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Neutral Citation Number: [2023] EWHC 490 (Fam)

Case Nos: FA-2022-000125 and BD18D10886

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

On appeal from HHJ Shelton sitting in the Family Court in Leeds

The Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 7 March 2023

Before :

Mr Justice Moor

- -

Between :

Pamela Jane Teasdale
Appellant

-and-

Rebecca Sarah Carter
First Respondent

-and-

Daniel James Teasdale
Second Respondent

- -
- -

Mr Jonathan Southgate KC (instructed by Silk Family Law) for the **Appellant**
Mr Nicholas Fairbank (instructed by Gardner Leader LLP) for the **First Respondent**
Mr Charles Hale KC (instructed by Denney King Consultants Ltd) for the **Second Respondent**

Hearing dates: 16th and 17th January 2023

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JUDGMENT

MR JUSTICE MOOR:-

1. This is an appeal from HHJ Shelton sitting in the Family Court at Leeds. The hearing took place in December 2021, with judgment delivered on 20 April 2022. Permission to appeal was given by Sir Andrew McFarlane, President of the Family Division, on all grounds on 8 August 2022. The President said that, for the reasons advanced in the Appellant's Skeleton Argument, the proposed appeal had a reasonable prospect of success. He added that, in particular, the argument that the judgment fails to set out an adequate explanation of the judge's principal reasons and analysis of the factual evidence may well succeed.

2. The case concerns the ownership of a property known as Cow House which is situated on a farm known as Burne Farm, Sheffield Road, Todwick. The Farm itself is owned in joint names by the Appellant and Second Respondent. The decision of HHJ Shelton was that the First Respondent, their elder daughter, was entitled to the transfer of Cow House into her sole name on discharge of the outstanding mortgage with the Agricultural Mortgage Corporation ("AMC") on the basis of a proprietary estoppel.

3. I have to say that this is one of the most regrettable pieces of litigation that I have ever come across. It is not just because this family has become so fractured as a result. The total costs of the litigation at the conclusion of the hearing below were approximately £828,000. The costs of this appeal are £220,000. These figures do not include the costs of the financial remedy proceedings. The house at the heart of the dispute, Cow House, is worth £245,000, after a 20% reduction for an agricultural occupation restriction. When the appeal was opened, it was said that, if I allowed the appeal, the matter would have to be re-heard at further vast expense, as an appeal court clearly could not substitute different findings of fact for those found by the judge below. The final reason that the position is so regrettable is that the parties agreed a way forward on 7 October 2020 which would have obviated the need for all this litigation. Unfortunately, the agreement was subsequently repudiated by the Appellant, on the basis that the First Respondent had enlarged her claim in other respects. The case was then litigated for nine days before HHJ Shelton. It has been heard for two days before me, although that time estimate included only half a day of reading time and absolutely no judgment writing time.

4. If the case had to be reheard, I cannot see how it could take less than a further five days, although I do now accept that there might be a way to avoid such a re-hearing by "parking" the issue until after the conclusion of the financial remedy proceedings between the Appellant and the Second Respondent.

The relevant history

5. The Appellant and the Second Respondent married on 21 September 1974. The First Respondent is one of their two daughters. I propose to refer to the Appellant as the Wife; the Second Respondent as the Husband; and the First Respondent as Rebecca simply for the sake of convenience. I mean no disrespect to any of them by so doing.

6. The Husband was born on 20 July 1949, so he is now aged 73. He is a farmer. The Wife was born on 5 July 1954, so she is aged 68. I am told that she wants to establish a livery business at the farm.

7. The Husband's family have been farmers for three generations. Originally, Elm Tree Farm was acquired by his grandmother in 1948. The farm was transferred to the Husband and his parents in 1968. The Husband himself was granted a tenancy (Agricultural Holdings Act) of Burne Farm, Sheffield Road, Todwick, Sheffield on 14 July 1972. At the time, it consisted of a dilapidated farmhouse and around fifty acres of land. Later that year, he met the Wife and they married on 21 September 1974. They moved into the farmhouse at Burne Farm in 1975, after renovations had been completed.

8. They have two children. Rebecca was born on 24 October 1977. She is therefore aged 45. She is married to Andrew Carter. Penelope was born on 17 July 1985, so she is aged 37.

9. The Husband purchased the freehold of Burne Farm in his sole name on 28 May 1997. The purchase was enabled by the sale for development of part of Elm Tree Farm in 1995. By the late 2000s, Cow House was an unconverted barn some twenty metres from the main house. There is no dispute that it was agreed that it would be redeveloped into a family home for Rebecca and her husband to occupy. Planning permission was obtained, albeit on the basis that the property was to be occupied by an agricultural worker. The barn was then converted at a cost of approximately £200,000 and Rebecca and her husband moved in on 1 November 2009. They have lived there ever since, now with their daughter. The issue, however, is the terms on which they did so and the way in which the works were financed. In due course, a mortgage was taken out with the Agricultural Mortgage Corporation ("AMC") in the sum of approximately £150,000. Rebecca and her husband paid £700 per month which covered this mortgage together with a small additional sum for water rates. Again, however, there is a dispute as to whether she was paying rent or discharging the mortgage.

10. In September 2008, the farm was transferred into the joint names of the Husband and the Wife by way of gift. The farm, however, continued to be run by the Husband via DJ Teasdale & Son. The farm income comes from crops, fertilizers, contract work and single farm payments. I have not investigated the full extent of the assets. There is clearly land in a number of different locations, some of which is owned by a company called Foragevale Ltd. The Husband inherited, from his parents, the remainder of Elm Tree Farm in 2016. I was told, during the hearing, that the total value of all the land was approximately £2.5

million. In addition, the Husband sold land at Carlton for development for £2.4 million. At the time of his Form E, he had £2,334,746 in bank accounts from the sale of that land, although I am told that this has now been eroded by costs. I have to say that I consider that the availability of this money should have made the resolution of the overall dispute between these parties relatively straightforward. I have already noted the tragedy that this was not the case.

11. The Husband and Wife separated in August 2018. The Wife petitioned for divorce on 20 November 2018. A decree nisi (conditional order) has been pronounced but it has not, as yet, been made final. The Husband applied for financial remedies by way of Form A on 16 April 2019. I understand that there was then an application for a freezing order made by the Wife. I have no details, although I am told that a way forward was subsequently agreed. The one consequence was that Rebecca stopped paying the sum of £700 per month to the Husband to enable him to discharge the mortgage. Instead, she has since paid it to the mortgage company herself.

12. The First Directions Appointment in the Husband's application for financial remedies was heard by Buxton DDJ on 15 July 2019. The issue of third party interests had already been raised. The parties agreed to consider the matter. On 11 December 2019, Rebecca's solicitors filed notice of acting. The matter was transferred to HHJ Shelton, who made directions on 15 April 2020.

13. On 27 May 2020, Rebecca sought a declaration that the beneficial interest in Cow House rests in her entirely by virtue of proprietary/promissory estoppel. She applied to be joined as an Intervener on 3 June 2020. She said that she had contributed financially to the renovation of Cow House and serviced the mortgage. She added that she had invested her time and labour in reliance on her parents' repeated promises that the property would be hers. On 8 June 2020, the Husband acknowledged Rebecca/her husband's beneficial interest in Cow House. He also said that the land in respect of the adjacent manège had been gifted to her on her 21st birthday instead of her having a birthday party.

14. On 30 September 2020, the Wife did not accept that Rebecca had acquired a beneficial interest at any time in Cow House but she said that the family could remain living there as long as they wished. She added that both daughters would inherit the farm in due course but said that both parents had agreed that Rebecca would not own it to avoid the risk of a property in the centre of the farm falling into the hands of a third party. She noted that Cow House is subject to an agricultural restriction which neither Rebecca nor her husband could fulfil. She said, however, that she was agreeable to transferring Cow House to Rebecca on the basis that Rebecca would be responsible for the remaining mortgage, now reduced to approximately (£85,000). She also sought a right of pre-emption in the event of Rebecca seeking to sell the property.

15. Rebecca's solicitors responded on 5 October 2020. The letter raised the issue of the manège and access by their client to the paddock and stables as well as the question of covenants and easements that would be required to secure Rebecca and her husband's occupation of Cow House.

16. The matter was heard by HHJ Shelton on 7 October 2020. I acknowledge that none of the counsel then instructed appear before me now. Nevertheless, they are all experienced financial remedy counsel. The order included two recitals and five agreements. The first recital and three of the agreements are relevant. The first recital was in the following terms:-

> *"It is recorded that the parties are not in agreement as to the extent of Rebecca's ownership and entitlement in respect of Cow House and the curtilage boundary, access, parking use of stables and manège and other access rights, covenants and easements in respect fo (sic) the property and or personally."*

17. The relevant three Agreements were:-

> "*1. That subject to the recital above, Rebecca Carter is the beneficial owner of Cow House and the First Respondent agrees that Rebecca is permitted to use and enjoy peaceful occupation of the stables, manège and pasture, together with such access rights and easements as are reasonably necessary for the current use and enjoyment of Cow House.*
>
> *2. That the Applicant and Respondent shall, at a time to be agreed, transfer to Rebecca Carter all their legal and beneficial interest in the property known as Cow House, situated within Burne Farm, Todwick, on the basis that to the extent that the parties cannot agree the matters contained in the recital above, such matters shall be determined by the Court:*
>
> *(a) Upon such terms as are necessary to provide Rebecca Carter with a good and marketable title to the property and*
> *(b) Together with all necessary rights and easements over Burne Farm as are determined to be reasonably necessary for the current use and enjoyment of Cow House and*
> *(c) Until such time as Rebecca Carter has paid to the Applicant the required amount pursuant to paragraph 3 below subject to Rebecca Carter indemnifying the Applicant (as mortgagor) on a monthly basis a sum in respect of the AMC mortgage secured upon the land known as 'Handkerchief' registered under title no SYK65883.*
>
> *3. Following completion of the transfer if (sic) the legal estate in Cow House the Intervenor will undertake to pay the Applicant a sum equal to the amount required to redeem the AMC mortgage."*

18. There were, undoubtedly, a number of typographical errors in the drafting of these recitals as can be seen above. Indeed, the order, at one point, refers to Rebecca as the First Respondent but it is clear that the references above to the First Respondent are referring to the Wife. I also accept that there is a potential inconsistency between the first of the three Agreements, which says that Rebecca is the beneficial owner of Cow House, and the second Agreement, which refers to the Husband and Wife transferring all their legal and beneficial

interest to Rebecca. This can, of course, be squared on the basis that they can only transfer a beneficial interest if they have one, but I accept it was not well drafted.

19. The order itself gave permission to Rebecca to intervene but adjourned her involvement generally with liberty to restore at the conclusion of the Financial Dispute Resolution Hearing (FDR). The Husband and Wife had to set out their position in relation to the first recital. There was a direction for Cater Jonas to provide to the Husband and Wife a valuation of Cow House on the basis of the respective positions. There was to be a private FDR before Mr Christopher Pocock KC. Tragically, this never occurred. Mr Charles Hale KC, leading counsel for the Husband blamed this on the Wife but I have been unable to form any view as to who was responsible.

20. It is right to note that, on 21 October 2020, the Wife's solicitors sent a letter saying that her case was that Rebecca was entitled to rights of access to Cow House but no other rights to the manège, paddock or stables, other than a licence on condition it gave rise to no legal right to occupy.

21. The matter came back before HHJ Shelton on 4 May 2021 in the financial remedy proceedings. Rebecca was not present nor represented. She had not by then pleaded her case. The Wife had made clear her case that she wished to retain the former matrimonial home at Burne Farm and sufficient land and outbuildings as would be necessary for her to commence a livery and livestock business. The Husband's position was that she should receive a lump sum and live elsewhere, whilst he would retain the matrimonial home and all the land. Rebecca was invited to set out her Particulars of Claim. Again, the order confirmed that it was the intention of the Husband and Wife to transfer their legal and beneficial interests in Cow House to Rebecca, subject to an agreement or order as to what interests and rights shall also be transferred and, so far as the Wife was concerned, the provision of indemnities.

22. Rebecca's Points of Claim were dated 18 June 2021. Her claim included that she was the beneficial owner of Cow House; the beneficial owner of the manège, having spent £11,563.93 on its construction; that she had grazing rights to the paddock; that she had a beneficial interest in the New Stables, having paid £1,250 towards them; that she had a beneficial interest in the Turnout, having paid £470 towards it; and a right to park in the Green Barn. It was this Claim that caused the Wife to withdraw her agreement as to Cow House itself, although counsel for both Rebecca and the Husband submit to me that she was bound by it, as it was an express declaration of trust, which she had confirmed by signing a witness statement detailing the agreement.

23. There followed the hearing before HHJ Shelton that occupied seven days of court time in December 2021 to hear the oral evidence. The witnesses were Rebecca, the Husband, the Wife, Rebecca's husband, Andrew Carter, and her sister, Penelope. All the witnesses, other than the Wife, supported Rebecca's case. The judge then adjourned for written submissions to be prepared. He then allowed two further days for counsel to speak to their written submissions. Quite how two additional days were necessary when they had gone to all the

trouble of putting the submissions in writing is not clear to me but it certainly cannot be said that the judge did not have all the material before him in great detail. Inevitably, he reserved judgment.

24. The judgment was first sent to the parties as a draft in March 2022 but the final version is dated 20 April 2022, although Mr Southgate KC, who appears on behalf of the Wife, tells me that the very final version was sent by email on 21 April 2022. It is a long judgment running to some 170 paragraphs and 35 pages, although I entirely accept that page count alone does not signify very much. The judge says that the claim for beneficial ownership of property was heard as a preliminary issue in accordance with the decision of Nicholas Mostyn QC in TL v ML[2005] EWHC 2860 Fam at [36]. He recites that Rebecca sought a declaration that she is the sole beneficial owner of Cow House and the manège; and the joint owner with her parents of New Stables; and that she sought easements including to allow her the use of a paddock and Green Barn. He says that the Husband conceded Rebecca's claim. The Wife disputed it but had earlier agreed that Rebecca was the beneficial owner of Cow House. The Husband wishes to continue to work the farm. The Wife wishes to retain the farmhouse and outbuildings to run a livery business. Rebecca sought a declaration that Cow House benefits from a right of peaceful occupation unmarred by a livery business.

25. He then sets out Rebecca's case, namely that the manège was gifted to her instead of a 21st birthday party and that she paid for materials for its construction. She said she was told at the age of 18 that she could have exclusive use of the paddock if she paid for her horses. In fact, she only had half the paddock. Cow House was a disused farm building and she paid for its construction on a promise that it would be hers. She shared the New Stables with the Wife as well as the Turnout area. The Husband conceded the claim. The Wife denied it in its entirety. The Wife argued that the claim was made in league with the Husband for the collateral purpose of defeating her claim to run a livery business at the farm. She alleged that Rebecca paid rent for her occupation of the property and denied that there was any agreement that she was to acquire any ownership rights. She makes the point that Rebecca's occupation is a breach of the agricultural restriction. This has not really featured in the appeal and I am not clear what the effect of this may be. Fortunately, it does not matter to my decision.

26. The judge then deals with the legal framework. There is no criticism of his approach to the law. He rightly says that the burden of proof is on Rebecca. He notes that proprietary estoppel was pleaded. He sets out that the law he must apply is as summarised by Lewison LJ in Davies v Davies [2016] EWCA Civ 463 at [38]:-

> *"Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:*
>
> *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 WLR 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 ER 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 & CR 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 FLR 806 (a decision criticised for other reasons in Gillett v Holt).”

27. The judge then dealt with the alternative case put on behalf of Rebecca and the Husband that the order of 7 October 2020 combined with the Wife's signed written statements in the financial remedy proceedings dated 9 March 2021 and 31 August 2021 amounted to an express declaration of trust "*at least as to the footprint of Cow House*". Further it was said that there was a common intention constructive trust subject to an obligation to discharge the mortgage. Mr Southgate KC, on behalf of the Wife, objected on the basis that neither case was pleaded and that he would have dealt with the issue differently if they had been. The judge agreed with Mr Southgate. He added that he did not consider the agreement was sufficiently certain to amount to an express declaration of trust given the areas of disagreement as to the extent of the curtilage etc.

28. He then deals with the evidence that he had heard from paragraphs [61] to [153]. There is no doubt that he covers the evidence in considerable detail and there is no suggestion that he has been inaccurate in any way. It is also clear from these paragraphs that he was well aware of the positions of each party. Mr Southgate submits to me that these paragraphs amount only to a recital of the evidence but I do not accept that is entirely correct, although it is right that most of these paragraphs do simply recite the evidence he heard. There are, however, a number of findings of fact contained in these paragraphs, as well as comments on the evidence and the weight to be attached to it. By way of example only, in paragraph [137], he finds that the Wife's evidence about the funding of Cow House was vague. In addition, I take the view that paragraph [79] makes findings of fact, whilst leaving open the important issue of who paid. That paragraph reads:

> *“(Rebecca) also produced a spreadsheet of payments, supported by documentary evidence, in respect of the work to Cow House. It shows a little over £81,000 came from (Rebecca and Andrew's) personal accounts and £118,000 from the Lloyds account into which the AMC loan was paid. The total spent was around £200,000. (The Wife) identified a duplicate entry of £235 for tiles and disputed other items amounting to £18,500. Even on (the Wife's) approach, in excess of £180,000 worth of expenditure is not disputed, although the point was left open as to whether this was met, not by (Rebecca) but by (the Husband)”.*

29. Another example is in paragraph [139] where the judge notes that Rebecca and Andrew moved into the main farmhouse with the Husband and Wife in January

2009, prior to moving to Cow House in November 2009. The mortgage from AMC was taken out at the very end of January 2009. The judge says:-

> "*They had paid eight months' rent for Cow House on (the Wife's) case between March 2009 and November 2009 when they were not living there. Why? (The Wife) said she could not explain why. The question would have to be put to (the Husband".*

30. Indeed, there is no doubt that the Husband was repaid the sum of £52,000 on receipt of the AMC mortgage. The Husband's case was that this was repayment to him of the loan he had made to Rebecca to use towards the building works prior to the receipt of the AMC loan. This is set out in the judgment at paragraph [101].

31. The judge moves to his analysis at paragraph [154]. He says at [155] that he must keep in mind that it is a case between members of the same family, not a dispute between companies and that the quality of the documentary evidence between the two is likely to be very different. At paragraph [156], he reminds himself of the importance of approaching the evidence of the parties with great caution, as they each have their separate agendas. He finds that there were contradictions and inconsistencies in the evidence that each of them gave, adding that they were in turn vague and defensive as well as being very much aware of what needed to be said. He then finds that the evidence of Andrew and Penelope was "more spontaneous and open".

32. At [157], he confirms that he read and re-read the considerable evidence in the bundle and his notes of the oral evidence. He says he has taken into account the written opening, closing notes of all counsel and their oral submissions, which he had found to be of considerable assistance in writing the judgment. He says at [158] that he is applying the law as stated above in relation to the pleaded case of proprietary estoppel and gift in so far as it relates to the manège. He reminds himself again of the burden of proof and sets out the standard of proof.

33. The crucial paragraph is [160] where he makes his findings as to the beneficial ownership of Cow House as follows:-

> *"(a) Despite the references to rent, both in (Rebecca's) bank statements and the Husband's cash book and accounts, (Rebecca) did not occupy Cow House as its tenant. There was never any tenancy agreement, rent book or work undertaken by the Husband and the Wife to Cow House as its landlord since (Rebecca) took up occupation in early November 2009.*
> *(b) I accept (Rebecca) and (Andrew's) evidence that they would never have moved to Cow House as its tenants.*
> *(c) The Husband gave an unambiguous promise that Cow House would be (Rebecca's) if she met the cost of the conversion, including the payment of the AMC loan. Legal title would be transferred on the redemption of the loan. The promise was made with the Wife's full knowledge and authority. It was also promised that Cow House would*

be left to (Rebecca) by will in the event the Husband and the Wife died before the loan was repaid in full.
(d) It was a promise upon which (Rebecca) might reasonably expect to rely and did rely.
(e) In reliance on the Husband's promise I find (Rebecca) met the cost of the conversion as is set out in her spreadsheet of just over £200,000. The Wife disputes £18,598.79 of the payments. It is a significant sum even on the Wife's account. I reject the suggestion that the Husband met the cost of the conversion, notwithstanding the absence of the Lloyds Bank accounts and (Rebecca's) savings accounts. (Rebecca) put in significant money, time and effort into the conversion.
(f) I reject the Wife's evidence that such monies as (Rebecca) spent on Cow House amounted to no more than Rebecca 'putting her stamp on the property'. It went far beyond that, as my findings made clear.
(g) It would be unconscionable for either the Husband or the Wife to go back on their promise.
(h) I prefer the evidence of (Rebecca), the Husband and (Rebecca's) witnesses on the issue of Cow House to that of the Wife.
(i) I am satisfied (Rebecca) has established a proprietary estoppel as to the beneficial ownership of Cow House. I shall deal below as to the minimum award necessary to do justice to (Rebecca's) claim".

34. On the other hand, he reached the conclusion that Rebecca had not made out her claims in relation to the manège. Even then, however, he preferred the evidence of Rebecca to that of the Wife as to Rebecca's financial contributions to its construction in the sum of £11,568 but he was not satisfied on the evidence that it was gifted to Rebecca or that any promise was ever made that it was to be hers in returning for her paying towards the materials for its construction. His reasons were:-

> *"(i) The context in which the manège was constructed is entirely different to that of Cow House.*
> *(ii) The statutory formalities were not complied with to render any gift effective.*
> *(iii) The Husband did not part with an isolated piece of land at the centre of the farm. It is not, on my assessment of the evidence, what happened or was ever his intention.*
> *(iv) The Husband was happy to build the manège provided (Rebecca) contributed. He made no promise about (Rebecca) having any beneficial interest or licence to use it or the paddock. The expectation was that (Rebecca) and Penelope would inherit the farm in due course.*
> *(v) (Rebecca) made no reference to the manège at the time of her intervention into these proceedings. Her claim related solely to Cow House. I do not accept her explanation in evidence that she was concerned to secure Cow House first, especially when horses are said to be the centre of her life.*
> *(vi) The claim for the manège was advanced once it became known the Wife was pursuing her case to develop a commercial livery yard within the financial remedy proceedings."*

35. At paragraph [162], he reached the same conclusion in respect of the New Stables and any licence to use the turnout area for the same reasons. Again, however, he preferred the evidence of Rebecca to that of the Wife as to the ownership of a horse and that the sale proceeds went towards the construction of the stables but, overall, Rebecca's contribution was very modest. In this regard, he said that, even if he was wrong, any equity would be satisfied by Rebecca's use of the land until now. Her contributions were only modest but she enjoyed extensive and free use of them. It would not be proportionate to grant any further remedy. The judge then accepted the Wife's evidence in relation to available parking for Cow House. Any use of Green Barn by Rebecca for parking and storage was, he found, not promised or even discussed at the time conversations took place as to the Rebecca's development of Cow House. Again, however, if he was wrong as to that, he was satisfied that any equity had been more than satisfied.

36. He then turns to his decision. He says he need not repeat the numerous authorities in counsel's closing note as to the remedy he should award in relation to Cow House. He says that Cow House was a property designed and built by Rebecca to her own taste as her "*forever home*". He adds that he has taken into account Mr Southgate's arguments as to the advantages of a clean break in which Rebecca receives a financial payment for her interest. He accepts that it would minimise friction and avoid compelling people who have fallen out to live peaceably together, along with having tax advantages. Nevertheless, at paragraph [168], he reaches the clear conclusion that Cow House should be transferred to Rebecca on discharge of the AMC loan. He finds that transfer is the minimum award necessary to do justice in the light of the proprietary estoppel she has established; the express promise made to her; and her contribution to its construction. There were to be easements for the ancillary services such as access, drainage, gas tank and bio-digester. He refused, however, to make a declaration preventing the opening of a commercial livery yard on the basis Rebecca was not entitled to such a declaration.

37. He then had to deal with the costs of the proceedings. He did so in an ex-tempore judgment on the same day, 20 April 2022, although he had previously received written submissions. He noted that Rebecca's costs were £274,583. The Husband's costs were £254,000. The Wife's costs were £300,000. He sets out the law as to costs in a way that is not challenged. He said that he "fell short" of saying that the Husband should not have been represented. Rebecca had succeeded in part of her claim and the Wife had withdrawn her earlier concession. The Wife should therefore pay one-half of Rebecca's costs on the standard basis. He then reached the same conclusion in relation to the Husband's costs. He said he would deal with the CGT payable on the transfer of Cow House and the issue of the rights of pre-emption at the final hearing.

38. The Wife filed a Notice of Appeal on 10 May 2022. The relief she sought was that Rebecca's estoppel claim be dismissed. She also sought a stay. Her Grounds of Appeal were also dated 10 May 2022. The first ground is headed "findings and credibility". It challenges the judge's findings of fact that Rebecca and her witnesses were telling the truth. It says that the judge failed to reflect his finding that Rebecca and her witnesses had given collusive false

evidence in relation to the other parts of Rebecca's claim that he had dismissed. It is then said that the judge was wrong not to make findings about a listening device that the Wife alleged had been placed in the farmhouse by Rebecca. He was wrong not to take into account that it was admitted that the Wife had not been a party to the promises. It is argued that he reached an unsupportable conclusion as to whether Rebecca had paid rent as, it is asserted, the evidence it was rent was overwhelming. It is said that the judge failed to attach proper weight to a failure by Rebecca and the Husband to produce documents, which required adverse inferences to be drawn. The next point raised is an application to adduce fresh evidence which it is said undermined the judge's findings, namely that the Husband had executed a new will in 2018 that did not leave Cow House to Rebecca.

39. The second ground is that the judge was wrong to determine that this was not a clean break case. There should have been a capital payment and by refusing to so order, the judge was elevating the claim to one of constructive trust which the judge had specifically rejected. The third ground is that the judge was wrong to make the costs order in favour of Rebecca as, it is said, there would have been a compromise had the false claims as to the manège etc not been made. Finally, the fourth ground is that the judge was wrong to make a costs order in favour of the Husband as he should not have been represented, relying on the decision if Ong v Ping [2015] EWHC 3258. The point is made that joint closing submissions were prepared by counsel for Rebecca, Mr Nicholas Fairbank and leading counsel for the Husband, Mr Charles Hale KC, at the end of the hearing. It was also asserted that it was wrong to make the same costs order for the Husband as for Rebecca, as this wrongly elevated the Husband to the position of a claimant rather than a co-defendant.

40. The Wife sought further reasons from the judge on 30 June 2022. The request seeks findings as to credibility; countervailing benefits in relation to detriment and his reasons for deciding the issue of the minimum award to do justice. The judge responded on 14 July 2022. He noted that no such request had been made when he sent his judgment in draft on 15 March 2022. In relation to the main judgment, he said that he had nothing to add, including on credibility. In relation to costs, he made six points. The first is important. He said that he had not found an agenda on the part of Rebecca and the Husband to subvert the outcome of the Husband's financial remedy case. Rebecca succeeded as to Cow House. The Wife had made no offer that matched or bettered his decision. He had taken into account the failure to succeed on the remaining claims by only awarding her half her costs. The Husband was entitled to be represented and not merely be a witness.

41. The Wife's Skeleton Argument is dated 22 July 2022. It acknowledges that the first Ground of Appeal is against findings of fact but it says that the findings are demonstrably contrary to the weight of the evidence and are unsafe. It is said that the process of reasoning and analysis is absent. It argues that some of the evidence given by Rebecca can only have come from undisclosed documents. It is asserted that the judge did not deal with the concession that the Wife had not been a party to the relevant discussions. It is said that the 2011 wills of both the Husband and the Wife provided for Cow House to transfer to both daughters

equally, along with the rest of the farm. It is then asserted that the fresh evidence as to the 2018 will of the Husband makes the findings unsafe and that the failure to disclose was deliberate non-disclosure and a major breach of good faith. The notes produced talk of the house that Rebecca "occupies". Turning to the second Ground, it is said that the remedy must be proportionate and take account of the benefits already received. It refers to rent free occupation leading to only a life interest in a case called Campbell v Griffin (Court of Appeal 2001). It ends by saying that there should have been a lump sum payment to Rebecca to achieve a clean break given that the family is "*hopelessly and acrimoniously divided*".

42. Rebecca filed a Respondent's Notice although I do not have the relevant date in my bundle. The Notice asserts that the agreement made in the October 2020 court order was an express declaration of trust, that the Wife confirmed in a statement dated 9 March 2021 which amounts to proof by subsequent acknowledgment. Alternatively, there was a common intention constructive trust.

43. Rebecca's Skeleton Argument is dated 24 October 2022. It argues that the appeal is entirely without merit. It says that Rebecca and her husband built the house so it was clear they were not renting. It adds that the legal analysis of the judge was faultless. His findings were legitimate. It is not necessary in a judgment to answer every point. There was no finding that Rebecca and her witnesses gave collusive false evidence. It is said that the judge simply preferred Rebecca's evidence and that of her witnesses, including her sister, Penny who said that "*Rebecca owns Cow House; it was promised to her*", which, it is contended, went unchallenged. The Wife had confirmed during cross-examination that she believed the husband's evidence that the property would be transferred to Rebecca once the mortgage had been repaid. Although she is bound by her husband's promise whether she knew about it or not, she admitted she knew. There was no need to make a finding as to the listening device. The Husband had been wrong to categorise the £700 per month as rent (and pay the tax), but the payments equated throughout to the mortgage plus water usage and they started before occupation. Rebecca has, since May 2019, paid direct to the mortgage company after the freezing order was put in place. Altogether, it is argued, Rebecca and Andrew have paid £65,000 off the loan, as well as contributing £83,500 towards the build. The document adds that only £18,500 of payments were disputed by the Wife. It is argued that the point about the wills only goes to credibility. The Husband was never asked about a new will, whereas the Wife lied about writing Rebecca out of her will and did not disclose her new will either. It is said that the transcript shows she knew the Husband had changed his will. She should have sought disclosure if she thought it was important. In any event, the Husband could not extinguish Rebecca's interest by his will. Rebecca's records as to expenditure came from a spreadsheet. There were only a handful of statements missing and she could not get them from the bank as they were over six years old. The judge, it is submitted, should not be criticised for not traversing every single point advanced on behalf of the Wife.

44. The Husband's Skeleton Argument is dated 26 October 2022. It is asserted that the attack made by the Wife on the judge's findings of fact is bound to fail given that he read all the documentary evidence, listened to extensive oral evidence and extensive submissions, and plainly evaluated the core issues. He made clear findings as to vital issues that cannot be challenged. An appellate court cannot substitute findings without the clearest evidence that the first court's determination was wrong (see Designers Guild Ltd v Russell Williams (Textiles [2000] 1 WLR 2416 HL). The judge's treatment of credibility was rightly nuanced. The other claims were different because they were asserted to be gifts, but were satisfied by the use of the land to date. There was no finding of collusive false evidence by Rebecca, the Husband and her witnesses. The contents of wills cannot displace primary findings. In relation to costs, the Husband was a respondent to the litigation. He had no choice but to appear and be represented. After all, it is contended, the decision impacted on the financial remedy proceedings, which were to be heard by the same judge. Moreover, the Wife could have applied for him to be discharged if she thought that appropriate but, in reality, the Husband needed to be bound by the judgment.

The Law on Appeals

45. Permission to appeal from a Circuit Judge to the High Court is governed by Family Procedure Rules 2010, Rule 30.3 which provides:-

> *"(7) – Permission to appeal may be given only where –*
>
> *(a) The court considers that the appeal would have a real prospect of success; or*
> *(b) There is some other compelling reason why the appeal should be heard".*

46. The case of Re: R (A Child) [2019] EWCA Civ 895 decides that there must be a realistic, as opposed to a fanciful, prospect of success. There is no requirement that success should be probable, or more likely than not. The President has, of course, given permission to appeal but I must consider the matter afresh. The fact that permission to appeal has been granted does not mean that the appeal will be successful.

47. Rule 30.12 is operable:-

> *(1) Every appeal will be limited to a review of the decision of the lower court unless –*
>
> *(a) an enactment or practice direction makes different provision for a particular category of appeal; or*
> *(b) the court considers that in the circumstances of an individual appeal it would be in the interests of justice to hold a re-hearing.*
>
> *(2) Unless it orders otherwise, the appeal court will not receive –*

(a) oral evidence; or
(b) evidence which was not before the lower court.

(3) The appeal court will allow an appeal where the decision of the lower court was –

(a) wrong; or
(b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court.

48. The first ground of appeal is against findings of fact. It has always been said that this presents a real difficulty for an appellant in that the judge has heard the witnesses and been able to assess them. This, of course, is something that the judge hearing the appeal cannot do. In Piglowska v Piglowski [1999] 1 WLR 1360, Lord Hoffman, in the House of Lords, said at 1372D:-

> *"First, the appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that, It applies also to the judge's evaluation of those facts. If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC1 at 45:*
>
> > *"The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are an inherently incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance…of which time and language do not permit exact impression, but which may play an important part in the judge's overall conclusion."*

49. Mr Southgate specifically referred me to the decision of the Court of Appeal in Simetra Global Assets Ltd v Ikon Finance Ltd [2019] 4 WLR 112. This was an unusual case in which the judgment ran to thirteen pages after a thirteen day hearing. I entirely accept that the judge did not deal with certain parts of the evidence, including written evidence, that ran flatly counter to his findings. Males LJ said the way for the judge to demonstrate the necessary care is to:-

> "*make use of the building blocks of a reasoned judicial process by identifying the issues to be decided and by marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected as unreliable" and*
>
> *"fairness requires that a judge should deal with apparently compelling evidence where it exists which is contrary to the conclusion that he proposes to reach and explain why he does not accept it".*

50. Finally, I am asked to admit fresh evidence. The test for doing so is well established and to be found in the case of Ladd v Marshall [1954] 1 WLR 1489 (Court of Appeal) that held that further evidence will only be admitted on appeal (1) if it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (2) if the further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive and (3) if the evidence is such as is presumably to be believed.

My conclusions – Ground 1

51. I am clear that I cannot ignore the fact that the judge heard oral evidence over the best part of seven court days. This evidence was not just that of the parties. He heard the evidence of Rebecca's husband, Andrew and her sister, Penelope. The fact that four witnesses gave evidence for Rebecca and only one for the Wife is not, of itself, probative of anything but it is noteworthy that Penelope was, in effect, giving evidence against her own interests, as, absent this claim, she is likely to inherit half of the farm, including Cow House. The simple fact, however, is that the judge was able to assess that evidence in a way that I simply cannot. He was well aware of all the arguments on both sides. He refers to inconsistencies in the evidence of the witnesses but then goes on to make clear findings of fact as to the main matters that were in dispute. I have come to the clear conclusion that I cannot say that he made a finding that was not open to him or that was against the weight of the evidence.

52. The judge made a clear finding that Rebecca was promised the house if she discharged the mortgage. There is a further clear finding that the Wife knew all about this and agreed. There is no doubt that Rebecca then acted to her detriment in reliance on the promise. Indeed, a clear picture emerges of her and Andrew being intimately involved in the conversion of the derelict barn to a completed house; ensuring the build took place, which is not an inconsiderable achievement; and then moving into the property as their "*forever home*". Rebecca retained a comprehensive spreadsheet of what was spent. Why would she do that if it was nothing to do with her? The weight of the evidence supports her contention that she made significant financial contributions to the cost of the works. I do not have nearly the same grasp of the detail as the advocates who appeared in front of me or the judge below but I was taken by the fact that the works cost at least £200,000 of which £150,000 was covered by the mortgage. Who paid the balance of the cost? The Husband was repaid £52,000 that he had provided, but that came from the mortgage once it had been taken out. Rebecca said that she paid the balance. Her spreadsheet showed £81,000 coming from the personal accounts of herself and Andrew. Of course, she might have been repaid some of that from the mortgage but it was agreed that £41,000 was spent from the mortgage on the works, so there would only have been a maximum of £57,000 left. Moreover, there is still the sum of £50,000 spent over and above the mortgage. Indeed, there seems little doubt that Rebecca paid for the kitchen at a cost of £12,100 plus VAT, and she received the VAT rebate in due course. I am absolutely clear that the judge was entitled to accept the evidence of Rebecca and Andrew, as he did in paragraph [160(e)] of his

judgment. Why would she make these payments if the house had not been promised to her?

53. I am equally clear that the judge was entitled to find that the house was promised to her if she paid for it. This inevitably involved paying off the mortgage that was taken out. Four witnesses gave evidence that this was the case. The judge did not accept the denials of the Wife. Indeed, he found that the promise was made with her full knowledge and authority. The promise must have come initially from the Husband as he was the sole owner of the land at the time. I accept Mr Fairbank's submission to me that this promise cannot be overridden by the transfer of the farm by way of gift to the joint names of the Wife and Husband, particularly given the finding of fact that the Wife was fully aware of the promise.

54. Mr Southgate raises a number of specific challenges to the findings of the judge. He says that the judge's acceptance of the evidence of Rebecca and her witnesses as to Cow House cannot stand given his finding that they gave "*collusive false evidence in relation to other parts of (Rebecca's) claim which he dismissed."* First, I am clear that the judge did not make any such finding. He did say that he had "*not found an agenda to subvert the outcome of the financial remedy claim*", when considering the question of costs. He declined to respond to the specific question raised of him in relation to the main judgment concerning credibility. It is impossible to elevate this to a finding that they gave "*collusive false evidence".* Second, it is clear from the judgment that he considered the issue of the manège to be entirely different to that of Cow House. Even here, he preferred the evidence of Rebecca to that of the Wife as to the contribution made by Rebecca in the sum of £11,568.93 towards its construction. He specifically says, however, that the context in which it was constructed is entirely different to that of Cow House. Indeed, it is obvious that the construction of a manège is entirely different to the construction of your own home, which you then move into and live in for well over a decade. The judge was entitled to consider the evidence and decide, as he did, that whatever was said was not sufficient to establish a gift. The formalities had not been complied with. He did not find that the witnesses had lied to him about this. It is impossible to elevate a sentence at [161] of his judgment that he was not satisfied on the evidence that any promise was ever made, into a finding that the witnesses had lied to him. Any discussions happened many years before and recollections can differ. Instead, he found that the Husband was happy to build it, provided Rebecca contributed. The only finding the judge made as to the promise was that it did not include Rebecca having any beneficial interest or even a licence to use it. Whilst he might have expressed himself slightly better, overall, I am clear that he was entitled to find that there was no legally enforceable gift, without the need to make a corresponding finding that witnesses have given "collusive false evidence".

55. It is then said in the Grounds of Appeal that the judge was wrong to take into account "the unambiguous concession" that the wife had not been a party to the promise or the relevant concession about Cow House. I consider this has no merit at all. At the time, the Wife was not an owner so she could not have been a party to the promise. The judge, however, made a clear finding that she knew

all about and authorised it. It would be surprising if she did not, given that Cow House was being built as a property for her daughter to occupy and, eventually, own. It is almost inconceivable that Rebecca would move in without her parents discussing the terms on which she did so. The judge dealt with this by his finding that the Wife was fully aware of the promise. He cannot be criticised for such a finding.

56. The one point, of course, that the Wife can make is that the payments of £700 per month were described as rent by both Rebecca on her bank statements and by the Husband when disclosure was made to HMRC. To my mind, the crucial evidence in this regard is the finding that Rebecca started making these payments immediately that the mortgage was taken out, some nine months before she and Andrew moved into the property. I simply cannot see why she would do that if they were rental payments. Moreover, the payments matched the mortgage instalments, including capital repayments. They did not increase like rental payments. There was no formal tenancy agreement. The Husband said that he was told by his accountant that he had to treat them as rental payments. I do not know why that was the case but it is an explanation. For all these reasons, I am entirely satisfied that the judge was entitled to come to the conclusion that he did, namely that these payments were not rent.

57. It is then asserted that the judge failed to attach proper weight to Rebecca's failure and that of her husband to produce documentation relevant to her claim. I am absolutely clear that this assertion has no merit. A detailed spreadsheet was produced. I was told by Mr Fairbank, on behalf of Rebecca, that nearly a full run of bank statements was produced and there were only a few missing. Given that we are talking about statements from thirteen to fourteen years ago, it is not at all surprising that Rebecca could not get replacements for missing statements but the spreadsheet speaks for itself.

58. In argument, Mr Southgate relied on there being no actual evidence of any particular conversation. I find this to be an unrealistic submission. The court was investigating conversations that took place nearly 15 years ago. I consider that a court should be extremely suspicious if witnesses inform the court with great certainty and precision as to an exact conversation that is said to have taken place thirteen or fourteen years ago, giving, in some cases, exact dates, times and locations. The reality of family life is very different. This aspect cannot be grounds for interfering with the judge's findings.

59. Mr Southgate also raises the failure of the judge to make a finding as to who placed a listening device in the lounge used by the Wife at the farmhouse. The judge said he was unable to do so on the balance of probabilities. Rather than resorting to the burden of proof to decide the issue, he declined to make a finding. I am quite clear that he was entitled to do so. This aspect had nothing to do with the central question of whether or not proprietary estoppel had been proved. Whilst it might have gone to credit, there were three potential candidates for planting this device, namely the Husband, the Wife and Rebecca. The Wife cannot be excluded as she might well have wanted to listen to what the Husband was saying but, even if she was to be excluded, the Husband could not be excluded. Moreover, given that the judge generally preferred the

evidence of Rebecca to that of the Wife, I really do not see how this alleged failure to make a finding assists the Wife.

60. I now turn to the fresh evidence, namely the 2018 will. I read the evidence on a provisional basis. Indeed, I was aware of it from my reading of the papers. Mr Fairbank responds by saying that the Wife was well aware of this will and she should have sought disclosure of it from the Husband in advance of the trial. In this regard, he is able to point to the Wife saying, in answer to his question asking her if she had changed her will, "so has Dan (the Husband)". He therefore says that the application fails the first limb of the Ladd v Marshall test. I do not accept that. The will should have been disclosed yet it was not.

61. The second question, however, is whether it would have an important influence on the result of the case. I do accept that it is relevant to the Husband's credibility, although he had been asked questions about his 2011 will, which again did not leave Cow House to Rebecca. I do not know what the Husband would have said about this 2018 will. I must not indulge in speculation. It is, of course, a fact that, if the two daughters inherited the entirety of the Farm, they would both be very well provided for financially and could then decide how to proceed. Overall, I have decided that, although I will admit the evidence, it is not sufficient to overturn the decision of the judge below. This evidence would not have affected the evidence about the history of the building of Cow House; the contributions made; and the like.

62. I have already noted that it is very difficult to overturn findings of fact made by a judge in circumstances such as here. Nothing that I heard in argument or read in writing has convinced me that the findings made by the judge are unsafe or should be revisited. Whilst some judges might have set out more detail at paragraph [160], I am satisfied that the judge has done sufficient to explain and justify his findings. The appeal is dismissed on Ground 1.

Ground 2 – minimum equity to do justice

63. Ground 2 is that the judge should have awarded a lump sum to Rebecca rather than require the promise to be kept. It is argued that the minimum equity to do justice was not to transfer the property to Rebecca on payment of the mortgage but rather to achieve a "clean break" by paying her the sum of £153,000 which it is said is the equity in the property. It is further said that, by making the order he made, the judge "elevated the claim to one of constructive trust".

64. I am absolutely clear that this Ground should be dismissed. Cow House was built for Rebecca and her husband. She was intimately involved in its construction. She has lived there now for over thirteen years. She has been found to have paid for the construction by a combination of direct payments and discharging the mortgage. It has been described as her "forever" home. This sort of situation is completely different to cases where the claimant merely had a right to reside in the property. I am clear that, if the test for proprietary estoppel is established in a situation such as this, the correct remedy is a transfer of the property as promised. Indeed, I take the view that the so-called "clean break" would be a form of compulsory purchase against the wishes of the owner

of the property, which would not be an equitable remedy. This Ground is dismissed.

65. Given my conclusions as to Grounds 1 and 2, it is unnecessary for me to resolve the issue as to whether or not the declaration of beneficial ownership in the October 2020 order, combined with the Wife's signed statement, was itself sufficient to create an express declaration of trust pursuant to s53(1)(b) of the Law of Property Act 1925.

Ground 3 – costs order in favour of Rebecca

66. The third Ground of Appeal is that the judge was wrong to order the Wife to pay one-half of Rebecca's costs. Again, it is not said that the judge got the law wrong. This was not a case where the principle of "no order as to costs" applied. The judge started with a blank sheet of paper. The judge rightly said that the court considers which party has been responsible for the generation of costs. He applied the decision of Wilson LJ in Baker v Rowe [2009] EWCA 1162 (Civ) at [25] to the effect that, even where the judge starts with a clean sheet of paper, the fact that one party has been unsuccessful must usually be regarded as meaning that the unsuccessful party has been responsible for the generation of the successful party's costs and that will often be the decisive factor in the exercise of the judge's decision

67. Having read the judgment, it is immediately clear that the issue of Cow House was absolutely central to the litigation. There can be no doubt that the Wife lost on that part of the litigation. Moreover, she lost both as to proprietary estoppel and as to transfer of the property to Rebecca, rather than a monetary award being made.

68. It is argued on behalf of the Wife that the reason for the litigation was the false claims by Rebecca over and above those relating to Cow House. If that was the case, the Wife could have protected herself by making it clear that she stood by the recitals to the order of October 2020 that Rebecca was the beneficial owner of Cow House. In those circumstances, there would have been no need to litigate that part of the case. The Wife would then have been awarded her costs in full of defending the other claims. Regrettably, she did not proceed in that way.

69. I do accept that Rebecca was not successful in relation to the other claims. I consider that the judge has reflected that in his costs decision by only awarding her one-half of her costs. Overall, I am clear that his reasoning and decision making cannot be criticised. He was entitled to make the order for costs that he did. This Ground is also dismissed.

Ground 4 – costs order in favour of the Husband

70. The final Ground of Appeal relates to the order for costs made in favour of the Husband. Again, the order was that the Wife pay one-half of the Husband's costs on the standard basis. The Wife argues that it was not reasonably necessary for the Husband to be separately represented. She relies on the

decision of Ong v Ping [2015] EWHC 3258 (Ch), a decision of Morgan J. That was a case where a mother and her children brought a claim in relation to a discretionary trust. Both were separately represented but relied on a single Points of Claim. The court distinguished between the period up to the date of service of the single Points of Claim and the period thereafter, ruling that separate representation was not reasonably necessary thereafter.

71. The difficulty with that line of reasoning in this case is that the litigation with which I am concerned is ancillary to the main financial remedy litigation between the Wife and the Husband. The outcome of this litigation was always going to have an important impact on the financial remedy litigation. Indeed, it is the same judge hearing both, with the same leading counsel appearing in both.

72. I simply cannot see how one set of lawyers could represent both the Husband and Rebecca. There can be no doubt that Rebecca could not have been represented by the Husband's divorce solicitor. Equally, I do not see how Rebecca's solicitor could have represented the Husband in this part of the litigation alone. Although they may have ended up advancing the same case, there would be a potential conflict of interest in so far as the main financial remedy litigation was concerned, let alone significant issues on matters such as legal professional privilege.

73. I do understand that there may be a legitimate argument about the level of representation that the Husband should have had. Did he need leading counsel? Mr Hale KC, who appears on his behalf, responds that it is only right that he was represented by the same advocate who will appear in the financial remedy litigation. The Wife had leading counsel in both so it is only fair for his client to do so as well. This is clearly a legitimate point of view.

74. I have come to the conclusion that the judge was entitled to come to the decision that he did, namely that the Husband was entitled to representation and that the same costs order should therefore be made as was made in relation to Rebecca's costs. It may be that, if I had been the trial judge, I would have come to a different conclusion but that is not the test. As is made clear in Pigloswka, this was an exercise of discretion, involving value judgments on which reasonable people might differ, such that a degree of diversity as to outcome is inevitable. In those circumstances, it is not the function of the appellate tribunal to substitute its view for that of the judge below when it cannot be said that the decision of the judge was wrong. It follows that this Ground is also dismissed.

75. For the future, however, I suggest the following course of action. If there is ever an issue as to the representation of a party at a piece of ancillary litigation prior to financial remedy proceedings, an application should be made to the judge in advance for a ruling as to whether or not a costs order will be available at the conclusion of the litigation. In this case, it seems highly likely to me that the judge would have decided, at such a preliminary hearing, that the Husband was entitled to representation and, as a result, a costs order would be available to him if he was successful. The benefit, however, would have been that the parties would all have known where they stood and their potential exposure to

costs orders. Moreover, it would obviate the sort of argument that is now being raised in this case.

Conclusion

76. For all those reasons, this appeal stands dismissed.

Mr Justice Moor
2 February 2023