Neutral Citation Number: [2023] EWHC 1379 (Ch)

Case No: PT-2021-000456

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

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

Date: 8 June 2023

Before :

MASTER TEVERSON

- -

Between :

KULJINDER KAUR THANDI	**Claimant**
- and -	
TRIPATPAL SAGGU	**Defendant**

- -
- -

Joshua Griffin (instructed by **Fahri LLP solicitors**) for the **Claimant**
Jeff Hardman (instructed by **Mills Chody LLP**) for the **Defendant**

Hearing dates: 30 March 2023

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment will be handed down by the Judge remotely by circulation to the parties' legal representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on 8 June 2023

MASTER TEVERSON :

1. This is my reserved judgment following the hearing before me on 30 March 2023 of the Claimant's application by application notice filed on 29 November 2022 seeking (i) summary judgment on part of the Defendant's counterclaim pursuant to CPR Part 24 referred to in the skeleton argument filed on 29 November 2022 in support of the application as "the Contract Counterclaim"; (2) an unless order requiring the Defendant to re-amend the pleading of his counterclaim for proprietary estoppel and/or a constructive trust; and (3) costs.

2. I had originally intended to hand down judgment on 18 May 2023 having provided a copy of the draft judgment to the parties' legal representatives by 4pm on 15 May. However, on 9 May 2023 the Claimant issued an application notice seeking an order allowing the court to consider new evidence alleged to be relevant to the Claimant's application for summary judgment. I directed that the application be listed on 18 May 2023 and delayed handing down judgment. The parties then sensibly agreed that the matter be dealt with by written submissions being filed and served by 4pm on 31 May 2023 limited to no more than 5 pages of A4 paper and single-sided. Written submissions were filed on behalf of the Claimant and the Defendant pursuant to the consent order dated 17 May 2023. I have taken these into account.

3. For the purposes of this application it is necessary for me to set out a summary of the background facts. In so doing I am not to be taken as making any findings of fact. There are a large number of factual disputes between the parties.

4. In 2017 the Defendant's company, Earlswood Interiors Limited, carried out renovation works for the Claimant at her residential home at 8 Heath Drive, Dartford, Kent DA1 3LE. Quotations for the works were provided to the Claimant by an employee, Mr Rash Bajwa, and by the Defendant's brother, Mr Manraj Saggu.

5. The Claimant paid £71,000 for the work done to her home between 28 March 2017 and 30 June 2017.

6. The Defendant says the total amount of works which his company ended up undertaking for the Claimant was £86,000 and that a balance of £15,000 remained outstanding. The Claimant's case is that she had overpaid the Defendant by £3,240.

7. The Claimant says she was intimidated by the pressure put on her by the Defendant and his family to pay a further £25,000. The Defendant denies

that in December 2017 any demand was made for the Claimant to pay £25,000. The Defendant says that the Claimant had underpaid by £15,000. The Defendant says the Claimant made numerous promises to pay the outstanding debt of £15,000 but failed to do so. The Defendant says that in conversations with him the Claimant would provide reasons, excuses and explanations for not paying.

8. The Defendant says that during one such conversation the Claimant mentioned to him that she had a shop at 5-7 Parkside Parade Northend Road Dartford DA1 4RA ("the Property") that she wanted to sell and that she wanted to find someone that could move fast on the purchase. The Defendant says he told the Claimant he would be interested. He says he asked the Claimant how much she wanted for the property. He says they agreed on a sale and purchase price of £270,000. He says the price was fixed. It was agreed that both parties would find independent solicitors to act for them. He says it was agreed both parties should aid and not delay the solicitors to complete the sale. He says it was agreed he would issue a credit note for £15,000 owed to the company on completion. He says it was also agreed that a list of tasks from a list prepared by Mr Rash Bajwa would be carried out on completion.

9. The Claimant says she was provided by the Defendant with three separate letters that purported to sell the Property to the Defendant. The three letters were made in writing on 24 April 2018, 31 May 2018 and 4 June 2018 ("the Letters"). The Claimant accepts that she signed the Letters but says she is a single mother who does not read or write in English and speaks basic English. The Claimant further says she signed the Letters as a result of the pressure exerted on her by the Defendant, believing them to be an agreement to pay the additional £25,000 demanded by the Defendant. The Claimant says she was induced to sign the Letters whilst acting under the undue influence and/or duress of the Defendant and without independent advice.

10. For the purposes of this application only, the Claimant invites the court to proceed on the basis that no undue influence or duress existed.

11. The Claimant says that:-

(i)there was no legally binding contract because the Letters are, on their proper construction, subject to contract;

(ii) in any event, the Defendant is estopped from denying that the Letters are subject to contract pursuant to the doctrines of estoppel by convention and/or equitable estoppel;

(iii) any contract of sale contained in the Letters is void for failing to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act");

(iv) the Defendant has failed to plead breach of contract either adequately or at all;

(v) alternatively, elements of the Defendant's damages claim are not recoverable as a matter of law.

(vi) in addition, the Claimant seeks an unless order requiring the Defendant to amend his Defence and Counterclaim to plead or re-plead in a single document his counterclaim alleging a proprietary estoppel and/or a constructive trust.

12. In view of its central importance to the application, I set out the terms of the letter dated 22 April 2018 in full. The letter has the Defendant's address in the top right-hand corner. It is dated in manuscript.

The letter reads:-

"Dear Mrs Kuljinder Thandi (Kinder) Residing at 8 Heather Drive Dartford DA13 3LE

I am paying you £2,000.00 cash today as a deposit toward the purchase of 5-7 Parkside Parade Erith DA1 4RA. This is knows as the Londis comprising of two corner retail units that's inside are opened into one. This includes the flats above the Londis and the land at the rear including the double garage.

The purchase price is fixed and agreed between both parties at £270,000 and a £2,000 deposit is being paid today 22/4/18 which will come off the sale price leaving a total balance for Mr TS Saggu to pay of £268,000 this is a full and final balance for the purchase. Both parties to pay their own legal costs.

The agreement is that the price remains fixed and TS Saggu completed on the property sale as soon as the mortgage and funds are in place. Both parties will find independent Solicitors who can draw up the agreements for the sale and do the necessary checks for the banks purposes. By signing below Kinder agrees to give any further information required in aid or not to delay the Solicitors or the sale for as the lender so they are comfortable to lend and complete on the deal. By signing Mr T Saggu will also have a duty to waive the £15,000 owed to his company for works undertaken at Kinder's residence at 8

Heather Drive Dartford DA13 3LE earlier in 2017. This credit note will be insured by Mr T Saggu on completion of the purchase 5-7 Parkside Parade.

Mr T Saggu will also as a gesture of good will carry out the listed task that his staff member has recorded on Saturday 21/4/18 at Kinder's property and this list will be emailed over to Kinder week of 23/04/18 to avoid any confusion for both parties. This work will be carried out again on completion however Mr T Saggu may choice to carry out certain jobs prior to completion at his own will.

This is an agreement that has been made by both parties at their own will and in a view that they both will benefit for their own personal reasons. By both signing below this will mean they both agree to the above and will carry out their own duties and obligations to each other/both parties. This has been drafted by Mr T Saggu and his family have read and approved the document. Kinder and both her children have also read and approved the document before signing So everyone can agree that the agreement is fair to both parties and reasonable."

Beneath the last paragraph is typed:-

Seller	*Buyer*
Date:	*Date:*
Name:	*Name:*
Sign:	*Sign*

Under the Seller heading, there is inserted in manuscript the date 22/4/18, the name Mrs Kuljinder Kaur Thandi and her signature. Under the Buyer heading is inserted in manuscript the date 22/4/18, the name Mr Tripatpal Saggu and his signature.

On a second page is typed:-

"Payment received for £2000.00 cash on the 22/4/18 by Mrs Kuljinder and she is to sign to confirm receipt of payment for both parties' records."

Below this is typed:-

Date:

Name:

Sign:

There is written alongside in manuscript the date 22/4/18, the name Mrs Kuljinder Kaur Thandi and her signature.

13. The Defendant says the agreement was signed in the Claimant's house on 22 April 2018. He says he then gave the Claimant £2,000. He says that Mr Bajwa gave the Claimant a further £1,000 on 31 May 2018 and £2,000 on 4 June 2018. These payments were evidenced by letters dated 31 May 2018 and 4 June 2018 in substantially the same form as the letter dated 22 April 2018. The Defendant says these payments were deposits towards the agreed purchase. The Claimant says they were loans made to her.

14. The letter dated 31 May 2018 records that a further £1,000.00 cash was being paid on that day as a further deposit towards the purchase of 5-7 Parkside Parade Erith DA1 4RA. The remainder of the first paragraph and the second, third, fourth and fifth paragraphs contain the same wording as the letter of 22 April 2018 except that in the second paragraph it is recorded that the total balance for the Defendant to pay was £267,000. The letter dated 31 May 2018 was signed by the Claimant under the heading Seller. It was signed by Rash Bajwa as the person making payment on the Defendant's behalf. On the second page, the receipt of the £1,000 cash was confirmed by Mrs Kinder with her name and signature. The Claimant's son Ronak Thandi, then aged 14, signed as a witness.

15. The letter dated 4 June 2018 records that a further £2,000 in cash was being paid that day as a further deposit. It records in the second paragraph that this left a total balance for the Defendant to pay of £265,000.00. This letter was again signed by the Claimant and by Rash Bajwa on behalf of the Defendant. The signatures were witnessed by one B. Franklin.

16. In outline, matters developed as follows:-

(i)On 5 July 2018 Manak Solicitors sent a draft contract for approval to Chancellors Lea Brewer LLP ("CLB") referred to as Seller's Solicitors.

(ii)It appears from a letter dated 13 July 2018 from CLB solicitors addressed to the Claimant that on 27 June 2018 the Claimant attended their offices in connection with the sale of 7 Parkside Parade.

(iii)On 15 July 2018 the Defendant texted the Claimant saying:-

"Hi Kinder

We need to sort out things today. They want to book Valuers in and the Solicitor is waiting to hear from you we are exchanging next week.

Call me urgent

Thanks"

(iv)By letter dated 27 July 2018 Manak Solicitors wrote to CLB saying their clients were extremely disappointed at the lack of progress. They said:-

"we are instructed to put your client on notice that unless contracts are exchanged within the next 7 days our clients will have no alternative but to withdraw from this transaction and as per the parties original agreement demand the return of £25,000.."

(v)On 6 August 2018 the Defendant sent a text message to the Claimant saying he didn't want to buy the shop any more as it was taking too long. He asked her to let him know when she could pay him back the £25,000 she owed him.

(vi)On 2 October 2018 Mr M. Martinez LLB sent a letter before action on behalf of the Defendant to the Claimant. The letter demanded the repayment of the total sum £22,100 to the Defendant within 14 days from the date of the letter failing which proceedings in the County Court might be issued. The letter stated that in addition to the debt, the Defendant could also sue for specific performance of the contract *"meaning that he can ask the Court to order you to transfer the property to him."*

(vii) On 8 October 2018 the Defendant caused to be entered in the Charges Register to Title number P148518 a unilateral notice "in respect of Contracts for sale dated 22 April 2018, 31 May 2018 and 4 June 2018. These documents are referred to together in the Particulars of Claim as "the Letters".

(viii) On 6 August 2019 the Defendant sent to the Claimant draft High Court proceedings drafted by Counsel.

(ix) By letter 16 June 2020 Mr Omar Faruk, Barrister, wrote on behalf of the Defendant to the Claimant asking for payment of £25,000 by 31 June 2020.

(x) An application was made on behalf of Mrs Thandi to HM Land Registry in July 2020 to cancel the unilateral notice. The application was accompanied by a letter dated 8 July 2020. The letter states that the

Claimant acknowledges she signed the Letters and understood that she was selling the Property to the Defendant for £270,000. The Claimant however says the letter was sent to HMLR by a Mr Joseph Asombang without her instructions and Mr Asombang has made an affidavit stating that he acted without the Claimant's instructions and neither did the Claimant at any time suggest to him that she knew or understood that she was selling the Property to the Defendant.

(xi)In August 2020 the Defendant objected to the Claimant's application to cancel the notice.

17. The procedural history is as follows:-

(i)The Claim was issued on 19 May 2021.

(ii) On the same day the Claimant applied for an interim injunction.

(iii)On 2 September 2021 after a contested hearing Mr Justice Adam Johnson ordered the Defendant forthwith to apply to HM Land Registry to cancel the unilateral notice on the undertakings given to the Court by the Claimant and accepted by the Court as set out in the Schedule to the Order. Subject to one exception, the Claimant undertook until the conclusion of the proceedings or further order of the Court not to dispose of her estate or interest in the Property or in her residential home 8 Heather Drive, Dartford, at which the works had been carried out.

(iv)The Defendant filed a Defence and Counterclaim dated 15 September 2021. The Claimant filed a Reply and Defence to Counterclaim dated 7 October 2021.

(v)A case and costs management hearing took place before me on 5 April 2022. Case and costs management directions were given. The claim was directed to be entered in the Trial List listing category C with a time estimate of 3 days. The trial was to take place between February and May 2023.

(vi)On 25 July 2022 the Defendant was by consent given permission to amend its Defence and Counterclaim in the form provided to the Claimant's solicitors on 21 July 2022. An amended Reply and Defence to Counterclaim was filed by the Claimant on 1 September 2022.

(vii)On 5 October 2022 the claim was listed for trial in a 5 day window commencing on 2 October 2023 with a time estimate of 3 days.

(viii)On 27 October 2022 the Claimant made a Part 18 Request for further information.

(ix)On 17 November 2022 the Defendant filed his response to the Claimant's Part 18 Request.

18. It is against that background that the Claimant's application was issued on 29 November 2022. The application notice stated that in support of the application the Claimant would rely on the Claimant's skeleton argument filed with the application and the 1st and 2nd witness statements of the Defendant made in opposition to the application for an interim injunction.

19. In response to the application there was filed on behalf of the Defendant the 2nd witness statement of Ranjeet Johal dated 15 February 2023. The 2nd witness statement of Mr Johal is 102 paragraphs in length and consists in the main of submissions and legal argument and comment. This is not the function of witness evidence.

20. The Defendant made a 3rd witness statement dated 16 February 2023. In paragraph 7 the Defendant refers to the statement in his previous witness statements that the agreement which the Claimant and he signed was given to both their solicitors for them to draft contracts for exchange. The Defendant says that what he meant by this was that following the conclusion of our agreement the parties were to instruct solicitors to complete the necessary formalities to give effect to our agreement. In paragraph 21 the Defendant says it was his solicitor Mr Manak who suggested that there needed to be further contracts entered into.

21. A witness statement in reply was filed by Ellie Constantinou, a trainee solicitor, on behalf of the Claimant to explain the delay in listing the claim for trial.

22. On behalf of the Claimant it is submitted that the Defendant's Contract Counterclaim has no real prospect of success. The Defendant's Contract Counterclaim is identified as being the Defendant's claim for specific performance of what is alleged to be a contract for sale or alternatively for damages for breach of the alleged contract for sale.

23. CPR rule 24.2 provides that:-

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if-

(a)it considers that-

(i)that claimant has no real prospect of succeeding on the claim or issue; or

(ii)that defendant has no real prospect of successfully defending the claim or issue; and

(b)there is no other compelling reason why the case or issue should be disposed of at a trial."

24. Paragraph 1.3 of Practice Direction 24 provides that an application for summary judgment may be based on-

"(1)a point of law (including a question of construction of a document),

(2) the evidence which can reasonably be expected to be available at trial or the lack of it, or

(3) a combination of these."

25. The Claimant's application is for partial summary judgment in relation to the Defendant's counterclaim. The Claimant says that she is, in substance, defending a claim by the Defendant to have an interest in the Property.

26. Principles applicable to applications for summary judgment were formulated by Lewison J. (as he then was) in *Easyair Limited v Opal Telecom* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098.

"(1)the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: see Swain v Hillman [2001] 1 All E.R. 91;

(2)A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];

(3) In reaching its conclusion the court must not conduct a "mini-trial";

(4) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements of case before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

(5) However in reaching its conclusion the court must take into account not only the evidence actually pleaded before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

(6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial that is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: see Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] F.S.R. 3;

(7) On the other hand it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."

27. On behalf of the Claimant Mr Griffin relied on the first sentence of the seventh principle formulated by Lewison J in the *EasyAir* case:-

> *"…it is not uncommon for an application under Pt 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it."*

As Lewison J. explained:-

> *"The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be."*

28. There is however a need for the court to be careful before giving summary judgment on a claim or against a claimant if reasonable grounds exist for believing that a fuller investigation of the facts at trial might affect the outcome of the case. In *Bolton Pharmaceutical Co 100 Ltd v Doncaster Pharmaceuticals Group Ltd* Mummery LJ (with whose judgment Longmore LJ and Lewison J agreed) stated at [18]:-

> *"In my judgment, the court should also hesitate about making a final decision without a trial where, even though there is no obvious conflict of fact at the time of the application, reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and affect the outcome of the case."*

29. There are two further reasons in this case why I consider that I should consider carefully whether this is a suitable case for summary judgment. The first is that the background facts are heavily in dispute. This does not preclude summary judgment being granted on a short point of law or construction but it requires the court to consider the potential relevance to the issue of the facts that are in dispute. The second is that the Claimant is seeking partial summary judgment on the Defendant's counterclaim in contract. The counterclaim based on proprietary estoppel, constructive trust and unjust enrichment will go to trial in any event unless settlement is reached. The possibility that determining the application will remove a road block to settlement is a consideration but no more than that.

30. In *TFL Management Services Ltd v Lloyds TSB Bank Plc* [2013] EWCA Civ 1415 Floyd LJ set out the principles in the *EasyAir* case and said at [27]:-

> *"I would add that the court should still consider very carefully before accepting an invitation to deal with single issues in cases where there will need to be a full trial on liability involving evidence and cross examination in any event, or where summary disposal of the single issue may well delay, because of appeals, the ultimate trial of the action: see Potter LJ in Partco v Wragg [2002] EWCA Civ 594; [2002] 2 Lloyds Rep 343 at 27(3) and cases there cited. Removing road blocks to compromise is of course one consideration, but no more than that. Moreover it does not follow from Lewison J's seventh principle that difficult points of law, particularly those in developing areas, should be grappled with on summary applications: see Partco at 28(7). Such questions are better decided against actual rather than assumed facts. On the other hand it may be possible to say that the trajectory of the law will never on any view afford a remedy: see for example Hudson and others and HM Treasury and another [2003] EWCA Civ 1612."*

31. The position was recently summarised by His Honour Judge Keyser KC sitting as a Judge of the High Court in *East-West United Bank SA v Gusinski* [2022] EWHC 3056 (Ch), per at [12]. He referred to dicta in three cases sounding a cautionary note in relation to granting summary judgment. Two of the dicta related to the position where what is sought is summary disposal of part of a case in circumstances where other parts of the case appear likely to go to trial. Paragraph 27 of the judgment of Floyd LJ in *TFL Management Services Ltd v Lloyds TSB Bank Plc* was one of those two dicta cited. Judge Keyser said:-

> *"These dicta do not indicate that it is wrong to deal summarily with a claim or issue when the court can be confident that all relevant facts are before and it is in a position to apply the law to those facts. There are certainly cases where it will be both possible and helpful to dispose summarily of some issues, even though there will have to be a trial on other issues. However, I take three points from these dicta. First, a court should guard against too readily concluding that the full litigation process will not cast further relevant light on the case. Second, the fact that a court is seised of an application for summary determination of an issue and is capable of determining that issue does not mean that it is obliged to accede to the request that it do so. It might be better to refuse summary determination on the issue and instead let the entire case proceed to trial. Third, one factor that might, in a particular case, militate against a summary determination of a single issue is the risk that the case will become mired in appeal proceedings rather than proceed efficiently to trial."*

32. The first ground relied upon by the Claimant is that there was no legally binding contract as the letters alleged to give rise to the contract for sale were, on their proper interpretation, subject to contract.

33. In support of her argument that any agreement was subject to contract the Claimant relies in particular on the second sentence of the third paragraph in the Letters which state:-

"Both parties will find Independent Solicitors who can draw up the agreements for the sale and do the necessary checks for the banks purposes."

The Claimant says it is clear from this sentence that a formal contract of sale would be prepared and that there would be an exchange of contracts.

34. The Claimant submits that an agreement may be made subject to contract either expressly or by implication and that that is the effect of the words used in the second sentence of the third paragraph of the letters.

35. This is not an issue that is relied on or pleaded in the Particulars of Claim. In paragraph 33 c. of the Amended Reply and Defence to Counterclaim it is pleaded that the alleged contracts were mere 'agreements to agree' and therefore unenforceable. Paragraph 33 is pleaded in response to paragraph 46 of the Defence in which it is averred that it is irrelevant that the letters referred to solicitors drawing up the agreements.

36. There is a difference between saying that an alleged agreement was no more than an agreement to agree and that an alleged agreement was expressly or impliedly made subject to contract although the effect may be the same. The argument that there is no legally binding contract because the letters were on their proper interpretation subject to contract was raised for the first time in the skeleton argument filed on 29 November 2022 in

support of the application. It was that argument and not the agreement to agree argument that was pursued before me on behalf of the Claimant.

37. The Defendant submits first that the Claimant ought not to be permitted to run the un-pleaded subject to contract argument at trial, let alone as a basis for summary judgment. In response it was submitted on behalf of the Claimant that the Defendant has been on notice of the subject to contract argument since the application and the skeleton argument filed in support of the application was served on or about 29 November 2022.

38. I accept that the lack of the pleading of an issue may not be an absolute barrier to the issue being relied on in support of this application for summary judgment but it is a further reason for me to consider carefully before granting summary judgment based on this ground.

39. The authorities demonstrate that where an agreement is not expressly stated to be subject to contract the distinction between an agreement which is conditional on formal contracts being drawn up and exchanged and one which is effective and binding until a full agreement is drawn up and exchanged can be a fine one.

40. The Claimant relies on the statement of Jessel M.R. in *Winn v Bull* (1877) 7 Ch.D 29, Jessel, M.R. at 32 at the conclusion of his Judgment:-

> *"…where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared."*

41. In *Winn v Bull* immediately after the sentence relied on by the Claimant, Jessel M.R. said:-

> *"When it is not expressly stated to be subject to a formal contract, it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail."*

42. Earlier in his Judgment, Jessel MR referred to the distinction pointed out in the authorities between an agreement which is final in its terms, and therefore binding, and an agreement which is dependent upon a stipulation. He referred to the judgment of Lord Westbury in *Chinnock v Marchioness of Ely* 4 D.J. & S 638. and said:-

> *"There Lord Westbury says: "I entirely accept the doctrine…that if there had been a final agreement, and the terms are evidenced in a manner to satisfy the Statute of Frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by*

the parties." Then he goes on, "But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation.""

43. The letters were not expressly stated to be subject to contract. The sentences following those relied on by the Claimant purport to record what the parties have agreed:-

"By signing below Kinder agrees to give any further information required in aid or not to delay the Solicitors or the sale for as the lender so they are comfortable to lend and complete on the deal. By signing below Mr T Saggu will also have a duty to waive the £15,000 owed to his company for works undertaken at Kinder's residence…"

44. In my view that issue of construction is better left in this case to the trial judge so that a determination can be made on the basis of the facts as found and not on the basis of the Letters alone. In my judgment, the Defendant has a real prospect in succeeding on the subject to contract issue. It is arguable as a matter of construction and looking at the Letters alone that the parties intended them to have at least some immediate contractual effect.

45. Further, the subject to contract issue ought not in my judgment to be determined in isolation. It is linked to other issues of law and construction relating to the agreements.

46. The argument that the letters were no more than an agreement to agree was raised by Mr Walsh, counsel then acting for the Claimant, at the interim injunction hearing before Mr Justice Adam Johnson on 1 September 2021. It is pleaded in paragraph 33c. of the Amended Reply and Defence to Counterclaim but not in the Particulars of Claim. Paragraph 9.2 of Practice Direction 16 provides that:-

"A subsequent statement of case must not contradict or be inconsistent with an earlier one; for example a reply to a defence must not bring in a new claim. Where new matters have come to light a party may seek the court's permission to amend their statement of case."

47. The agreement to agree argument was not relied on before me. If it is intended at trial to rely on the subject to contract argument or the agreement to agree argument I take the view that it would be better for them to be raised as points of law and construction in the Particulars of Claim. As matters stand, the Defendant has not been required to plead in response either to the subject to contract point or to the agreement to agree point. A further issue which is not addressed is whether the Letters were intended

to be provisional or interim agreements only and if so what was their intended scope.

48. In view of my decision that the construction issues are best left to the trial judge, I will not express any further views on the contractual effect or otherwise of the Letters themselves.

49. The issue of pleading applies with even greater force in relation to the second argument relied upon by the Claimant in support of its summary judgment application.

50. The second argument relied upon by the Claimant is that the Defendant is estopped from denying that the Letters are subject to contract pursuant to the doctrines of estoppel by convention and equitable estoppel. The Claimant says that, on the Defendant's own evidence, both parties acted on the assumption that formal contracts would be prepared and that exchange of contracts would take place, and that in any event the Defendant represented that was the position to the Claimant.

51. The estoppels relied upon by the Claimant are not pleaded either in the Particulars of Claim or in the Amended Reply and Defence to Counterclaim.

52. The Claimant relies on the Defendant's own evidence filed in response to the interim injunction application as evidence that the parties acted on the common basis that there would be an exchange of contracts. The Claimant refers to and relies on paragraph 9 of the Defendant's 1st witness statement and paragraph 8 of his 2nd witness statement in both of which it is stated:-

> *"This agreement was later given to both our solicitors for them to draft contracts."*

53. The Claimant also relies on a text sent by the Defendant to the Claimant on 13 July 2018 in which the Defendant says:-

> *"We need to sort things out today*
>
> *They want to book Valuers in and the Solicitor is waiting to hear from you we are exchanging next week*
>
> *Call me urgent*
>
> *Thanks"*

54. The Claimant also relies on the narrative in the bill sent by Chancellors Lea Brewer LLP to the Claimant which refers to acting for her in connection

with the proposed sale at the sale price of £270,000, subject to contract. It refers in paragraph 3 (a) to *"perusing draft contract supplied by the buyer's solicitors."*

55. The Claimant by her application dated 9 May 2023 seeks to rely on documents on the files of Chancellors Lea Brewer LLP ("CLB") and Manak Solicitors as evidence that the parties through their solicitors were acting on the basis that there would be an exchange of contracts. The Claimant says it is plain from the content of the files that the parties were acting on the common assumption that there was no binding contract between them.

56. It is at this point that the application is in danger of descending to the level of becoming a mini trial. The Claimant relies on an email sent by Manak to CLB on 5 July 2018 enclosing a *"draft contract for approval"*. The Claimant points out that the draft contract contained special conditions in relation to completion and the deposit and that the contract was described to the Claimant by CLB as being conditional upon the buyer receiving satisfactory property search results and a satisfactory offer of mortgage finance. The Claimant also relies on an email sent by Manak to CLB on 27 July 2018 stating that:-

> *"we are instructed to put your client on notice that unless contracts are exchanged within the next 7 days our clients will have no alternative but to withdraw from this transaction and as per the parties original agreement demand the return of £25,000.."*

57. The Claimant relies on that email as showing that the Defendant considered himself entitled to withdraw from the transaction unless contracts were exchanged within 7 days. The reference in the email of 27 July 2018 to *"as per the parties original agreement demand the return of £25,000"* is said by the Defendant to be inconsistent with the Claimant's subject to contract argument.

58. The Claimant further says that the contents of the Manak File casts serious doubt on the Defendant's third witness statement in which he states: *"At no time did I expect that further contracts needed to be drawn up to be signed"*. In his written submissions dated 31 May 2023 counsel for the Claimant says this statement is inconsistent with an email sent by the Defendant to Manak on 27 June 2018 in which the Defendant states that there will be an exchange of contracts. This is a new point. In my view it is the type of point that should be raised at trial in cross-examination and not relied upon in support of a summary judgment application.

59. In my judgment it would not be right to enter a summary judgment on the basis of the alleged estoppel by convention or equitable estoppel for a number of reasons. First, the estoppels alleged by the Claimant are not pleaded. This means that the facts relied upon as giving rise to the estoppels are not set out. They are not pleaded too by way of defence in turn.

60. Secondly, the estoppel argument is by its nature not suitable to be determined summarily on written evidence alone or in isolation of the issue of construction of the letters.

61. Thirdly, the understanding and expectation of the parties is much better left to be determined by the trial judge on the basis of the facts as found. This is in the context of a claim in which the Claimant's primary case is that she never agreed to transfer the Property to the Defendant.

62. It is further submitted on behalf of the Claimant that the Contract Counterclaim has no real prospect of success on the ground that any contract of sale contained in the Letters is void for failing to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Section 2, so far as relevant, provides:-

> *"(1)A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document, or where contracts are exchanged, in each.*
>
> *(2)The terms may be incorporated in a document either by being set out in it or by reference to some other document.*
>
> *(3)The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."*

63. On behalf of the Claimant it was submitted that the Letters fail to identify: (1) the Claimant as proprietor of the Property; (ii) the purchaser; or (iii) the seller. It is further submitted that the Letters fail to incorporate mutual obligations for the purchaser to purchase or the seller to sell the Property. As a result of the draft contract disclosed on the CLB and Manak files, the Claimant intends if summary judgment is not granted to seek permission to amend the Particulars of Claim to plead that not all the terms of the contract were contained in the Letters.

64. In my judgment, the section 2 points are not sufficiently clear cut as to warrant being dealt with summarily and pre-trial looking at the Letters in isolation. The Defendant has a real prospect of satisfying the court that if the Letters were immediate binding contracts for the sale and purchase of the Property the essential details of the contract are set out in the Letters. I

have already concluded that the prior issues of construction should not be determined summarily.

65. In *Firstpost Homes Ltd v Johnson* [1995] 1 W.L.R. 1567 at 1571 Peter Gibson L.J. explained the changes brought about by section 2 as follows:-

> *Section 2 brought about a markedly different regime from that which obtained hitherto. Whereas under section 40 [of the Law of Property Act 1925] contracts which did not comply with its requirements were not void but were merely unenforceable by action, contracts which do not comply with section 2 are ineffective; a contract for the sale of an interest in land can only be made in writing and in conformity with the other provisions of section 2. Whereas an oral contract was allowed and enforceable provided that it was evidenced in writing and the memorandum or note thereof was signed by or on behalf of the party against whom it was sought to be enforced, oral contracts are now of no effect and all contracts must be signed by or on behalf of all the parties. Whereas the contract or the memorandum or note evidencing the contract previously could be contained in more than one document only one document is now allowed, save where contracts are exchanged, although reference to another document may be permitted in the circumstances laid down in subsections (2) and (3). Whereas the memorandum or note needed for section 40 did not have to contain every term of the contract, all the terms must now be contained in the document in question. Whereas the doctrine of part performance allowed certain contracts otherwise unenforceable to be enforced, that doctrine now has no application. It is to my mind plain that the Act of 1989, which, as its long title indicates, was to make new provision with respect to contracts for the sale or other disposition of interests in land, was intended to make radical changes to such contracts in a way that was intended to simplify the law and to avoid disputes, the contract now being in a single document containing all the terms and signed by all the parties. Thereby it has been sought to avoid the need to have extrinsic evidence as to that contract."*

66. In that case a short letter prepared by the secretary of a director of Firstpost Homes Ltd recorded an oral agreement by the late Mrs Fletcher to sell identified land to Firstpost Homes Ltd. The letter however contained no commitment on its face for Firstpost Homes Ltd to purchase. On that ground it was held the letter did not contain mutual obligations and could not amount to a contract for the sale of an interest in land. In the present case the letters do on their face record mutual obligations. The extent of those obligations and whether they were breached are matters for investigation at trial. In addition the Claimant is referred to at the foot of the Letters as Seller and has signed the Letters. The Defendant is referred to as Buyer at the foot of the Letters and has signed the letter dated 22 April 2018. The letters dated 31 May 2018 and 4 June 2018 were signed by Mr Bajwa as the person making payment on the Defendant's behalf.

67. In my judgment, the section 2 points are best determined at trial at the same time as the issues as to the construction and effect of the Letters is

determined. The section 2 issues are best considered in the context of the evidence as a whole. There is in my view the real possibility of facts being found by the trial judge which would affect the determination of the issue one way or another.

68. Further in my judgment it would not be in accordance with the overriding objective for me to decide the issues raised under section 2 summarily for the following reasons:-

(i)the section 2 points relied upon by the Claimant could have been made the subject of a strike out or summary judgment application at the outset of the claim;

(ii)Mr Justice Adam Johnson recorded at paragraph 22 of his judgment on 2 September 2021 that the Claimant accepted that the Defendant had an arguable case that a contract was entered into on the basis of the letters, even though she disputed that on the points advanced in her particulars of claim. Those points included the point that the letters did not comply with section 2;

(iii) the Order of Mr Justice Adam Johnson dated 2 September 2021 recites the court being satisfied that the complexity of the issues and the need for an expeditious disposal of the proceedings warrant it remaining in the High Court;

(iv) the points under section 2 are legally distinct from, but evidentially linked to, the issue whether the letters were intended by the parties to operate as contracts or whether the parties contemplated that they would only be contractually bound when contracts were exchanged;

(v) the points relied upon by the Claimant under section 2 are not so clear-cut as to be determined simply by looking at the Letters themselves in isolation from their factual background;

(vi) there is the real possibility that the evidence as found at trial may determine whether the Letters were intended by the parties to be a memorandum or note of a prior oral agreement or whether they were intended by the parties to be some form of provisional written agreement ancillary to or in anticipation of a subsequent contract for sale and purchase of the Property;

(vii) there is a real risk that a summary determination of the section 2 issues will delay the trial as a result of an appeal or application for permission to appeal not being finally determined in time for the trial to proceed in October 2023;

(viii) the summary determination of the issue is unlikely to reduce significantly the length of the trial or to save costs in view of the counterclaims for relief relying on proprietary estoppel and constructive trust in the event the letters are held not to comply with section 2 of the 1989 Act.

(ix) in those circumstances, the determination of the section 2 issue is as likely to delay final determination as it is to expedite settlement.

(x) the parties and the judge at the interim application in September 2021 recognised the complexity of the issues and the need for an expeditious disposal of the proceedings.

69. The Claimant also seeks summary judgment on the ground that the Amended Defence and Counterclaim does not adequately particularise the alleged breach of contract by the Claimant. In paragraph 38 of the Amended Defence it is pleaded that the Claimant "then unscrupulously and also in breach of the agreement, notified the Defendant that (i) she no longer wished to sell him the property and (ii) despite the agreement, sought to sell the property to someone else.." It is not pleaded when this took place.

70. In paragraphs 47 of the Amended Defence it is pleaded that the Claimant has "clearly breached her agreement, in that, she has failed to comply with a term of the agreement which was her promise of sale for land". In paragraph 48 it is pleaded that the Claimant "has failed to comply or neglected to comply with obligations".

71. In response to the Claimant's request for further information, the Defendant gave as particulars of the facts said to amount to breach that:-

(i)the Claimant failed to sell the Property to the Defendant;

(ii)The Claimant failed to pay her own legal fees;

(iii) The Claimant failed to instruct and/or dis-instructed her conveyancing solicitor thereby preventing completion of the Property;

(iv)The Claimant failed to provide any and all information as required for the completion process.

72. On behalf of the Claimant it is submitted that the bare assertion that the Claimant failed to sell the Property to the Defendant is without more an inadequate allegation of breach. In my judgment, the Defendant should be required to particularise when the Claimant is alleged to have acted in

breach of the agreement relied upon, the nature of the alleged breach and whether the Claimant was then called upon by the Defendant to exchange or to complete and failed to do so. The Defendant should also plead the facts and matters relied upon by him to demonstrate that he was in a position to complete.

73. The allegation that the Claimant failed to pay her own legal fees is inconsistent with the Defendant's evidence that he agreed to discharge the Claimant's legal fees and his claim to recover those fees. The third particular of breach is not given a time frame. The fourth particular of breach does not specify when this failure is alleged to have occurred.

74. In my judgment, this lack of particularisation is not a sufficient ground for granting summary judgment on the Contract Counterclaim. I agree however with the Claimant that the Defendant has not sufficiently identified when the breaches by the Claimant are alleged to have occurred. This is potentially relevant to the issue as to whether the parties agreed that the sale should be rescinded on terms and, if not, to the issue whether the Defendant was himself ready and willing and able to perform his side of the bargain. I will accordingly direct that the Defendant is within 21 days from the date when my judgment is handed down to provide further and better particulars in accordance with paragraph 72 above.

75. The Claimant asks the court to grant summary judgment in relation to the Defendant's claim for damages. The Defendant seeks to recover the sum of £15,000 in respect of waiver of fees for work carried out on behalf of the Claimant and £5,000 paid by the Defendant as a deposit. The Claimant says those sums are not recoverable as the Defendant would have paid those sums had the contract been performed. The Defendant has made an alternative claim for restitution of those amounts based on unjust enrichment. In my judgment, the issue of the assessment of damages is best left to the trial judge. The Defendant has a realistic prospect of recovering the deposits paid and the fees waived by him on the understanding that the contract would be performed, as reliance loss.

76. By the second part of her application the Claimant asks the court to order that the Defendant file a Re-Amended Defence and Counterclaim to re-plead his claims under proprietary estoppel and constructive trust. The Claimant says that the Amended Defence is too vague. The Claimant says that the Part 18 response whilst an improvement is itself a prolix document and there are now inconsistencies in the Defendant's pleading. It is pointed out that the alleged contract for sale is identified as the assurance giving rise to the proprietary estoppel but at the same time it is said that the assurance was communicated or relied upon by reason of matters occurring

prior to the alleged contract of sale. The Claimant further says that the nature of the constructive trust case is unclear in that it is not clear if the Defendant contends that a constructive trust has arisen or simply that the court should declare a constructive trust as the remedy for proprietary estoppel. The more general point is made that the Defendant's counterclaim in equity is now spread over two documents the bulk of it being set out in a Part 18 Response.

77. The points based on the inadequacy of the Amended Defence and Counterclaim could and should have been taken when the Defendant applied for permission to amend its Defence and Counterclaim in July 2022. The Claimant chose instead to consent to permission being given to the Defendant to amend his Defence and Counterclaim in the form provided to the Claimant's solicitors on 21 July 2022 and then on 17 October 2022 to make a detailed Part 18 Request.

78. It was in my judgment too late by the time this application was issued to invite the court to order that the Defendant re-plead in its entirety his case relying upon proprietary estoppel and constructive trust. It would not now be in accordance with the overriding objective to order that the Defendant re-plead that part of his case. There is a risk that the making of such an order would leave insufficient time for witness statements to be prepared and exchanged prior to the trial in October 2023. It will be a matter for the trial judge to determine on the facts whether any proprietary estoppel or constructive trust arose and if not whether the Defendant is entitled to recover sums claimed as restitution.

79. For the reasons stated above, I do not consider that the issues raised in relation to the Contract Counterclaim are suitable for summary determination. As it seems to me, what needs to happen now is that amendments to the Particulars of Claim are drafted on behalf of the Claimant in order to plead the issues of construction relied on in relation to the Letters and the alleged estoppels by convention and equitable estoppel. If the amendments when drafted are not agreed, an application for permission to amend will need to be made. If time permits, I would be willing to list any such application alongside the hearing on 28 June 2023.

80. In view of the limited availability of the parties' legal advisers, it is not possible to list a hearing to deal with consequential matters until Wednesday 28 June 2023. I propose in the circumstances to hand down this judgment without any attendances being required at 10.30am on Thursday 8 June 2023 and to send out this judgment in draft on or before Monday 5 June 2023 inviting typographical corrections to be provided by counsel by 4pm on Wednesday 7 June 2023.

81. For the reasons set out above:-

(1)The application for summary judgment is refused;

(2)The Defendant is by 4pm on 29 June 2023 to provide the further and better particulars referred to in paragraph 72 above namely to further particularise when the Claimant is alleged to have acted in breach of the agreement relied upon, the nature of the alleged breach and whether the Claimant was then called upon by the Defendant to exchange or to complete and failed to do so. The Defendant is also to set out the facts and matters relied upon by him to demonstrate that he was then in a position to complete.

82. By paragraph 3 of the Order of Mr Justice Adam Johnson dated 2 September 2021 it was ordered that at all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including mediation). I was told that no mediation has yet taken place. Any party not engaging in ADR in some form may expect to be heavily punished in costs irrespective of the outcome of the claim and counterclaim. I would urge that following the determination of this application both parties will re-evaluate the strength and weakness of their respective cases.

83. I invite counsel to agree a minute of order.