First Claimant talked to him about the Property situation as such in 2005. He recalls the First Claimant asking him if he knew of any mortgage broker but did not recall that it was in 2005, nor did he have a positive recollection of when it was.

21. There is no direct documentary evidence which pinpoints the timing of Mr Hanif's involvement. The First Claimant's unchallenged evidence is that it was Mr Hanif who suggested that the First Claimant consult a firm of solicitors called W J Short & Co ("W J Short") in respect of the proposed mortgage. There is correspondence (for example, a letter of 6 May 2005 to the Official Receiver's Office, and a letter of 16 May 2005 to the Claimants) showing that W J Short was instructed by the First Claimant, and acted on his behalf during the course of 2005. Kawsar gave evidence at trial that he remembers driving his father to a meeting with Mr Hanif in April 2005. He remembers the date because he had only recently passed his driving test, and on that particular trip he crashed the car into the boundary wall of Corpus Christi Church. He was challenged as to why he had not included that evidence in his witness statement. He said, fairly in my judgment, that he had not considered the crash relevant to the issues on which he was asked to give evidence, but was able to give that evidence under cross-examination when being asked how he was so sure of the date. In any event, the link between Mr Hanif and the First Claimant's instruction of W J Short in 2005 is sufficient to satisfy me that the Defendant must have

recommended Mr Hanif to the First Claimant some time in the weeks or very few months prior to May 2005.

22. The Claimants sought to characterise the Defendant's insistence that he made the recommendation in late 2006/2007 as an attempt to distance himself from the unfortunate chain of events which followed the First Claimant's instruction of W J Short in 2005. The First Claimant gave evidence in his witness statement that the Defendant held himself at least partly responsible for those events, and that the First Claimant believed and (in oral evidence) still believes that he was right to do so. By contrast, the Defendant's evidence was that he did not and does not hold himself responsible for those events. I accept that at the relevant time the First Claimant believed the Defendant to be partly responsible for the difficulties that arose, however unjustifiably.

23. Upon being instructed, W J Short investigated the registered title of the Property and discovered the caution entered by the Original Trustee. W J Short told the first Claimant that in order to raise a mortgage on the Property he would need to clear the caution off the property register. The First Claimant says that he understood that advice, but was not asked to, and did not, authorise W J Short to contact the Official Receiver on his behalf in that regard. Be that as it may, W J Short did contact first the Original Trustee, and then by letter dated 6 May 2005 the Official Receiver. This had the effect of reactivating what until that point had been a dormant bankruptcy debt. The New Trustees were appointed with effect from 4 October 2005, and began the process of trying to collect the outstanding debt, the value of which was at that point stated to be £348,629. The only asset against which the New Trustees could enforce the debt was the Property, which was no longer in negative equity. They were working against a time limit: as a result of section 261 of the Enterprise Act 2002, which came into force on 1 April 2004, there was a cut-off date of 1 April 2007, after which the Property, being the First Claimant's principal residence, would fall out of the New Trustees' estate and revert to the First Claimant. The New Trustees wanted to realise their interest in the Property before the Enterprise Act 2002 deprived them of it.

24. The New Trustees entered a restriction against the Property pursuant to an application dated 13 February 2007, and commenced possession proceedings against the Claimants. In due course a hearing date was fixed for the possession claim. The claim for possession could be defended only if the Claimants were able to pay off the remaining debt to the New Trustees, the original estimate of £348,629 being later negotiated down by Kawsar on his father's behalf, firstly to £95,000 and finally in mid-2008 to £85,000. The only means by which the Claimants could discharge the debt was by a loan secured on the Property. To summarise the outcome of a number of avenues explored at the time, no lender was willing to lend to the Claimants.

The Defendant's involvement

25. It was at this point that the Defendant became actively involved. There is a sharp divergence in the parties' evidence as to how and when he became involved.

The Claimants' case

26. The Claimants' evidence is that the Defendant felt responsible for the Claimants' difficulties because it was he who had originally advised the First Claimant to consult Mr Hanif, and it was Mr Hanif's recommendation of W J Short that had led ultimately to the attempt by the New Trustees to enforce their interest by seeking possession of the Property. The Defendant, being the first link in that chain, felt a degree of responsibility for the problems that the Claimants were now facing. He came up with the idea of purchasing the Property from the Claimants, using a mechanism he had previously used to purchase another property. He would buy the Property outright with the assistance of a very short-term bridging loan, and then immediately mortgage it with a company called Mortgage Express for 70% of its value (its agreed value at the time being somewhere between £290,000 and £300,000). The short-term bridging loan (referred to as a "daylight bridging loan") was then to be repaid within hours of the transfer taking place.

27. The Claimants say that this agreement was reached when the Defendant and his wife went to the Property for dinner one evening in March 2008. The invitation had been issued after the First Claimant had discussed the imminent enforcement of the bankruptcy debt with the Defendant over the phone on a number of occasions in early 2008. Believing that the Defendant was at least in part responsible for the revival of the bankruptcy enforcement process, the First Claimant had, he says, suggested that they should all try to find a solution to the problem. The situation was discussed in detail at the dinner in March 2008. The Defendant suggested that the Property would be transferred into his name and that he would arrange a mortgage, raising 70% of the value of the Property, which he would pay to the Claimants to enable them to buy out the New Trustees' interest.

28. It was also agreed that the Claimants (or their children) could buy back the Property for the same price when they could raise the necessary funds. In the meantime, the Claimants would continue to reside in the Property, and would be responsible for the mortgage repayments. After the details were agreed at the dining table, the Defendant went over to the Second Claimant and said, "Do not worry about it Babi [sister-in-law], I have spoken with Dada [brother in law] and everything will be sorted". The Claimants say that this was a reference to the conversation he had just had with the First Claimant at the dinner table about how he was going to help. It was agreed that the Defendant should continue to liaise with Kawsar to make the necessary arrangements. The Claimants are adamant that there was no reference to or discussion of any time limit to the agreement that they would be able to buy back the Property when and if they were able, either at that dinner or at any later stage. It was suggested to the Second Claimant that perhaps the First Claimant or Kawsar simply failed to tell her about the two-year limit; they just wanted to reassure her that everything was going to be all right. The Second Claimant responded: "This was a big matter so if there was something like that they would have mentioned it to me".

The Defendant's case

29. The Defendant's account differs in a number of important respects. According to the Defendant, the Second Claimant came to his home, in tears, and told him that she and the First Claimant were in a difficult situation, and that the Standard Tandoori was in a mess, and asked him if he could find a way to help. She did not know the details, but asked him to speak to Kawsar. He then met with Kawsar who told him the details of the Claimants' problems. Kawsar told him that the landlord of the Standard Tandoori

had increased the rent payable under the lease of the Standard Tandoori ("the Restaurant Lease") and was not going to issue a new lease, and that the restaurant was a problem unless they paid all the arrears. Kawsar also told the Defendant that the Claimants had borrowed money that was charged against the Property and that they had problems with the Property. The Defendant invited Kawsar to come to his office to review the documents. At that subsequent meeting Kawsar also told him about problems with a property in Cheltenham then owned by the Claimants, which was in a dilapidated condition, and which the First Claimant was under a statutory duty to repair. The Defendant says he felt "overwhelmed to help them after these meetings".

30. He accepts that he and his wife attended the Property for the dinner referred to by the Claimants, and that at some point during the evening he did offer reassurance to the Second Claimant, telling her not to worry, that he had spoken to her husband, and "everything will be sorted". No details of the problems faced by the Claimants were discussed, he says, and he denies that any agreement was reached with the Claimants on that occasion. Rather, the agreement was reached directly with Kawsar on his parents' behalf following the visit of the Second Claimant. The Defendant points out that the figure of £205,000 could not have been mentioned at a dinner party in March 2008, since the question of what sum he would be able to raise had not yet been determined, and was not in point of fact finalised until on or shortly before 17 April 2008. This can be seen from the chain of events starting with his contact with a mortgage broker called Gary Morgan, whom the Defendant said when giving evidence that he called in early April 2008 soon after, possibly the very day after, meeting with Kawsar. He also claims that at the time he was involved in buying a property in Islington with the benefit of the daylight bridging finance offered by Mortgage Express, and Gary Morgan advised that the quickest way to obtain finance to assist the Claimants was to purchase and mortgage the Property instead of buying the flat in Islington. The Defendant's evidence at trial was that he had a decision in principle for a mortgage to assist him to buy the Islington flat, not a formal offer, and that is why he has no documentation relating to it. He cannot now remember the address of the property in question.

31. The Defendant says he initially spoke to Kawsar about the possibility of using the daylight bridging loan to purchase the Property from the Claimants. It was at a later meeting that the sum of £205,000 was agreed, and it was further agreed that the Claimants could buy back the Property for the same price within a two-year period following their sale of the Property to the Defendant. The Defendant would let the family occupy the Property as tenants to give the family time to get back on their feet. He says Kawsar indicated that two years would be long enough to achieve this, and that is why two years was agreed. The Defendant further relies on an attendance note dated 28 March 2008 made by Alison John of John Farr-Davis, solicitors at the time acting for him on the intended transfer, which refers to the details of the proposed transfer, the "same sort of one day bridge and then re-mortgage which he did on the previous London property" and includes the note: "Mr Deb also advised that the sellers would be leasing the property back and they would also be having an option for 5 years to purchase the property back at the same price he was buying in at". The reference to the five-year option in the attendance note is consistent, it is said, with the Defendant's case that he ultimately agreed with Kawsar a time limit, albeit of two years, on the right of the Claimants to buy back the Property at the original sale price of £205,000.

Issues of fact

32. There are accordingly three central issues of fact concerning the question of how the agreement came to be made, and what its terms were:

    1) Was the Defendant alerted to the Claimants' predicament by the First Claimant speaking to him about it several times on the telephone; or by the Second Claimant going to the Defendant's house in tears to ask for his help?

    2) Was the situation discussed, and if so was an agreement reached, at the dinner party in March 2008; or was the agreement reached between the Defendant and Kawsar on behalf of his parents during the course of March/April 2008?

    3) Did the Buy Back Agreement, whenever it was agreed, include a time limit of two years?

    As mentioned in paragraph 13 above, the central issue in the case is issue (3). However, it is necessary to explore issues (1) and (2) in some detail, in order – broadly – to provide the context when assessing the conflicting accounts in relation to issue (3).

(1) How the Defendant came to be involved

33. The parties' evidence on this issue differs dramatically. The Defendant's evidence contained a number of significant mistakes and flaws, both as to substance and as to chronology. When giving oral evidence the Defendant repeated claims in his witness statement that both the Second Claimant and Kawsar told him about problems with the Restaurant Lease concerning arrears, and the landlord's threat not to renew the Restaurant Lease, at the same time as they told him about the recent financial problems regarding the Property. He also confirmed that Kawsar was at that stage talking about taking over running the Standard Tandoori.

34. However, contrary to the Defendant's evidence on these matters, Kawsar gave unchallenged evidence at trial that the Restaurant Lease had been renewed in 2004, not 2008. The First Claimant accepted that in 2005 and 2006 there were difficulties at the restaurant connected to the rent going up, and also as a result of competition. But there is no evidence, nor has it been suggested, that in early 2008 the rent due under the Restaurant Lease was in arrears, or that there was an impending rent review, or that the landlord was threatening to forfeit the restaurant lease or take any other enforcement measures. Similarly, Kawsar gave evidence that at the relevant time in 2008 he had just been made general manager of a restaurant in Oxford, Branca, which had nothing to do with his family, and there was no question at that time of his planning to take over running the Standard Tandoori. He remained in employment at Branca until September 2010, after which he worked at The Bousaka, another restaurant, also unrelated to his family. The plans to take over the Standard Tandoori did not begin to evolve until 2010/11, as shown by the email dated 1 August 2011 from Kawsar to the Defendant in which Kawsar attaches a business plan he has "put together for the banks" and indicates that he has been "working on this for the past five weeks". Dildar confirmed that he and Kawsar started running the Standard Tandoori in 2011.

35. I note that the First Claimant accepted, when it was put to him, that in 2006 Kawsar and Dildar had "taken over the restaurant". This seems wholly at odds with the clear evidence of Kawsar, and Dildar, which was quite specific as to where Kawsar was working and when; and indeed it is inconsistent with the Defendant's evidence. I find that the First Claimant's memory of events was faulty, and that he himself was getting the chronology confused.

36. Returning to the Defendant's evidence, at the very least, these multiple mixed-up references suggest that the Defendant has confused or conflated in his mind a number of issues, and a number of meetings and interactions with various members of the family, at different times between 2004 (the last rent review under the Restaurant Lease), 2006 (when the First Claimant told him that business was suffering from the rent going up and the competition), and 2010/11 (when Kawsar formed and then implemented a plan to take over the restaurant with his brother). Nor is this an isolated example of the Defendant's mistaken memory; I refer to my finding above that the Defendant's recommendation of Mr Hanif had been made at the beginning of 2005. The references by the Defendant, in both his witness statement and his oral evidence, to events which took place at wholly different times from the events he purports to remember taking place at the same time call into question the accuracy of his memory, and undermine his evidence as to how he became involved in the Claimants' problems at the beginning of 2008.

37. A further unexplained anomaly is the reference in an email dated 1 July 2016 from the Defendant to Kawsar, when the dispute was starting to crystallise, in which the Defendant wrote to Kawsar "It was you who approached me to help you and your family during this difficult time in your life". Further, when giving evidence, the Defendant said "When Kawsar came to my office and the Second Claimant rang me before that asking for help … they were in a difficult situation". That reference in 2016 to the Second Claimant ringing the Defendant, not visiting in tears to ask for help, is a yet further account and differs from the one he gave in his witness statement. This is yet another example of the shifts and confusion in the Defendant's evidence on this topic, which do not lead me to place confidence in his memory or his account.

38. There are no further documents which bear on this issue, even indirectly. I have considered the inherent likelihood of the Defendant's account of what happened. As a matter of impression, it strikes me as inherently unlikely that the Second Claimant would have attended the Defendant's home to ask him for help. Although she did visit the Defendant's mother at the Defendant's house, there is no evidence of any occasion on which the Second Claimant acted unilaterally in approaching either family friends or anyone else in this way. Rather the evidence suggests that she dealt with the external world of solicitors, mortgagees, and brokers through her husband and children, predominantly Kawsar. Neither party made submissions on inherent likelihood in this context, and accordingly I do not place much weight on the impression I gained, other than to say I have considered it and find it, if anything, to support my findings on this issue.

39. Taking all these matters into account, the multiple and repeated mistakes, as to subject matter, to whom he spoke, whether phone calls or visits, and timing, in the Defendant's written and oral accounts, are sufficiently wide ranging to lead me to conclude that his evidence on this topic is unreliable. Accordingly, I reject the

Defendant's evidence that he became involved in the particular issue regarding the Property as a result of a visit from the Second Claimant in early 2008.

40. What then of the Claimants' account on this question? The First Claimant's evidence is that he talked to the Defendant on the phone several times in early 2008 and suggested that they were "all in it together", because he held the view that, because it was the Defendant who had recommended Mr Hanif, he was the first link in the chain leading to the reactivation of the bankruptcy, creating the urgent need to raise funds to avoid the Property being repossessed. When giving evidence, the First Claimant repeated that view and clearly still holds it. As stated above, I accept this evidence, not least because it seems still to prey on his mind today. The Defendant was asked several times whether the First Claimant had told him that he, the First Claimant, held that belief. The Defendant appeared to avoid answering that question on a number of occasions, instead repeatedly asserting that he himself did not look at it in that way. When pressed to answer the question posed – whether the First Claimant had told him that the First Claimant did see it that way – the Defendant finally said that he had never had a call, there was never any discussion, and that he had nothing to do with the First Claimant's business (notwithstanding the question had been about the Property, not about any business of the First Claimant).

41. This answer is at odds with the Defendant's oral evidence that the First Claimant had told him about the issue with the Property, first said to be "well after 2007", revised to "he spoke to me about the house towards the end of 2007", albeit he then modified that to the First Claimant having spoken to him about the Property "very vaguely". These were answers he gave when being cross-examined about the year in which he had recommended Mr Hanif to the First Claimant. The point here is not the discrepancy in that date, but rather the evidence he gave that the First Claimant did tell the Defendant about the First Claimant's issue with the Property. This is inconsistent with the Defendant's later evidence that there was "never" any discussion between himself and the First Claimant.

42. Given the Defendant's own evidence that there were phone calls between the First Claimant and himself from late 2007 in which the issue with the Property was addressed, and given the clear evidence that the First Claimant did (and still does) hold the Defendant responsible (whether or not unjustifiably it is unnecessary for me to decide) for the difficulties the family was facing, I find that phone calls did take place between the First Claimant and the Defendant in late 2007 and early 2008, in which the First Claimant alerted the Defendant to the threat that the Property would be repossessed, and the urgent need to raise funds to prevent this; and that he did ask the Defendant to find, or to help find, a solution to the Claimants' problems. Again, there is no documentary evidence against which to measure the accuracy of the First Claimant's account. It is however inherently likely that it was the First Claimant who alerted the Defendant to the problems, and asked for his help, and I so find, for that reason and for the reasons I give above.

(2) Was the situation discussed, and if so was an agreement reached at the dinner party in March 2008; or was the agreement reached between the Defendant and Kawsar on behalf of his parents during the course of March/April 2008?

43. The Claimants' case is that the situation was discussed when the parties, together with the Defendant's wife, met for dinner; and agreement was reached to transfer the

Property to the Defendant, who would fund it by taking a mortgage for £205,000, being 70% of the value of the Property, which the Claimants would use to pay off their debts. They would pay the mortgage repayments and would continue to live in the house. When they were in a position to raise the necessary funds, they would be able to buy the Property back at the same price as the Defendant had paid for it.

44. The Defendant admitted without hesitation when giving oral evidence that he attended a dinner at the Property around that time in 2008. He denies that he had any business discussion with the First Claimant, and says would not have discussed any potential solution with the Second Claimant because, he said, she would not have understood. He accepts that he said to the Second Claimant words to the effect "Don't worry, everything [is] going to be ok".

45. In refuting the claim that the agreement was reached at the March 2008 dinner, the Defendant points to what it is said are two important inconsistencies in the Claimants' account: firstly, the reference to the precise amount of the monies to be raised (£205,000); and secondly, the assertion made by the First Claimant in his witness statement that the Second Claimant heard the matters being discussed. As to the first of these, in his witness statement the First Claimant states: "the Defendant said that he could secure a mortgage of 70% of the value of the Property, which at that time amounted to £205,000". In cross examination the First Claimant confirmed this passage: "yes, that is exactly what happened". So whilst the First Claimant's witness statement is ambiguous as to whether those precise figures were mentioned at the dinner party, in his oral evidence he confirmed that they were.

46. The First Claimant was then taken through a series of communications between the Defendant and third parties during the course of March and April 2008 (which I do not need to rehearse in detail) culminating in an email dated 17 April 2008 from Kawsar to Ms Thomas of Llys Cennen, solicitors acting for the Claimants on the proposed sale, confirming, for the first time, that the sale price of the Property was to be £205,000. It was put to the First Claimant that this demonstrates that the sale price was only agreed shortly before 17 April 2008. If that is correct, the Defendant submits, then the specific sale price cannot have been discussed at the dinner in March 2008. This supports the case, it is said, that the situation was not discussed, much less an agreement reached, at that dinner party. Further, the first offer made following the Defendant's consulting Mr Morgan in early April 2008 was in fact for 85% of the value of the Property (see the offer of 3 April 2008, sent by Mr Morgan to the Defendant by letter dated 4 April 2008), and so it appears that neither the amount not the percentage would have been known at the dinner party which took place in March.

47. I agree that the precise figures, whether as to amount or percentage, would not have been agreed that evening, since they were not finalised until mid-April. I do not accept that this anomaly torpedoes the Claimants' factual case, namely, that the situation was discussed, and agreement on the way forwards was reached, at that dinner. Bearing in mind the process of revisiting memories over years, and the added effect of doing so for the purposes of litigation, the First Claimant may well have transposed into his memory the fact that what subsequently came to be offered was 70% of the value of the Property, and that 70% turned out to be £205,000. But that does not without more wholly dispose of his account that the mechanics of the rescue scheme were agreed that night, and included a Buy Back Agreement unlimited to any

time period. Such a mistake of detail, made some 14 years after the events in question, cannot bear that weight. On the other hand, the Defendant had used the daylight bridging loan mechanism on at least one occasion prior to these events: the 28 March 2008 attendance note of Ms John makes this clear and the Defendant himself accepts it. Indeed, his evidence is that, when considering how he could assist the Claimants, he started to think that this would be the route through which he could, at no cost to himself, raise money secured on the Property, which he could then pay to the Claimants to clear their debts. He may have mentioned 70%, by way of example or by way of aspiration, or he may not. But if he did not, that does not in my judgment in itself mean that the First Claimant's account of the mechanics of the agreement having been reached on that evening is to be rejected.

48. Secondly, the First Claimant initially stated that the Second Claimant was involved in the whole conversation. He subsequently changed that evidence to say that she heard everything, whilst busy moving between the kitchen and the dining room, listening to the conversation, serving "her little brother [the Defendant] and his wife". The main conversation was between himself and the Defendant, and the Second Claimant was busy cooking for the Defendant and his wife. The Second Claimant when giving evidence said that she was not present at the dinner table when the First Claimant and the Defendant were discussing the agreement, and did not hear the conversation, but that after dinner the Defendant came up to her and told her not to worry, the problem had been discussed with the First Claimant, and everything would be all right. It appears that the First Claimant overstated the case in his witness statement, in asserting that his wife had heard everything. That distinction does perhaps suggest, as was submitted on their behalf, that, whatever might be said about their respective memories, the Claimants were not colluding in giving evidence of what they remembered on that night. Moreover, I do not think that that difference in their evidence undermines the evidence of the First Claimant when it comes to the main thrust of his recollection that evening.

49. It is common ground that the Defendant reassured the Second Claimant at the end of the dinner using words to the effect that "everything will be all right". It is hard to account for such a remark being made if there had been no discussion of the problems facing the family. Further, I have regard to the fact that the parties' families, and in particular the Defendant and the Claimants, had always been very close. As I have found, the First Claimant had told the Defendant about the threatened repossession, and asked for his help. I bear in mind the imminence of the possession hearing and the desperate steps that were being taken around that time by Kawsar on behalf of his parents to obtain a mortgage on the Property; it is self-evident that the subject would have been at the forefront of the minds of the parties. It is in my judgment inherently unlikely that the subject was not mentioned at that dinner.

50. The Claimants say they left Kawsar to liaise with the Defendant as to the necessary arrangements, and to handle the documentation. The Defendant says he initially dealt with Kawsar. This is supported by Ms John's attendance note of 11 March 2008 which reports the Defendant's identification of Kawsar as the person who will be calling about the deal, and also Kawsar's subsequent call to Ms John later that day. The Defendant further states specifically that he spoke to Kawsar (and not to the Claimants at the March dinner party) about the possibility of using the daylight bridging finance to purchase the Property from the Claimants. It was at a later

meeting with Kawsar that the sum of £205,000 was agreed, and it was further agreed that the Claimants could buy back the Property for the same price within a two-year period following their sale of the Property to the Defendant. The Defendant would let the family occupy the Property as tenants to give the family time to get back on their feet. He says Kawsar indicated that two years would be long enough to achieve this.

51. The Defendant's evidence under cross-examination on these claims was unsatisfactory. He was taken to paragraph 17 of his witness statement which refers to two meetings with Kawsar, at the first of which he referred to the ability to buy the Property at a 15% discount on the market price; and the second at which he says he agreed the detailed terms and conditions: a purchase price of £205,000 to be raised by way of daylight bridging loan, and the Claimants and their sons to have the ability to buy the Property back at that price, but only for two years. Under cross-examination that account shifted a number of times. At first the Defendant said that at the first meeting with Kawsar a discount of 15% had been discussed, but at the second meeting, which he said took place just a couple of days later, he told Kawsar he could only raise 70% of the value of the Property. That revision however could not have taken place within a couple of days of the first meeting since at the time the Defendant awaited a mortgage valuation, and it was that valuation which eventually drove the percentage down to 70% and the amount down to £205,000.

52. Further, on being pressed as to what had changed between the first meeting and the second meeting to allow the Defendant to give further details, the Defendant said that he did not, after all, discuss further terms and conditions at the second meeting, and referred instead to further phone calls with Kawsar (phone calls which were not referred to in his witness statement), and it was during those calls that he said that he discussed the terms and conditions with Kawsar, in particular the time limited Buy Back Agreement. In the end the Defendant said that there were phone calls before the first meeting, between the first and second meetings, and after the second meeting; and that it was after the second meeting, during a phone call not referred to in his witness statement, that the agreement with Kawsar was made. I agree with the Claimants' submission that the Defendant knew that the making of the agreement was key to his case, and it is at the very least odd, and remains unexplained, that no reference was made to these phone calls in his witness statement at the point where he expressly addressed the facts relating to making the alleged agreement with Kawsar.

53. As well as the shifting accounts of the numbers of meetings and phone calls between the Defendant and Kawsar which the former says gave rise to the agreement, there is a lack of specificity about the arrangements which were agreed. No details are given, possibly because none are now remembered, about how the subject was raised, what reasons for the time limit were discussed (beyond Kawsar saying that he would need about two years to get back on his feet), or the tenor of the conversations involved. Whilst that may (understandably) be down to the Defendant's hazy memory after the passage of time, it paints a very abstract picture, lacking any specific details about the elements leading to the agreement that the Defendant says he made with Kawsar.

54. To summarise the parties' respective positions on this factual issue: the Claimants say the agreement was made on the evening of the dinner party, and that the Buy Back Agreement was not time limited. In terms of implementing that agreement, they left matters with Kawsar to sort out with the Defendant. The Defendant says there was no discussion of the issue, nor of any solution, at the March dinner party; that he dealt

with Kawsar and Kawsar alone; and that what was agreed with Kawsar was that there would be a Buy Back Agreement which could be exercised by the Claimants (or their sons) within two years of the transfer of the Property to the Defendant.

55. There is some documentary evidence around this time which is relevant. An attendance note of Alison John, dated 11 March 2008, records a phone call with the Defendant, including the following:

> "Call in with regard to very good friends of his who are restaurant owners in Oxford. Apparently they seem to have got into trouble possibly with the Inland Revenue and also a company to whom they owe money and it seems there may be a Charging Order or something against their properties being a restaurant and a house in Oxford worth about £300k. … … What Raj [the Defendant] is thinking of doing is buying the property off them with the aid of a mortgage so they can pay off their creditors and then perhaps in due course he will be able to sell it back to them. They haven't quite decided how to perms [sic] things as yet but he said he would get the gentleman Kawsar to ring AKJ later on in the day and then hopefully we could sort things out maybe we would need to make some Court Application or something like that because they may be getting near to being repossessed."

56. On the same sheet of paper Ms John records a later call with Kawsar (misspelling his surname "Char") which includes the following:

> "returning his earlier call … he said that … before he … went any further with it he had to sort out some sort of deal with Raj and speak to Raj further and he told Raj that once he had done so he would get back to us."

57. A further attendance note of Ms John dated 28 March 2008 records a call with the First Claimant on 20 March 2008 "following his letter" in which he said that his son had been able to sort out a postponement of the eviction and "he" was in discussion with the Defendant about the Defendant buying the Property. It is not possible to determine whether by "he" Ms John intended to refer to the First Claimant or Kawsar.

58. Another attendance note of Ms John of the same date records a call from Ms John to the Defendant on 26 March 2008, telling her that he was going to buy the Property and was sorting out the finance, and would like John Farr-Davies to act for him. It went on:

> "He would be doing the same sort of one day bridge and then re-mortgage which he did on the previous London property …
>
> Mr Deb also advised that the sellers would be leasing the property back and they would be also having an option for 5 years to purchase the property back at the same price he was buying in at".

59. By 3 April 2008 Llys Cennen, solicitors acting for the Claimants, were writing to John Farr-Davis concerning the mechanics of the conveyancing (but making no reference to the issues underlying the transfer to the Defendant). By letter dated 4

April 2008, Gary Morgan, the Defendant's broker, wrote to the Defendant thanking him for his "recent appointment" of GM Mortgage Services, and saying:

> "Following our previous meeting, you stated that you are a second time buyer looking to re-mortgage in order to capital raise for the purposes of a further property purchase for your Buy to Let portfolio".

He went on to recommend a mortgage of £250,750 over 25 years with Mortgage Express, on the basis that it was the only lender that would re-finance a property which has been in the applicant's ownership for less than six months. The sum mentioned was 85% of the valuation of the Property at £295,000. It is uncontroversial that later the sum to be lent was reduced to £205,000, or 70% of the value of the Property.

60. Before considering the significance of these documents, a health warning is necessary. None of the makers of the statements in these documents were called as witnesses. Accordingly, they have not confirmed the truth or accuracy of their contents, and neither has the evidence contained in them been tested. Further, the note of the conversation Ms John records having with the First Claimant on 20 March 2008 was made no less than 8 days after that conversation; and the conversation she records having had with the Defendant on 26 March 2008 was made 2 days after that conversation. That raises questions as to the accuracy of her memory at the time, in the absence of disclosure of the underlying notes taken at the time of the calls (if any).

61. With that health warning in mind, a number of observations or inferences may nonetheless be drawn. First, the attendance notes of 11 March 2011 suggest that Kawsar's involvement in terms of discussing matters with the Defendant predated the Defendant's ultimate plan, which the sequence of attendance notes suggests was not formulated by 11 March 2008 when Kawsar called Ms John after having spoken to the Defendant about the situation.

62. Secondly, by 26 March 2008, the Defendant was reporting to Ms John that he was intending to use the daylight bridging finance which he had used before (about which it appears Mr John already knew) to purchase the Property. Also by that date the Defendant was reporting to Ms John that the Claimants "would also be having an option for 5 years to purchase the property back at the same price he was buying it at". This demonstrates that by 26 March 2008 the Defendant (1) had in mind all the elements of the rescue scheme, including the daylight bridging loan method of financing and the Buy Back Agreement; (2) was thinking about time limiting the Buy Back Agreement; (3) had in mind a period of five years, not two; and (4) was telling Ms John that the continuing occupation of the Claimants' family would be pursuant to a lease, in other words, as tenants. The attendance note is silent as to whether the Defendant had yet discussed any of these matters with either the Claimants or Kawsar.

63. Thirdly, the letter of 4 April 2008 from Gary Morgan shows that by that date the Defendant had made the application for the daylight bridging loan. The letter suggests that he had actually met Gary Morgan ("following our previous meeting, you stated… "), whereas the Defendant's evidence at trial was that, following the first meeting with Kawsar, and aware of the time pressure, he hurriedly called Mr Morgan and made arrangements over the phone. The Defendant made no reference to having met Mr

Morgan. There is perhaps a hint that the 4 April 2008 letter is at least in part an exercise in box ticking for compliance purposes or possibly a proforma which had been cut and pasted. This provides a neat illustration of the risk of accepting at face value the contents of documents when their authors are not available to speak to and be tested on them.

64. The documents are therefore broadly helpful in tracking the progress of the plan as it came to be formulated by the Defendant, and Kawsar's involvement through his calls to Ms John. The documents also show, as urged on behalf of the Defendant, that it was Kawsar who was dealing with all correspondence and phone calls with third parties, including the New Trustees, solicitors, and mortgage brokers, from February 2008. However, they throw no light on the point at which the agreement was reached, nor between whom. The parties can give no date for the March 2008 dinner party, not even whether it was early or late March. What can be seen however is that by 26 March 2008 the elements of the rescue scheme, comprising the daylight bridging loan and the Buy Back Agreement, had been formulated by the Defendant, and so it would have been possible for him to have spoken about and agreed those proposals with the Claimants before the end of March.

65. What is left are two accounts each with unsatisfactory, or unpersuasive, elements. The Claimants say the agreement was reached at the March 2008 dinner party, which could have taken place at a time in late March 2008 when the structure of the rescue scheme had been decided; but the First Claimant includes reference to the purchase price of £205,000 and the 70% of value mortgage, which had not been established by then. On the other hand, the Defendant insists he reached agreement with Kawsar in early to mid-April 2008, but his account of how that agreement was reached shifted and changed under cross-examination, and was itself inconsistent with his witness statement, with the result that the evidence was unconvincing, at best confused, and at worst appearing to be generated as he went along in response to questioning. He gave no coherent account of any time or any occasion, or occasions, at which the agreement was broached, negotiated, or finalised with Kawsar, nor any details of particular terms discussed or agreed.

66. When comparing the two accounts, it is my judgment that that of the Defendant poses significantly more problems than that of the Claimants, for four reasons in particular. First, I bear in mind the inherent unlikelihood that the situation would not have been discussed at the dinner party, since the Defendant had (on both parties' accounts) been alerted to the problems. Secondly, it is common ground that the Defendant offered reassurance to the Second Claimant that evening. It is unlikely that he would have offered reassurance if there had been no discussion and no way forwards had been identified. Thirdly, it appears that the mechanics of the arrangement were in the Defendant's mind when he called Ms John on 26 March 2008, which is at least consistent with the discussion of the agreement in principle having already taken place or taking place shortly thereafter. Fourthly, I am struck by the fact that the Defendant remembered exactly which dinner party in March 2008 was being referred to when asked about it in cross-examination, which, given the problems with his memory in other important respects, would tend to suggest the dinner party did have some significance, and he offered no alternative account of why that dinner stuck in his memory.

67. Taking into account the witnesses' evidence, such documentation as there is, and noting that neither of the parties' accounts is free from difficulties, I find that the agreement in principle was made between the Claimants and the Defendant at the March 2008 dinner party, and not with Kawsar, whether at two meetings, or three meetings, or during any number of phone calls. I find that at the March 2008 dinner party the Defendant agreed with the First Claimant that he would buy the Property using a daylight bridging loan, that the Claimants or their sons would be entitled to buy it back at the same price; but that the details relating to the 70% of the value and a purchase price of £205,000 had not at that time been decided upon, and did not therefore form part of the discussion; their inclusion in the First Claimant's account of that evening are mistakes on his part. I further accept the First Claimant's evidence, which was not challenged, that the Defendant said at that time that he had no desire to make a profit out of the arrangement.

68. It is common ground that after that the Defendant dealt exclusively with Kawsar. I find that the subsequent interactions between Kawsar and the Defendant related to the machinery and implementation of the principles that had been agreed with the First Claimant on behalf of both Claimants at the March dinner party, and that it was during these conversations that the agreed purchase price of £205,000 as 70% of the value of the Property was finally arrived at.

69. It may be said that these collected findings as to when and how the agreement was reached together are in truth are a hybrid account combining elements of what each party has said. It was urged by Mr McLoughlin on behalf of the Defendant that it was not open to me to find (nor by implication to reject) anything other than the facts, in toto, advanced by the Claimants in their pleaded case and in their evidence. I agree that I cannot properly make factual findings based only on suppositions or speculation of my own, a fortiori where such findings or speculations were not explored with the relevant witnesses. I think, however, that Mr McLoughlin puts the submission too high, and that in any event I am not prevented from reaching the conclusions I have reached, which accept some, but not all, of the Claimants' evidence on the central question, whilst also finding that the First Claimant's memory is in some respects faulty. The individual elements, in terms of what was discussed or agreed at the dinner party, are not logically dependent on each other and some can be severed, as it were, without destroying the remainder.

70. Nor is the finding inconsistent with the Claimants' Particulars of Claim, which states at paragraph 17 that the Defendant approached the Claimants proposing an arrangement with the agreed features of the arrangement (but not including a limit on the Buy Back Agreement). The Particulars of Claim do not plead particulars as to between whom, when, where, or by what words, that agreement was reached, although notably they do at paragraph 18b plead that the arrangement proposed by the Defendant would include a term that the Defendant would "pay a sum of money to be agreed between the parties" (my emphasis). So the pleaded case is consistent with the evidence showing that the sale price had not been agreed by the dinner party, albeit the First Claimant's evidence was that the sale price was agreed at dinner that evening. My findings are therefore consistent with the Claimants' pleaded case, and I am not prevented from making such findings because I have rejected individual elements of the First Claimant's evidence.

71. It does not matter in my view that the informal agreement was in effect reached in two stages, with the principle and the mechanics being agreed with the Claimants at the dinner party, and the details of the amount to be paid left for later determination. Indeed, as I have just noted, that was the Claimants' pleaded case. Lastly on this issue, I remind myself that neither side denies that the informal agreement was reached, in these terms. There is no dispute about that at all. As stated earlier, in one sense these precise findings do not matter, save insofar as they reveal the interests and motives of the parties at the time, and demonstrate their particular qualities as actors then and witnesses now. The material point of difference is whether or not the Buy Back Agreement, however it was reached, was subject to a time limit of two years. I turn now to consider that central question.

Did the Buy Back Agreement include a time limit of two years?

72. I have found that the Buy Back Agreement was discussed and agreed in principle at the March 2008 dinner party. The Claimants assert that it did not include a time limit when agreed at that dinner party (nor thereafter). The Defendant does not (and cannot) contend otherwise, because it is the Defendant's case that there was no discussion of the rescue scheme at the March 2008 dinner party at all. I find that no time limit was discussed or agreed at the March dinner party. The question therefore becomes: was a time limit introduced into the Buy Back Agreement following the agreement at the March 2008 dinner party but prior to the transfer of the Property taking place in September 2008?

73. Kawsar's evidence on this issue is unequivocal: he also understood the agreement to have been reached between the Claimants and the Defendant at the March 2008 dinner party (at which he was not present); his parents made no mention of any time limit; and he himself never discussed a time limit with the Defendant.

74. In his witness statement the Defendant states that he limited the Buy Back Agreement to two years because that is how long Kawsar said he would need to be in a position to raise the funds to buy back the Property. Notably, he said in cross-examination that when Kawsar said he could buy it back within two years, it was said casually, and confirmed that that statement was part of an "informal casual conversation". In cross-examination, the Defendant said he imposed the two-year limit because he could not be expected to carry a loan of that amount indefinitely; and would not want the debt on his shoulders for 25 years. It was put to him that those are two different answers. That is true, but they are not mutually exclusive, albeit only the first was referred to in his witness statement. The second makes good sense, but there is no evidence that that was a matter he raised at the time the agreement was reached.

75. The only contemporaneous documentation referring to the imposition of a time limit is the attendance note of Ms John of John Farr-Davis of 28 March 2008, in which she records being told by the Defendant two days earlier that the Claimants " …would also be having an option for 5 years to purchase the property back at the same price he was buying in at". Given that Ms John is not here to speak to the note, it must be treated with some caution; care must be taken not to give it more weight than on its face it is capable of bearing. It seems likely that the Defendant told Ms John something along the lines of what she reports him having said. To believe that she would have created the attendance note in these terms if that were not the case seems fanciful.

76. On the other hand, the inferences to be drawn are limited. First, it is a five-year period that is referred to, and the Defendant has not provided an explanation of the difference between that and what he maintains was the agreement to limit the Buy Back Agreement to a two-year period. Secondly, and more importantly, the attendance note does not say, and in my judgment cannot be read as implying, that this element of the deal – namely, the imposition of a time limit on the Buy Back Agreement - is something which the Defendant had yet discussed with the Claimants, or with Kawsar. On the other hand, it is right to note that the timing of the note – 26 March 2008 – is consistent with my finding that the principal terms of the agreement had been agreed with the Claimants by or around this date. It just is not possible to tell which elements had been discussed with the Claimants, and which had not. It is not beyond the bounds of reasonable possibility that the information given to Ms John by the Defendant contained elements of both.

77. This much is little more than speculation, and in the final analysis the 28 March 2008 attendance note raises more questions than it answers, questions which the Defendant himself has not been able adequately to explain. Those deficiencies mean that the attendance note lacks probative value as regards the question at issue, and I give it no weight. There is no other contemporaneous documentary evidence of any agreement to a time limit, and the Defendant has not given evidence of any specific conversations(s) at which it was agreed. With the passage of time that is perhaps not in itself surprising, but regrettably it does not assist the task of determining whether any time limit was agreed.

Tenancy Agreement

78. One issue raised was about the quality of the Claimants' occupation following the transfer of the Property to the Defendant. By email dated 13 March 2009, some six months after the transfer, Kawsar supplied to the Defendant information regarding the terms that "we want in the Tenancy Agreement". He finished "please let me know if you need anything else". There is no other post-transfer documentation about any intended tenancy agreement, and no tenancy was entered into. The mortgage obtained by the Defendant in relation to the Property was a buy to let mortgage, from which it can be reasonably inferred that its grant may well have been conditional on the grant of a tenancy to the occupants of the Property. This is consistent with the 28 March 2008 Ms John attendance note which refers to the family leasing the Property. The Defendant gave oral evidence that the tenancy which he had in mind would have been a 12-month Assured Shorthold Tenancy, because that was the standard term granted in his other buy to let properties.

79. There was some suggestion that the agreement that the Claimants should continue to occupy the Property under a lease showed that the Claimants and/or Kawsar were aware that their continuing occupation was time limited, or otherwise precarious, presumably because as landlord the Defendant would have been able to terminate any tenancy agreement, or refuse to grant a new one, or demand a higher rent. Further, Mr McLoughlin on behalf of the Defendant relied on Kawsar's description of the arrangement in a letter dated 27 May 2008 to the New Trustees in which he refers to the Claimant remaining in the Property "on a rental basis" as illustrating the true nature of the relationship, namely, that (after expiry of the two-year time limit) the only rights the Claimants would have would be as tenants of the Defendant.

80. Kawsar in cross-examination said that he referred to the tenancy when writing to the new Trustees because that "was required for [the Defendant] to proceed with the buy-to-let mortgage"; that they "had been dealing with the trustees for so long and I was saying whatever was necessary to allow matters to proceed smoothly. There was an underlying arrangement. This is a family relationship that has gone back decades. This is how deep the ties go back." The Second Claimant said she had no memory of any arrangement regarding a tenancy agreement. The fact the parties contemplated that a tenancy agreement might be entered into is in my view likely to have been connected to the type of mortgage the Defendant had been able to secure; it is equally likely (to paraphrase Kawsar's evidence under cross-examination) that Kawsar chose to give the trustees the official version of events, rather than go into the details of the underlying agreement made between the Claimants and the Defendant.

81. I note also that the payments made by the Claimants throughout their occupation of the Property whilst in the ownership of the Defendant mirrored the mortgage repayments due under the mortgage he had obtained, and fluctuated from around £1600 per month at the outset to just under £400 after mortgage rates dropped. Whilst conceptually there is nothing to prevent rent being set to track equivalent mortgage rates, the evidence of the Defendant did not go so far as to suggest that he regarded the Claimants as being in truth in occupation of the Property as tenants, either before or following the expiry of the two/three-year period of the alleged time limit. I accept that Kawsar did regard entering into the tenancy as part of the "official line", to satisfy third parties who might be scrutinising the arrangement, and did not reflect an understanding on either side that the Claimants and their family were occupying the Property as tenants as between themselves; it did not displace the underlying agreement between the parties. I find the issue of the possible tenancy of no assistance in terms of evidencing the parties' attitude to and understanding of the quality of the Claimants' occupation following the transfer, and neither does it shed any light on the central question whether the Buy Back Agreement was subject to a time limit.

82. The Defendant further relies on two documents from the Llys Cennen 2008 conveyancing file. First, an attendance note dated 17 September 2008 recording a phone call from Kawsar to the writer. It contains bank details of the First Claimant, and went on: "Inf'd me that his parents had agreed with Mr Deb that they can remain in the property for the foreseeable future". Second, reliance is placed on the Completion Information and requisitions on title dated the same day, 17 September 2008, signed by solicitors acting on behalf of both parties. At 2.1(b) the question was asked "By what time will the seller have vacated the property on the completion date?", to which the answer was "We have today been informed that the Vendors are remaining in the property for a short while."

83. The suggestion was that these documents also demonstrated that the parties intended the Claimants' occupation of the Property after the transfer to the Defendant to be short lived. To my mind this evidence, read in context, does not bear such an interpretation. Firstly, the phrase "for the foreseeable future" if anything favours the Claimants' case, indicating an arrangement unlimited in time, and without a foreseeable end point. Secondly, neither the maker of the note, or (if different) the person who completed the Completion Information on behalf of the Claimants as vendors, have given evidence. Thirdly, given that both documents were drafted on the same day, the phrase "for a short while", which I interpret as denoting a lesser period

of time than the phrase "for the foreseeable future", looks likely to have been the drafter's paraphrase of the earlier instruction "for the foreseeable future", rather than recording any different instruction from Kawsar between the attendance note and the signing of the form. Thus it is the phrase "for the foreseeable future" which I take to be the more accurate representation of what Kawsar actually told Debra Thomas that day.

84. Fourthly, the reference to the Claimants remaining in the Property for "a short while" is in any event inconsistent with both parties' contentions: at that stage, according to the Defendant, it was anticipated (a) that the Claimants would remain in occupation and (b) that they would be entitled to buy the Property back within two years, and so would be entitled to remain in occupation for a minimum of two years, a period which the phrase "a short while" does not seem apt to describe. Whatever the truth of how it came to be formulated in that way, and taking into account the attendance note referring to "the foreseeable future", it does not represent what either party is now saying was agreed and intended to be the minimum period of the Claimants' right to occupy and/or to buy back at the original price. I do not regard either of these documents as supporting the Defendant's case on the alleged time limit.

Events after the sale of the Property

85. Of considerably more significance are the actions of the parties, and the Claimants' family, following the transfer of the Property to the Defendant, and the question is whether those actions shed any light on the central issue. The evidence falls into three categories: firstly, what is said to have been an attempt to buy back the Property within the initial two-year time limit, together with the alleged request by Kawsar in 2010 to extend the period from two years to three years; secondly, the expenditure by members of the Claimants' family on a number of home improvements to the Property; and thirdly, the response by the Defendant when Kawsar sought to implement the Buy Back Agreement in 2015.

(1) Intended buy back in 2010, request for an extension, the passing of the alleged time limit

86. By an attendance note date 29 March 2010, Ms John recorded that she had received a call from the Defendant on 26 March 2010, in which the Defendant had said that "the people who he had bought the property for [sic] a year or so ago wanted to buy it back and Hywel Davies would be acting for them." The Defendant relies on this attendance note as being consistent with his evidence as to the two-year time limit. He accepted in cross-examination that he did not remember this conversation, merely inferring from the note that it took place. He draws the further inference that "this conversation with Alison John would have happened because I had spoken to Kawsar. He would have told me that he could be in a position to buy the Property." He accepted that he had no independent recollection of this taking place.

87. It seems unlikely that Ms John would fabricate or dramatically misrepresent what she had been told by the Defendant at around that time. On the other hand there is no further documentary evidence as to this alleged proposal, and no documents emanating from Hywel Davis who was said to be acting. Kawsar in cross-examination said that he did not recall any conversation about buying the Property back in 2010, but that he was in touch with Ms John himself around that tine in relation to the

possible auction of the Cheltenham property, which Kawsar speculated might have given the Defendant the idea that he, Kawsar, would have funds shortly to buy back the Property. He said that if there was a conversation about buying back the Property at that time it was nothing to do with any deadline, and flatly denies that there was any request by him, as alleged by the Defendant, to extend the period by a year. In any event there is no evidence that any steps were taken towards the Claimants buying back the Property then or at any time prior to 2015.

88. It seems likely that a conversation between the Defendant and Kawsar along these lines had taken place, based on the contemporaneous attendance note of Ms John, and, to a lesser extent, on Kawsar's evidence that he could not recall such a conversation (rather than denying that it had taken place). Even if the Defendant did ask Kawsar if the Claimants were ready to buy back the Property, and even if Kawsar had originally agreed and later decided that they might need another year, it seems to me that those facts, whether taken singly or together, are not conclusive or even suggestive of the existence of a time limit. Such a conversation would be equally consistent with the absence of any time limit, reflecting merely Kawsar's initial desire, or ambition, to purchase the Property back in 2010, and then forming the view that that would not be achievable for another year. Indeed, if the conversation had taken place in the context of an agreed time limit, with the Defendant granting a one-year extension at Kawsar's request, it is surprising that there is no further evidence of the Defendant seeking to nudge the Claimants into buying the Property within that additional year; nor of them (through Kawsar) seeking to do so, or otherwise to manage the fact that the alleged extended time limit had now passed.

89. Further, the Defendant's case on this aspect suffers from inconsistencies. At paragraph 29(d) of the Defence it is pleaded that, from or around September 2011 (so at what would have been the expiry of the three-year period), the Defendant repeatedly contacted the Claimants by telephone (and possibly held a meeting with them on one occasion) in an attempt to discuss new terms on which the Claimants might be able to buy back the Property. In his witness statement he says that from 2013 onwards he spoke to Kawsar "on several occasions and urged the [Claimants] to buy the Property back", and "indicated that the Property would need to be bought back at market value, but that I would agree a discount." There are thus two notable inconsistencies between the Defendant's pleaded case and his witness statement (each of which contains a Statement of Truth signed by the Defendant): first, as to the party with whom he says he had discussions (in the Defence it was the Claimants, in his witness statement it was Kawsar); secondly, as to the date on which those discussions commenced (in the Defence it was from September 2011, in his witness statement it was 2013). When these inconsistencies were put to the Defendant, he said that he only ever spoke to Kawsar about the buy back, that the reference at paragraph 29(d) of the Defence to meeting with the Claimants was a mistake, and that that was a reference to Kawsar coming to his office to speak to him about it. He offered no explanation as to the inconsistences as to dates between the Defence and his witness statement.

90. Further, when the question of buying back the Property later came to be discussed between Kawsar and the Defendant in 2015/2016 (which I consider in further detail below), the Defendant does not say that during those conversations he referred at all to the fact that he had been urging Kawsar to do this since 2013, a surprising omission if it had in fact happened that way.

91. Taking all these matters into account, in particular the Defendant's changing and inconsistent case and evidence as to whom he spoke and when, I find that whilst an initial discussion as to buying back the Property may have taken place in 2010, and whilst Kawsar may have indicated that he hoped to be in a position to buy the Property back in a year's time, those matters even if true are of very little weight in determining whether or not the Buy Back Agreement was subject to any prior agreed time limit. I further find that the Defendant was not urging Kawsar, or the Claimants, to buy back the Property whether from 2011 or 2013. Such a claim is simply not supported by any contemporaneous evidence, and the failure to refer back to such conversations in the later 2015/2016 negotiations suggests that they did not take place.

(2) Improvements

92. The Second Claimant says in her witness statement that she, the First Claimant and their children carried out improvements to the Property in the years following its transfer to the Defendant, totalling some £15,000, including £8,000 renovating the kitchen and "many more thousands of pounds renovating the bathroom and installing a new boiler and double glazing". This expenditure is not contested. The kitchen improvements were made in 2009, within the alleged two-year time limit, and accordingly is equally consistent with each party's case on that issue. The remainder of the works were performed after the expiry of the two or three-year time limit alleged by the Defendant, in particular, new windows were supplied and installed at a cost of almost £8,000 in November and December 2015. I accept that it is inherently unlikely that the Claimants and their family would have made expenditure of this order, after the expiry of the time limit and its extension, if they had believed that the Property might be sold over their heads, the two- (or three-) year deadline alleged by the Defendant having passed. To that extent it is broadly supportive of the Claimants' case, but it cannot in my judgment be put any higher than that. Of far greater significance is what was said, and was not said, when the Claimants did, through Kawsar, attempt to buy the Property back, the point to which I now turn.

(3) Defendant's alleged failure to refer to the time limit

93. The Claimants' evidence is that by 2015, their sons were in a position to raise the necessary funds to buy back the Property. The evidence on behalf of the Claimants is that the Property was regarded as a family asset, and that it did not matter to them whether it was they themselves, or their children, who would be able to implement the Buy Back Agreement. The Defendant does not assert otherwise. In fact, it was Kawsar's evidence that the family was in a position to buy back the Property from around 2012, but was aware that the Defendant was heavily involved in, and challenged by, his own business affairs, and did not want at that stage to trouble him.

94. Kawsar contacted the Defendant by text first in spring of 2015 with a view to implementing the Buy Back Agreement. A text dated 18 March 2015 from Kawsar to the Defendant states "… Just getting back to you after being in touch with our broker. He wanted some more details about our original agreement. Please give me a call when you have a free moment." The words "getting back to you" suggest that the Buy Back Agreement had been the subject of recent communications between Kawsar and the Defendant. By text dated 27 July 2015 the Defendant wrote "I have sat down with my accountant and tax specialist regarding how you guys can get the property back to

your name", and asking for an email address "to send you an email reference to our discussions quite a while back". This also suggests that Kawsar and the Defendant had had an earlier discussion about the buy back; there is no further evidence on any such discussion in the period immediately prior to these texts, and it appears there was no follow up email to this text.

95. Kawsar and the Defendant finally met in person on 29 December 2015. At that meeting, it is common ground that the Defendant indicated that if the Claimants wished to buy the Property back it would have to be at market price, albeit the Defendant was willing to contemplate a small discount. Kawsar's evidence is that he was shocked by the suggestion. According to Kawsar, the Defendant referred to advice from his solicitor and his accountant, namely, that because there was no written declaration of trust in relation to the Property and the terms on which the Defendant had acquired it, he had no choice but to transfer it back at full, or at most slightly discounted, market value. Kawsar's evidence is that he told the Defendant that he would rather end the discussions, and that ultimately the agreement was with the Claimants, and that the Defendant should get in touch with them directly to explain his proposals. The Defendant accompanied him to his car, and told Kawsar about some of the challenges he had been facing in recent years, especially regarding his involvement with a Richard Rufus who had let him, the Defendant, down, causing significant financial losses. The Defendant accepted in cross-examination that he had been in business with Richard Rufus but was not able to say any more about it because of his involvement as a witness in an extant criminal prosecution of Mr Rufus.

96. The Defendant when giving oral evidence said that at the December 2015 meeting he had expressly referred to the two year time limit. In his witness statement that is not so clear: he states that he was shocked at Kawsar's insistence that the sale had to be at the original price of £205,000:

> " … given all the help that I have given to the family … I had only agreed to sell the Property to the Rojobs for £205,000 in the initial 2-year (and ultimately 3-year) period … the position adopted by … Kawsar and the Rojobs seemed to take no account of the fact that I had helped them when no-one else could, and, in doing so, I had given up the opportunity to purchase the flat in Islington in 2008 which would … have increased in value".

97. This passage reads to me as though he was when drafting his witness statement giving reasons as to why he had been shocked at the 2015 meeting, not asserting that he referred to the two-year time period at that meeting. Nonetheless, his evidence under cross-examination was that he did indeed refer to the two-year time limit during that meeting. He said that he did not subsequently refer to it in any of the emails, messages, or voicemails he left because he was intent on trying to agree a price, so as to find a way forwards, and there was no point dwelling on the time limit. Kawsar denies that the Defendant referred to the time limit during their meeting of 29 December 2015. In this context I also note that when giving oral evidence the Defendant insisted that he had mentioned the Islington property to Kawser at that meeting. That evidence is undermined by the terms of an email dated 8 July 2016 in which the Defendant writes to Kawsar that he thinks it right to draw the passed up opportunity to buy the Islington property to Kawsar's attention "which [he had] not

brought to his attention earlier". When challenged on the discrepancy the Defendant responded that "emotions were very high at that meeting on both sides." In my judgment, the discrepancy suggests, and I find, that the Defendant's memory of the 29 December 2015 meeting is confused and unreliable.

98. Further texts were exchanged between Kawsar and the Defendant in early 2016, Kawsar texting that he was struggling to see how he could explain the Defendant's proposal without it causing irreparable damage to the Defendant's relationship with the Claimants, and also suggesting that if the Defendant was unable to honour the agreement because of the accountancy and tax advice he was receiving then this was something he should contact the Claimants directly about, because "the agreement you made is ultimately with them, not me" (text of 26 February 2016). By text to Kawsar dated 26 February 2016 the Defendant wrote; "Trust me I haven't lost sight of anything hence I was there for you all in the [sic] time of need and have allowed this to continue for all these years". On 10 March 2016 Kawsar emailed the Defendant saying:

> "… As I understand it, you want to sell my parents' home back to my family, but at a slightly reduced amount from the current market value. However, that involves reneging on the agreement you made with my parents at the time of the sale, essentially that when they were in a position to buy back their home, you would sell it back to them for the same value that you bought it for. …
>
> "I've also considered <u>the primary reason</u> for going back on the agreement. You suggested that, as there was no Declaration of Trust signed at the time of the agreement that you have no choice but to sell the property at (close to) the current market value, as I understand it because to do otherwise would arouse suspicion and may have tax implications …". (my emphasis)

99. By that stage Kawsar had informed the Claimants of the position being taken by the Defendant, and the Second Claimant had herself called the Defendant to discuss the situation. During those calls, according to the Second Claimant, the Defendant justified his position by reference to being under pressure from "the tax people" who were looking to the Defendant to "pay extra tax", and that was why he had to sell the Property at market value. The Second Claimant had a further conversation with him after the Claimants had consulted solicitors and the Second Claimant approached the Defendant in an effort to avoid having to come to court. Again, her evidence is that there was no mention of a time limit during that conversation.

100. By email dated 8 July 2016 Defendant responded to Kawsar's email of 10 March 2016 saying that he had consulted his solicitor and accountant at length and at his own expense, and

> "they have both advised me that the property must be sold to you at market value or at least near market value. The reason for this is that if the property was sold to you less [sic] than this amount, there would be incredibly serious tax and fraudulent [sic] implications – I cannot stress this enough. … Any proposal that does not take the above implications into account will not work as the transaction must be done in a correct

> and legal manner. … I feel this is the right time to share with you something that I have not brought to your attention earlier. The mortgage amount that I used to purchase [the Property] would have been otherwise used by me to purchase another property in London for £350K. The value of this same property has now risen to £850-900K so an increase in £500-600K in equity. … Just to emphasise once again that I am not willing to compromise my business principles and reputation."

101. Subsequently, Kawsar and the Defendant exchanged WhatsApp messages, during which Kawsar continued to encourage the Defendant to meet with his parents to discuss the situation directly with them. None of those messages include any reference to a time limit. During this period the Defendant left voice messages for Kawsar, on 20 July 2016, 26 July 2016, 22 August 2016, 31 August 2016, and 6 September 2016. Transcripts of the messages were provided at trial. In none of the messages did the Defendant refer to any time limit, agreed or otherwise. Eventually the relationship between Kawsar and the Defendant broke down and communication ceased. After this, Dildar stepped in to try and reach an agreement with the Defendant. He met him in July 2018 with his mother. Dildar says that at that meeting the Defendant offered to sell the Property for £400,000. Later, Dildar arranged to meet the Defendant in December 2019 at the Peartree Hotel in Oxford. Dildar's evidence is that the Defendant told him at that meeting that he was "going into bankruptcy", that he owed money to people who were "more like loan sharks than normal High Street lenders", and that if he, the Defendant, were to go bankrupt, there was nothing to stop the lenders "coming after the house". He asked Dildar to tell the Claimants that an earlier proposal to buy the Property for £400,000 was still on the table.

102. Dildar also confirmed under cross-examination that the Defendant had told him in January 2018 about "the financial property implications of transferring the property back at an undervalue. This was also the first time he mentioned about the London property". Dildar was asked why he had not included this evidence in his witness statement. He said that he had had a thirty-minute interview (in preparation for his witness statement) and "was told to keep it brief, because I thought that we only had 2 pages for my statement". This to my mind sounds plausible; and (as I go on to consider) his account of what the Defendant told him at the time is consistent not merely with the evidence of Kawsar and the First Claimant, but with the contemporaneous documentation.

103. There is thus a significant amount of contemporaneous documentary evidence relating to the discussions between Kawsar and the Defendant in the form of texts, WhatsApp messages, emails, and transcriptions of voicemail messages. Two matters are striking. Firstly, in all of that correspondence, not a single reference is made to the alleged time limit. Secondly, in most of the messages containing substantive content, the Defendant expressly refers to the tax and trust issues which both Kawsar and the Second Claimant say were the reasons, and the only reasons, the Defendant gave them at the time as to why he would not sell the Property back at the original sale price.

104. The reasons that the Defendant relied on at the time, relating to tax issues and issues to do with a potential allegation of fraud, have never been properly explained by the Defendant. Those issues featured prominently in the contemporaneous written evidence, but are not now relied on by the Defendant in any way as being the reasons

why he would not sell back to the family at the original price. He appears to have been in financial difficulties at the time, as Kawsar and Dildar report him saying, with references to creditors being more like loan sharks than regular lending institutions. When cross-examined, he gave evidence that Mortgage Express and/or its assignee (he was not clear about which, and mentioned each) called him regularly to put him under pressure to liquidate his property holdings in order to pay back the lending secured against them. There was evidence that a company of which the Defendant was a director, and to which he had made a loan of £400,000, was facing insolvency around that time; the Defendant confirmed that as of the date of the trial he had received back no part of the loan. In his voice message of 31 August 2016, he says "I have a lot of pressure around from my accountant's perspective and a finance perspective." And in his voice message of 6 September 2016, he says "… we really have to get the ball rolling Kawsar because it's really affecting on many different way [sic]. My accountant is on my back. Mortgage Express are on my back. They want the money back. Also it's putting me in a very difficult place when it comes to raising more funding for my property business." All these references create the impression that the Defendant was in financial difficulties, or at least under financial pressure, at the time, something which he now denies. There is not sufficient evidence, and I do not need, to make a positive finding in that regard, but I accept Kawsar and Dildar's evidence that that is what the Defendant told them at the relevant times.

Conclusion on time limit

105. Whatever the truth about any financial difficulties facing the Defendant, the fact that at the time he was so vocal, and so consistent, about his reasons for requiring a sale at close to market value, together with the number of contemporaneous documents and voicemail messages which failed to refer to any time limit on the ability to exercise the Buy Back Agreement, together cast a shadow, to the point of wholly eclipsing, both the oral evidence of the Defendant at trial that he did refer to the time limit at the original meeting with Kawsar on 29 December 2015, and the ambiguous written evidence which is arguably of similar effect. I note also that his evidence about mentioning the Islington property at that meeting is demonstrably wrong, and have already found as a result that his evidence as to what was said at the 29 December 2015 meeting is unreliable. In light of these considerations, I find that at no point during the discussions and conversations between the Defendant and Kawsar and the Second Claimant, and in particular at the meeting on 29 December 2015, was the alleged time limit referred to by the Defendant, whether as the reason for not agreeing to sell back the Property for £205,000, or at all.

106. The absence of reference to the time limit during those discussions and negotiations is inexplicable if, as the Defendant alleges, such a term had originally been agreed with Kawsar. It is in my judgment inconceivable that, had a time limit been agreed, the Defendant would not have referred to it, and referred to it repeatedly, as he and Kawsar, and the Second Claimant, and subsequently Dildar, tried to reach agreement. It would be the first, and the only necessary, line of defence to any attempt by Kawsar to implement the Buy Back Agreement in 2015. The email exchange of 10 March 2016 and 8 July 2016 is particularly telling. In the first of those emails, Kawsar refers to "your primary reason for going back on your agreement … as there was no Declaration of Trust signed at the time … you have no choice but to sell the Property at (close to) the current market value, as I understand it because to do otherwise

would arouse suspicion and may have tax implications further down the line." In his reply on 8 July 2016, the Defendant repeated the advice he said he had received from his solicitor and accountant that "the property must be sold to you at market value or at least near market value [otherwise] there would be incredibly serious tax and fraudulent [sic] implications – I cannot stress this enough …".

107. This written protestation seriously undermines the Defendant's case that the Buy Back Agreement was subject to a time limit. If there had been a time limit, he would not have referred so vehemently, or indeed at all, to his solicitor's and accountant's advice, because he would not have needed to; nor would he have let pass unchallenged the suggestion in Kawsar's email that that advice was his "primary reason" for insisting that the purchase must be at or near the market price. That exchange, coupled with the absence of any reference to any time limit in all the other contemporaneous documentation and voicemails, and the Defendant's repeated references at the time to the professional advice he says he had received, leaves me in no doubt, and I find, that no time limit was referred to because no time limit had ever been agreed.

108. The first occasion on which the alleged time limit was referred to in any document was in a response dated 21 December 2016, from Curwens, solicitors acting for the Defendant, to the Claimants' letter before action dated 8 December 2016. As was pointed out to the Defendant in cross-examination, there are a number of anomalies between the account set out in this response and his pleaded case and his written and oral evidence. It was said that the Claimants had sought further extensions to the time limit after it had originally been extended by one year to three years; that the Defendant had subsequently agreed that the Claimants would have the right of first refusal when the Defendant came to sell the Property, and that the Defendant had attempted to implement this subsequent agreement at which point the Claimants are alleged to have made "various assurances for the purchase". None of these were matters which featured in the Defendant's evidence or formed part of his case; the account of them in Curwens letter, made on the Defendant's instructions, was simply dropped. I do not need to explore those anomalies further, given the conclusions I have reached on the primary evidence, and the witness evidence.

109. The issue of the Islington flat is in my judgment an evidential cul-de-sac. The first mention of it is in the email from the Defendant to Kawsar of 8 July 2016 in which he says that he had not previously mentioned this, but now felt compelled to. There is no documentary evidence to support the Defendant's claim that he set aside an imminent purchase in order to raise the money on the Property to assist the Claimants, and the position was diluted when the Defendant at trial explained the lack of any relevant documentation by reference to the fact, as he alleged, that what was on the table at that time was a decision in principle rather than any formal mortgage offer. It seems that at the time (2016) the missed opportunity was being presented as a moral justification for requiring the Claimants to buy back the Property at full (or close to full) market value. By trial it came to be used as a reason for arguing that the Defendant would not have entered into an open-ended agreement, without imposing a time limit on the Buy Back Agreement, when to do so would amount to his sacrificing the opportunity of making a profit on another investment. This submission however is inconsistent with the evidence, which was not challenged and which I have accepted, that at the time the agreement was made the Defendant expressly disavowed any

intention of making a profit out of the transaction with the Property. So long as his costs were covered by the Claimants paying the mortgage as it fell due, and compensating him for the costs of the transaction (both of which they did), then the Defendant's participation in the scheme was cost neutral to him, and he was happy to enter into the arrangement with the Claimants on that basis.

110. The Defendant claimed at trial that he was undertaking a significant risk in facilitating the Claimants' payment of their debts in this way: the market could have gone down, leaving him with negative equity; and if the Claimants had defaulted on their agreement to pay the mortgage repayments, the Defendant would have been liable for the monies owing. That is true on paper; but the loan was only 70% of the value of the Property allowing for a 30% fall in prices before the Property could have been in negative equity, a not insubstantial cushion; and it is clear that the Defendant trusted the Claimants to pay the mortgage repayments, and that he was right do so. On the risks he exposed himself too, therefore, I have concluded that he now protests too much, and that such thinking did not motivate him to impose any time limitation on his agreement to sell the Property back to the Claimants at the original price, which rather was motivated by strong feelings that he wished to assist his close friends in their hour of need.

111. The Defendant also claimed that he went to such lengths in his correspondence and voicemails to explain the tax and accounting issues which prevented him from selling the Property back to the Claimants at the original price because he wanted to be transparent and to give the full picture out of respect to the family. "The voicemail is very long because of transparency. I was always very frank and open about it and I didn't need to be." In one sense this rings true – he was being transparent about what may well have been serious tax and accounting problems for him in honouring his agreement (though I note that none of those have been explained at trial). However, that fact works against the Defendant, not for him: if he was being transparent, and if there had been a time limit, then it is difficult to see why that very transparency did not lead him to refer to it at that stage.

112. I would have reached the same conclusion on the alleged time limitation had I preferred the Defendant's version of events as to with whom, and how, and when he reached an agreement about the sale of the Property. Even if the whole rescue scheme had been agreed with Kawsar in March and April 2008, with no direct agreement between the Defendant and the Claimants, the matters I refer to above would have led me to conclude, for the same reasons, that there was no time limit to the Buy Back Agreement. If there had been, the Defendant would have referred to it when he came to deal with Kawsar in 2015/2016. There would have been no reason not to, and every reason to, refer to it, since such an agreement would have diverted any blame, or responsibility, from the Defendant in failing to sell back at the original price. Moreover, regardless of the way in which the original agreement arose, if there had been a two-year, or three-year, time limit, common sense suggests that Kawsar would have approached the matter of seeking to buy the Property back so long after the expiry of the extended limit in a very different way. In the end, in spite of the mass of detail and conflicting evidence as to the formation of the agreement, the alleged time limit, and what happened when Kawsar tried to buy the Property back, the most telling point against the Defendant's case is his failure to refer to the time limit during that time. His suggestion that he referred to it at the 29 December 2015 meeting with

Kawsar is frankly incredible, given the wealth of contemporaneous documentation in which it is conspicuous by its absence.

113. It follows that the evidence of the Defendant as to the existence of a time limitation on the Buy Back Agreement is rejected, and I find that as far as the parties were concerned the Buy Back Agreement was open ended. This would be a very surprising outcome in a commercial context, but it illustrates to my mind both the closeness and affection between the parties, and the imminence of the possession proceedings. The parties acted in great haste to face down the great peril facing the Claimants and their family; and the Defendant came up with a solution that could be implemented speedily, and which was effective to secure the Claimants' ability to carry on living in their family home. There may well have been discussions about a time period within which it was hoped, or even intended, that the family would be able to purchase back the Property at the original price; but it was never a condition of the Defendant's offer of help that the Claimants' right to buy the Property back at the original price was limited to two or three years. The Defendant acted hastily, and generously, but subsequently he has attempted to rewrite the agreement that was actually made at the time. The only reasonable inference from the totality of the evidence is that no time limit was ever discussed or agreed.

114. What falls now to be considered now is the effect of the Buy Back Agreement in equity. The Claimants put their case on two bases: proprietary estoppel and constructive trust. I shall first consider whether the Claimants make out their case on the basis of proprietary estoppel.

Proprietary estoppel

115. The classic (and deceptively simple) formulation of the doctrine of proprietary estoppel is set out in Megarry and Wade, The Law of Real Property (9th Edition, 2019), at paragraph 15-01:

> "An equity arises where:
>
> (a) The owner of land (O) induces, encourages or allows the claimant (C) to believe that C has or will enjoy some right or benefit over C's property, provided that the inducement etc is not specifically limited to a mere personal use of the land;
>
> (b) in reliance on this belief, C acts to his or her detriment to the reasonably determined knowledge of O; and
>
> (c) O then seeks to take unconscionable advantage of C by denying C the right or benefit which C expected to receive".

116. In order to establish that an equity has arisen on the basis of proprietary estoppel, a claimant must therefore establish (1) a representation; (2) detrimental reliance on that representation; and (3) unconscionability: per Lord Walker in *Thorner v Major* [2009] 1 WLR 776 at [29]. The doctrine has been developed and refined particularly over recent decades, and the reports include a large number of cases in which informal arrangements, often poorly articulated, between family members and/or friends have fallen apart and the claimant looks to equity to vindicate his or her expectations.

117. The correct approach to analysing a claim based on proprietary estoppel has been recently articulated by Lewison LJ in *Davies v Davies* [2016] 2 P & C.R.10 at [38] (cited with approval in *Guest v Guest* [2020] 1 WLR 3480 at [47]) as follows:

> "(i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: *Thorner v Major* [2009] UKHL 18; [2009] 1 W.L.R. 776 at [57] and [101].
>
> "ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: *Thorner v Major* at [29].
>
> "iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: *Gillett v Holt* [2001] Ch. 210 at 225; *Henry v Henry* [2010] UKPC 3; [2010] 1 All E.R. 988 at [37].
>
> "iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: *Gillett v Holt* at 232*; Henry v Henry* at [38].
>
> "v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: *Gillett v Holt* at 232.
>
> "vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: *Jennings v Rice* [2002] EWCA Civ 159; [2003] 1 P. & C.R. 8 at [56].
>
> "vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he

> enjoyed in consequence of that reliance: *Henry v Henry* at [51] and [53].
>
> "viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: *Henry v Henry* at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: *Jennings v Rice* at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: *Jennings v Rice* at [50] and [51].
>
> "ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: *Jennings v Rice* at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a "portable palm tree": *Taylor v Dickens* [1998] 1 F.L.R. 806 (a decision criticised for other reasons in *Gillett v Holt*)."

118. There has also been what Lewison L.J. described in *Davies v Davies* (at [39]) as a "lively controversy" as to the basis on which a court should look to satisfy an equity once established: specifically, whether the purpose of the court in satisfying the equity is (1) to give the claimant exactly what the claimant thought s/he had been promised; or (2) to compensate the claimant for the detriment suffered. In *Davies v Davies*, relying on a distinction made by Walker L.J. in *Jennings v Rice* (at [45]), Lewison L.J. observed (at [40]) that in this context proprietary estoppel cases fell into two distinct categories:

> "… A class of case in which the assurances and reliance had a consensual character not far short of contract. In such a case "both the claimant's expectations and the element of detriment will be defined with reasonable clarity". In that kind of case the court is likely to vindicate the claimant's expectations. Although Robert Walker LJ does not say so in terms, it is implicit that in such a case the claimant will have performed his part of the quasi-bargain. At [47] he referred to another class of case in which:
>
> > "… The claimant's expectations are uncertain… Then their specific vindication cannot be the appropriate test. A similar problem arises if the court, although satisfied that the claimant has a genuine claim, is not satisfied that the high level of the claimant's expectations is fairly derived from his deceased patron's assurances, which may have justified only a lower level of expectation. In such cases the court may still take the claimant's expectations (or the upper end of any range of expectations) as a starting point, but unless

> constrained by authority I would regard it as no more than a starting point."

119. Lewison LJ then observed that it is not clear from this passage what the court is to do with such an expectation even if it is only a starting point, and accepted as "useful working hypothesis" a suggestion made by counsel that:

> "there might be a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation."

120. In *Guest v Guest*, Floyd LJ (at [52]) agreed with Lewison LJ's analysis, adding that:

> "I would not regard this list of scaling factors as more than important examples of the considerations which come into play."

121. Returning to the first category of case, Robert Walker LJ in *Jennings v Rice* said (at [50]):

> "To recapitulate: there is a category of case in which the benefactor and the claimant have reached a mutual understanding which is in reasonably clear terms but does not amount to a contract. … In such case the court's natural response is to fulfil the claimant's expectations. But if the claimant's expectations are uncertain, or extravagant, or out of all proportion to the detriment which the claimant has suffered, the court can and should recognise that the claimant's equity should be satisfied in another (and generally more limited) way."

122. It was common ground that the sliding scale approach discussed by both Lewison LJ in *Davies v Davies* and Floyd LJ in *Guest v Guest* was only relevant in relation to Robert Walker LJ's second category, that is to say, cases in which the assurances and reliance did not have a consensual character not far short of contract. It was also common ground between the parties that if the Claimants were to succeed in establishing an equity, it would be an equity which fell into the first, quasi-contractual, category of case.

123. Counsel for the Defendant submitted that even in the first kind of case, the expectation of the claimant was merely a starting point, from which the court would then exercise its discretion depending on the circumstances. That submission I understand to be taken from the words "in that kind of case, the Court is likely to vindicate the claimant's expectations" (emphasis added, when Lewison LJ in *Davies v Davies* discusses the two kinds of case identified by Robert Walker LJ in *Jennings v Rice*.) I accept that in the first, quasi-contractual, type of case the Court retains a discretion as to how it satisfies the equity, and that there is no rule that it must do so by vindicating the claimant's expectation. The use of the phrase "starting point" in this context is however potentially misleading given its use in the judicial discussions

of the sliding scale approach which is required in the second category of case. The danger in using it in relation to cases falling into the first category is that the approach of the court becomes conflated with the exercise to be undertaken in cases falling into the second category, which uses the top end of the range of expectations as "the starting point".

124. In a case falling into the first category, there is, albeit not a presumption, a strong reason, inherent in the very nature of the arrangement as quasi-contractual, for the court to grant the claimant's expectation (assuming the claimant to have performed their side of the bargain), and it will require specific and convincing countervailing factors to justify departing from that outcome. Nonetheless, Robert Walker LJ's observations in *Jennings v Rice* (at [50]) suggest that, notwithstanding the arrangement is not far short of contractual in nature, a remedy less than vindicating the expectations might be appropriate where the expectation is out of all proportion to the detriment suffered.

125. It is not necessary that at the time the assurance is made the representor owns the Property in question. After acquired property can, depending on the circumstances, also be fixed with the equity arising from assurance, reliance, detriment and unconscionability. This proposition, derived from *Wayling v Jones* (1995) 69 P & C R 170 and *Thorner v Major* [2009] 1 WLR 776, was not in contention between the parties.

Findings on proprietary estoppel

126. It follows from my finding that there was no express time limit imposed on the ability of the Claimants to implement the Buy Back Agreement that an assurance was given by the Defendant to the Claimants they would be able to repurchase the Property from the Defendant, free of the Mortgage Express mortgage, for the sum of £205,000, at any point. The fulfilment of the assurance was accordingly conditional upon positive acts, requiring the transfer of the Property and the payment of money, by the Claimants. It qualifies in my judgment as a sufficiently clear representation that, upon satisfaction of the conditions, the Claimants would (re-)acquire an interest (namely, the unencumbered freehold interest) in the Property.

127. Did the Claimants rely on that assurance to their detriment? It is plain in my judgment that the Claimants did act to their detriment in reliance on what they understood to be the Defendant's promise that they would be able to repurchase their Property in the future, and that they were reasonable to do so. First, the Claimants transferred title in the Property to the Defendant at an undervalue. As a result, the Claimants received only somewhere between 68% and 70%, a little more than two thirds of the market value of the Property. Secondly, they took on the risk of meeting the mortgage repayments, regardless of whether those increased or decreased over time.

128. It is true that the Claimants have had the benefit of being able to continue to live in the Property as a result of the agreement they reached with the Defendant. However, what the Defendant seeks to characterise as a countervailing benefit was paid for by the Claimants: they have met the mortgage repayments for the duration. The Defendant submits that these repayments must be compared to what the Claimants would have had to pay rent for a similar property during this time, and suggests (using figures agreed by the parties) that they were some £140,000 better off making the

mortgage repayments than they would have been paying a market rent for a comparable property. I accept neither the basis nor the significance of the comparison. First, I agree with the Claimants' submission that the period during which any such comparison is to be made should end with the date on which the Claimants were ready to purchase the Property back, namely end 2015/early 2016, and should not include a comparison between the mortgage repayments and rental values for the period during which the Defendant has been refusing to sell Property to the Claimants. On that basis, the financial benefit would be in the region of £80,000.

129. Secondly, when the Claimants started paying the mortgage, it exceeded by a factor of almost three the amount which the Claimants had previously been paying for their own mortgage. The Claimants assumed the risk of adverse changes in interest rates after the two-year fixed rate period ended, which could have pushed the mortgage repayments even higher. This was a risk they took on in return for making the payments. Thirdly, to engage in a month-by-month comparison of similar rental values is to engage in the kind of technical spreadsheet exercise to be avoided when considering the question of detriment. Whilst countervailing benefits must be taken into account, the examination of detriment is one element in determining whether resiling from the assurance is unconscionable. That question is to be decided without resorting to precise mathematical or accounting style calculations: it must be considered in the round, and detriment is significant as an element of the enquiry into the question of unconscionability: see *Gillett v Holt* at 232, D-E, per Robert Walker LJ.

130. It is true that the terms on which the Property was transferred to the Defendant brought benefits to the Claimants. It is equally true that they paid a significant price for those benefits (in terms of losing 30% of the equity in the Property, and in terms of taking on the risk of the mortgage rates rising), and that that was a price they were only prepared to pay on the assurance given by the Defendant they would be able to buy the Property back. Bearing in mind that the ultimate question is one of unconscionability, which is to be looked at in the round, I accept the submission on behalf of the Claimants that it would be inequitable if a consequence of their compliance with the terms of their agreement with the Defendant was that they had deprived themselves of the opportunity to require him to comply with his side of the bargain. I also remind myself that the Defendant expressly entered into the arrangement with the Claimants on the basis he did not want to nor intended to profit from it. It was open to him to negotiate a commercial rent, but that was not what he was then interested in. Once again, it would be inequitable in my judgment if the Claimants were to be kept out of their Property because the Defendant had decided to assist them on the basis that the arrangement would be cost neutral to him, and that he would not look to gain any commercial advantage from it.

131. There is also the question of the improvements made to the Property. It seems that these were paid for largely if not wholly by the Claimants' children. It was submitted on behalf of the Claimants that this expenditure demonstrated reliance rather than detriment. Whilst accepting that the family often acted as a unit, and that the Property has come to be regarded by the family as a family asset, I do not regard expenditure made by the children of the Claimants in reliance on the assurance by the Defendant as relevant to the question of reliance, because what has to be shown is reliance by the Claimants, not by third parties.

132. My conclusion is that the Claimants acted to their detriment in reliance on the assurance. The detrimental reliance in accepting a sale price well below market value is indisputable, and it left them without a legal interest in the Property. Moreover, their reliance on the assurance in this way was reasonable having regard to the long-standing quasi-familial nature of the relationship, and the basis on which the Defendant was asked to and agreed to come to their aid.

133. I have found that there was an assurance that, on payment of the original purchase price, the Claimants would be entitled to buy back the Property from the Defendant at any time. I have further found that the Claimants reasonably acted in reliance on that assurance, to their detriment. The final question that must be answered in order to determine whether an equity arises in their favour as a result is whether it would now be unconscionable for the Defendant to repudiate that assurance. This question must be answered by looking at all the relevant circumstances in the round. In addition to the assurance and the detrimental reliance, I bear in mind the Defendant's representation to the Claimants that he did not seek to make a profit from the arrangement. It seems to me it is almost the epitome of unconscionability for him not merely to repudiate his assurance, but to do so with a view to making a profit from the arrangement in the form of a return on his investment, in return for the assistance he gave to the Claimants, offered at a time of great peril because of their long-standing ties of affection, at no cost to himself. To do so would be to take advantage of the predicament of close friends who trusted him to keep his word, and who acted to their detriment in reliance on what he told them he would do in future at such time as they were back on their feet. Taking all these matters in the round, I conclude that it would be inequitable for the Defendant to resile from his agreement with the Claimants, and that therefore an equity arises in favour of the Claimants.

Satisfaction of the Equity

134. The Defendant accepts that, the equity having arisen, the facts of this case fall into the first of Robert Walker LJ's two categories, being a case in which the assurances and reliance has a consensual character not far short of a contract. Both the Claimants' expectations – namely, that they would have the Property transferred back to them for a payment of £205,000 – and the element of detriment – namely, that they would accept a price substantially below the market value, and would be responsible for the mortgage repayments – were defined with clarity. In that kind of case the court is in the usual course of events likely, but not bound, to vindicate the claimant's expectations.

135. Even if that is merely a starting point, I see nothing in this case which persuades me to depart from that position. Further, no alternative way of satisfying the equity was proposed by the Defendant, and I was not addressed on any detriment to the Defendant in being obliged to sell the Property to the Claimants for £205,000 (beyond being deprived of a return on his investment). Where an expectation is wholly disproportionate to the detriment, the court should grant a different (usually a lesser) remedy than one fully vindicating the claimant's expectations. In my judgment, the facts of this case justify vindicating the Claimants' expectations in full. That outcome is not wholly disproportionate to the Claimants' detriment; in agreeing to sell the Property to the Defendant the Claimant lost 30% of their equity in the property; undertook the responsibility to make the mortgage repayments no matter what transpired as regards interest rates; and what is more transferred away their legal title

to the Property – all in the belief that they would be able to buy it back at same price. In losing that 30% of the equity, they also sold away any prospect of being able to own their own home in any other way. In those circumstances, the return of the Property in return for the sum of £205,000 does not seem disproportionate to the detriment suffered.

136. To the extent that it might be argued that the Claimants will receive a windfall, in the form of the increased value of the Property between 2008 and today's date, there are two responses. Firstly, the correct increase in value should be measured as between 2008 and 2015/16 when the Claimants attempted to buy the Property back. There are no agreed values for the Property at those dates, and the most one can draw is a reasonably safe inference that its value then was more than it had been in 2008 and less than it is now. Secondly, the Claimants have maintained the mortgage repayments unfailingly, partly to reflect the benefit of living in the Property, partly as a means of ensuring that there was no cost to the Defendant in entering into the arrangement, and partly in the expectation that the Property would one day be theirs at a price of £205,000. There is no reason why the Claimants should be deprived of the fruits of those repayments. I bear in mind that the Defendant had no intention of making a profit out of the arrangement, and has incurred no (unrecovered) costs in doing so. For the Claimants to benefit from any increase in value was exactly what the parties must have envisaged would be the case when they entered into their arrangement in 2008, just as if the value had gone below the 2008 figure the Claimants would nonetheless have had to pay £205,000 to obtain title to the Property. The potential for a change in value was inherent in the arrangement, and the Claimants cannot now be deprived of what they were promised because as matters have transpired they stand to benefit from the increase in value over time.

137. Finally, the Defendant did not go beyond the submission that vindicating the expectation was no more than a starting point when exercising the discretion as to how to satisfy the equity. No alternative options were suggested, so I have none to consider, albeit at paragraph 74 of the Defendant's skeleton argument it is submitted that an order requiring a transfer at £205,000 would be disproportionate inter alia because the cost of redeeming the mortgage secured on the Property is in the region of £210,000. I accept that if administrative or other charges have increased the sum payable to redeem the mortgage, then it is just for the Claimants to bear those additional costs, at least where they are of such minimal value as the evidence shows them currently to be. Accordingly, and based on the principles developed in the authorities referred to above, in the exercise of my discretion I decide that in order to satisfy the equity it is necessary for the Defendant to transfer to the Claimants unencumbered freehold title to the Property, upon payment by the Claimants to the Defendant of £210,000. Although I suspect it was not addressed by the parties at the time the agreement was entered into, it seems to me both equitable and consonant with the parties' agreement, in particular that the Defendant should not have to spend any of his own money in implementing the agreement, that the Claimants should meet the legal costs of the transfer.

138. I should note that the question whether the Court might be prevented from making such an order by reason of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("section 2") was briefly raised during the course of the hearing. After reserving his position at the beginning of the trial, Mr McLoughlin indicated

after the close of oral evidence, and before closing submissions, that he did not intend to take any section 2 point. Accordingly, I need not consider the relationship between section 2 and the doctrine of proprietary estoppel, beyond noting the Defendant's decision not to take any point is consistent with the recent decision of Snowden J in *Howe v Gossop* [2021] EWHC 637 (Ch).

139. Lastly on the issue of proprietary estoppel, the Defendant's pleaded case (at paragraph 31) was that the Defendant had acted to his detriment in firstly, entering into the Mortgage Express mortgage (by reason of his legal obligations imposed on him by it), and, secondly, foregoing the opportunity to purchase the flat in Islington; and that as a result the Claimants were now estopped from denying that he is the sole legal and beneficial owner of the Property. This was not a case that was pursued either in written or oral closings, and accordingly I do not need to consider it.

140. The point has been taken, both at paragraph 31 of the Defence and in closing submissions, that the Claimants have provided no evidence to show that they have the necessary funds to make the payment of £205,000. I am of the view that they do not need to provide such evidence in order to succeed in their claim: the order requiring the Defendant to transfer the Property is conditional on such payment, and if the Claimants cannot make the payment then it will not bite. It may be considered that there ought to be a limited period of time within which the Claimants must make the payment so that the Defendant can comply with an order that he transfer the Property to them at that price. If so, and in the event the parties cannot agree on a sensible period of time, this is a consequential matter on which I should be addressed following the handing down of this judgment.

141. Given my conclusions on proprietary estoppel, I do not need to decide whether or not the Claimants' case based on constructive trust is made out. Although Mr Clargo indicated that the claim based on constructive trust was in a sense the Claimants' primary case, the bulk of the statements of case, and the evidence, and written and oral argument, was directed to the claim in proprietary estoppel, and it is that doctrine which most obviously applies to the particular facts of this case.

Conclusion

142. In conclusion, and to summarise, I accept the Claimants' case that there was an assurance, on which they relied to their detriment, that they or their family would be able to buy back the Property at the original price of £205,000. I reject the Defendant's case that the assurance was in any sense time limited. I find in the circumstances that it is unconscionable for the Defendant to resile from that assurance. Therefore an equity arises. In order to satisfy the equity, and to do justice between the parties, the Defendant must transfer the Property back into the Claimants' name for the price of £205,000, plus any other sums that are required to redeem the mortgage, subject to a limit of £215,000, the Claimants bearing the costs of the transfer. If the additional costs have increased the payment required to more than £215,000 before the sale is concluded, the parties have liberty to apply to amend or vary the order. If the parties are unable to agree a form of order, I will invite submissions on the matters remaining in dispute following the handing down of this judgment.

143. I thank both Counsel for their assistance during the trial, and for the measured and constructive way in which they represented their respective clients in circumstances that were clearly distressing to the parties and their witnesses.