Neutral Citation Number [2013] EWHC 2168 (CH)

IN THEHIGH COURT OF JUSTICE **Case No. 2BM30346**
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Before : HHJ SIMON BARKER QC sitting as a Judge of the High Court

B E T W E E N:

(1) LEFTERAKIS ELEFTHERIOU
(2) ANASTASIOS KARAGEORGE
(3) HELEN KARAGEORGE

Claimant

and

(1) GLEN COSTI
(2) CHRISTINE SYDNEY COSTI

Defendants

Thursday 18 July 2013

Hearing dates : 9 – 11 and 18 July 2013

Representation :
Mr Andrew Harper instructed by Oliver Charles Solicitor for the Claimants
Mr Ali Tabari instructed by SGC Solicitors for the Defendants

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JUDGMENT

I direct that pursuant to CPR PD 39A par 6.1 no tape recording shall be made of this judgment and that copies of this version as handed down may be treated as authentic

1 Mr Lefterakis Eleftheriou, the 1st Claimant (C1), and Mrs Helen Karageorge, the 3rd Claimant (C3), are siblings. Mr Anastasios Karageorge, the 2nd Claimant (C2), is C3's husband.

2 In November 2009, the Claimants (Cs) purchased the freehold title to the property at 293 Uppingham Road, Leicester (the Property). The Property had previously been occupied as a branch of LloydsTSB bank. By 2009, the branch had been closed for some time and, when bought by Cs, the Property was boarded up. Cs' plan, which came to fruition, was to convert and refit the ground floor of the Property as a fish & chip shop (the Shop) with residential accommodation at the 1st floor (the Flat).

3 Other than agreeing with C1 to the general scheme for the Property, including the grant of a 21 year lease, C2 and C3 appear to have had no relevant involvement in and to have no relevant direct knowledge of the facts and matters the subject of this litigation. In short, C2 and C3 trusted C1 and left everything to him. C1 has considerable experience of the fish & chip shop trade.

4 Mr Glen Costi, the 1st Defendant (D1), is an experienced fish & chip shop proprietor; in the written evidence of one of Cs' witnesses, he is described as a Master Fryer. Mrs Christine Costi, the 2nd Defendant (D2, collectively with D1 : Ds) is his wife. D2 had some involvement in and knowledge of the matters in issue in this litigation, and she was or was intended to be a party to the transaction(s) the subject of this litigation; however, her role was subordinate to that of D1. In 2010, Ds were proprietors of a fish and chip shop in Evington, near Leicester.

5 There is another person, Mr Panayotis Loizou (PL), who has had a significant role in the subject matter of this litigation and has given evidence as a witness for Cs.

6 PL has or had a business partner or co-investor, Mr Eleftherios Louca (EL, collectively with PL : L+L) who is resident in Cyprus. In about January 2010, PL, on behalf of L+L, negotiated with C1 about operating a fish and chip shop from the Property; the essence of their negotiation was that (1) C1 would take responsibility for the conversion of the Shop and renovation of the Flat, including obtaining all necessary permissions; (2) L+L would reimburse C1 for the cost of the works and for the fixtures and fittings and equipment required for the Shop; and (3) L+L would take a long lease of the Property. When and on what terms property in the fixtures and fittings and equipment would pass is unclear.

7 Over the period February to July 2010, L+L paid £75,000 to C1 in cash or by bank transfer and C1 raised £630 from the sale of unwanted kitchen equipment. In addition, in October 2010, L+L paid £10,500 for signage directly to the supplier.

8 In March 2010, C1's solicitor, Mr Oliver Charles (OC), who is a sole practitioner, wrote to L+L's solicitor (SGC), expressly subject to lease, proposing a 20 – 24 year lease of the Property at a rent of £500 per week, subject to an initial 3 months rent free, with reviews every 4 years. At some point, OC prepared a draft lease for a 21 year term and sent this document to L+L's solicitor.

9 In September 2010, PL opened the Shop as the Atlantis Fish Bar. By this time, C1 had paid a further substantial sum, in the order of £50,000, in respect of the works, fixtures, fittings and equipment at the Property.

10 In his written evidence, PL states that by the time he went into occupation of the Property it had become clear to him that he would not be running the business for long. PL gives 2 reasons in his witness statement; they are not material to the matters in issue.

11 In November 2010, C1 and C2 met with L+L (EL having travelled over from Cyprus). They agreed that £50,550 would be treated as a loan subject to a weekly payment in lieu of interest of £60 per week on the basis that the capital sum would be paid to Cs in 12 months or earlier from the proceeds of sale of a lease of the Property. The intention appears to have been that the loan would be secured by a charge over the Property. C1 appears to have prepared an undated typed note of this agreement, in which Cs are described as the landlords and L+L as the tenants, which he faxed to OC, and which OC used - presumably with further oral instructions - in connection with the preparation of a loan agreement between Cs, as lender, and L+L, as borrower. However, until there was a lease L+L had no interest to charge and, by November 2010, L+L had no interest in taking a lease of the Property as C1, by then, appreciated.

12 In the event, no documents, whether lease or loan agreement, were executed by Cs and L+L.

13 The only document signed by at least one of these parties concerning the arrangements between C1, for himself or for Cs, and PL, for himself or for L+L, appears to be a document prepared by C1 in November 2010, but backdated to 7.1.10. C1 is defined as the landlord; the tenant is not defined but PL is the only other person identified. The document provides that both parties agree that :

> "1. The tenant authorises [C1] to carry out improvements to [the Property] on his behalf so the property can operate as a fish and chip shop. Upon completion and starting the business [PL] will refund the complete amount to [C1]
>
> 2. Once the shop opens the tenant will have a three months' rent free period
>
> 3. Payments will be weekly in advance £500/week".

This document was signed by PL and dated 21.11.10 by him. It appears also to have been faxed at some point by C1 to OC; C1's oral evidence was that it was prepared so that OC could have something in writing.

14 Having regard to (1) the evidence as to the oral arrangements between Cs and L+L, (2) the terms of the draft lease prepared by OC, and (3) the terms of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (which requires that a contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each), this document is plainly of no legal effect as an agreement.

15 Reverting to the chronology and stepping back to about September 2010, Ds were then interested in purchasing a fish and chip shop in Coalville, which is to the north west of Leicester. From about this time, D1 took to visiting the Shop, perhaps because PL is his cousin. PL sought to interest D1 in taking over the Shop, but D1 informed PL at that time that he was not interested.

16 However, it seems that other Greek Cypriots operated another fish and chip shop near to the shop in Coalville which Ds were interested in acquiring and that Ds were discouraged from pursuing their interest in the Coalville shop. This is corroborated, on the basis of custom rather than discouragement, by Nectarious Theocharous (NT), who is another cousin of D1 and who also gave evidence as a witness called by Cs.

17 D1 continued to visit PL at the Shop for a coffee or a drink on a regular basis, possibly up to 2 - 4 times a week.

18 It is common ground that from about November 2010, there was discussion between PL and D1 about the business at the Shop. PL says that D1 enquired about the business and that PL told him that the takings were in the range of £4.5k - £5k per week and that L+L would be prepared to sell the business for £210k. D1 says that PL told him that takings were in the order of £5.5k per week and that the owner of another nearby fish and chip shop, Marshalls, had offered £200k for the business. D1 says in his written evidence that the owner of Marshalls told him that his offer had been £80k. So, on D1's evidence, he knew or had reason to believe that PL was inclined to exaggerate. Discussions continued and included the proposal of an asking price, which appears to have been reduced to some £185k. D1 was also aware that any purchase would involve taking a lease and that Cs or C1 were/was the landlord and that the rent required was £500 per week.

19 It is at this point that the parties' cases and evidence diverge materially.

20 Cs' amendment to their pleaded case, in respect of which C1 signed a statement of truth :

(1) introduces for the first time the arrangements between Cs or C1 and L+L and is premised on the agreement between them being evidenced by the document PL signed by PL on 21.11.10 (referred to above[1]);

(2) alleges, after referring to expenditure and reimbursement over the period January to October 2010, that after taking into account C1's

[1] Paragraph 13

own time and effort, L+L agreed that £50,550 was due to C1 and would be a loan charged on the lease of the Property when granted;

(3) alleges that between November and December 2010, Ds and L+L agreed that (a) Ds would take over the business carried on at the Shop, (b) Ds would take a lease of the Property in place of L+L on the same terms as had already been agreed, and (c) Ds would pay £175k effectively to step into L+L's shoes as proprietors of the business at the Shop and prospective tenants of the Property;

(4) alleges that L+L informed C1 of this arrangement and that C1 expressed his willingness to grant a lease to Ds on the same terms as that proposed for L+L;

(5) alleges an agreement (the parties are not specified but the last parties referred to are C1 and L+L and no direct communication between C1 and Ds is alleged by Cs at or before this point in their amended pleading) that Ds would pay the sum agreed to C1 because he was owed £50,500 (*sic*) by L+L plus rent for December 2010 and part of January 2011;

(6) alleges that L+L insisted that £175k was to be paid by Ds before occupying the Property on the basis that C1 would pay the net sum to them; and,

(7) alleges that C1 agreed (although parties are not expressly referred to and no dates are alleged, this agreement seems intended to be alleged as between C1 and Ds) to allow £25k of the £175k to remain outstanding for one year and later agreed to a further £5k being deferred for 3 months.

21 C1's evidence is that he was receiving reports from PL about the latter's negotiations with D1 and that he (C1) only became involved in early December 2010 after being approached, on behalf of Ds, by NT, as a mutual friend, to attempt to persuade L+L to reduce their asking price from £185k to £175k, which he succeeded in doing, and which then led him to contact Ds. On C1's evidence, it was at this point in time that he agreed with D1 that £25k could remain outstanding as a loan.

22 However, Cs' case is that C1's involvement in negotiations about the business at the Shop, as distinct from a lease of the Property, was at all times as representative of L+L rather than on Cs' or C1's own account. In support of this proposition, C1 has disclosed another document signed by PL, and dated 11.1.11 by him, which states that PL authorises C1 to sell the equipment that was installed at the Property and will retain the money as part of the money PL owes C1. Neither the date nor the terms of this document sit comfortably with the broad proposition advanced by Cs as to C1's disclosed agency for or representation of L+L for the purpose of dealing with Ds, not least because before 11.1.11 C1 had received and banked a cheque for £145k from D1. In fact, D1 had left the payee blank and, in D1's presence, C1 had filled in his own name.

23 Unsurprisingly, Ds are not in a position to gainsay what C1 alleges about his dealings on behalf of Cs with L+L. Ds agree that they approached C1 through NT and there is no dispute as to the timing of this approach. As to what is alleged in relation to them by Cs :

(1) they deny reaching any agreement with L+L (that is with PL for L+L), including as to a price of £175k;

(2) they assert that as from December 2010 their negotiations were with C1, and that these negotiations included C1 agreeing to £25k of the £175k being left outstanding on loan for a year and, later, to a further £5k being left outstanding for 3 months; and,

(3) they assert that C1, not L+L, insisted that payment of £145k be made before he would permit them to occupy the Property.

24 Ds' pleaded case is that as from early December their negotiations were with C1, initially through NT and then directly between D1 and C1, and that they, by D1, reached an oral agreement with C1, for Cs, that (1) they would take a 21 year lease of the Property at a rent of £500 per week, fixed for 6 years, and (2) after a £5k discount, the premium for the lease, fixtures and fittings, and goodwill of the premises would be £175k. The other £5k element of the difference between £185k and £175k is explained as an oral agreement by C1 to reduce the rent from £500 per week to £400 per week for the first year which was rolled up as a price reduction of £5k.

25 I do not accept that D1 did not engage in negotiations with PL during his regular visits to the Shop between November and mid December 2010; however, the evidence is sufficiently clear for me to make a finding on the balance of probabilities that when D1 enlisted NT's assistance as an intermediary he did so because he had taken matters as far as he could with PL and because he was aware that he had to engage with C1 as or on behalf of the landlord(s) in order to progress negotiations further, including as to price and any sum to be treated as a loan, with a view to concluding matters.

26 On Cs' case, C1 represented both Cs, as landlords, and L+L, as vendors of the business carried on at the Shop including the fixtures and fittings and the goodwill. Thus, Cs' contend that there was a tripartite arrangement by which :

(1) D1, for Ds, agreed with C1, as L+L's agent or representative, to acquire the fixtures and fittings, equipment, goodwill and stock of the Atlantis Fish Bar from L+L for a price of £175k payable initially to C1 from which he would account to L+L for such sum as was due to them; and,

(2) D1, for Ds, agreed with C1, for Cs, to take a 21 year lease of the Property from Cs, at no premium, on the same, or substantially the same, terms as had been proposed to L+L.

On this basis, Cs contend that Ds made a tripartite arrangement comprising separate agreements with L+L and with Cs and that the agreement between L+L and Ds, being for business and assets other than an interest in land, is not required to be in writing.

27 Ds' answer is that :

(1) such arrangement as there was or may have been between Cs and L+L was a matter for those parties and was outside Ds' knowledge;

(2) the terms relating to both the business and the lease were negotiated by D1 and C1; and,

(3) the negotiations did not give rise to a tripartite arrangement or to two separate agreements.

28 By January 2011, Ds were pressing to commence trading from the Shop. To that end, D1 met C1 on the evening of 9.1.11 at the Gala Casino in Leicester, which is said to be a meeting place for the Greek Cypriot community in the Leicester area, and D1 gave C1 a cheque for £145k. The payee details had been left blank and C1 filled in his own name in D1's presence. C1's writing was unclear which caused Ds' bank to dishonour the cheque on presentation. To effect payment, Ds met C1 at their bank. There is a conflict of evidence between C1 and D1 as to whether this was before or after Ds went into possession. C1 says that a same day transfer was effected on 19.1.11, and certainly that is the date on which funds reached C1'sbank account (the account is actually Cs' names). D1 says that the meeting occurred before he went into possession of the Shop, which would place the date as 14.1.11 at the latest; that is the date on which the cheque was dishonoured. C1's account is explained chronologically and by reference to phone call on 14.1.11 and a document received from his bank. D1's account is less certain as to dates and places C1's phonecall notifying him that the cheque had not cleared at or around 9.1.11; that is 3 days before the cheque was credited to C1's account and 5 days before it was dishonoured. On this issue, I consider C1's evidence to be the more reliable.

29 On 15.1.11, Ds obtained the keys to the Property from PL and took possession of the Property. C1 plainly knew that Ds cheque had been dishonoured, but he probably also knew that the problem had been his writing of his own name as payee. Nevertheless, Ds were permitted to take possession of the Property before C1 had received any payment.

30 On Ds' case, a week or so later in January 2011 D1 arranged to meet C1 in a car park in Oadby, near Leicester, and D1 paid the sum of £5k to C1 in cash to clear the loan repayable within 3 months. C1 denies that such a meeting was arranged or took place and claims the sum of £5k in this litigation. I am able to decide this issue by reference to the evidence of NT, which I accept. NT's evidence is that, in June 2011, he invited C1 and D1 to his shop in an attempt to help broker a resolution of the matters in dispute between them. In response to cross-examination, NT agreed that, in the presence of C1, he had attempted to persuade D1 to accept that he had not given £5k in cash to C1 because it would be

damaging to C1's reputation, and added that reputation is very important. My reasons for accepting NT's evidence are the reluctant manner in which he accepted the point when put to him in cross-examination and the reaction of C1 to that evidence.

31 Ds' trading from the Shop was not successful. Ds contend that the business carried on by L+L was not profitable, and in support of this they refer to a trail of unpaid bills left behind by PL. Cs' witnesses (essentially PL and NT) assert that the location of the Shop and the fact that it was a new business required continual 'special offers', such as free chips with fish, in order to generate trade, and they attribute Ds' business failure to Ds' refusal to continue such offers. Ds continued to occupy the Property until 3.4.12. They have not paid any rent or other sum in respect of their occupation and contend that any sum payable for occupation may be deducted from the £150k already paid to C1.

32 Neither C1 nor D1, who were the main witnesses, gave entirely reliable evidence. I have just found that C1 has made a false claim and given false evidence about the £5k cash payment. I also find that that D1's case and evidence that he did not negotiate with L+L is unreliable; he may not have been willing to conclude negotiations without involving C1, but his discussions with PL about business at the Shop were not idle chat over coffee or drinks. I also bear in mind that (1) these events, although very important to both men, occurred upwards of 2½ years ago, and (2) the witnesses, other than those already mentioned, are not in a position to contribute to the essential fact finding. I therefore approach the evidence of both sides with some caution.

33 Fortunately, there is some contemporaneous written material which provides an insight into the arrangement(s) between C1 and D1. The most significant material is OC's note of his telephone call from C1 on 21.12.10 and the documents, including correspondence between OC and SGC and draft documents, which followed thereafter; save as noted below, all correspondence between OC and SGC was expressed to be subject to lease and contract. In addition, C1 has disclosed his bank statements showing the payments made from the £145k shortly after it was received from D1.

34 The following facts appear from these documents :

(1) on 21.12.10, C1 telephoned OC and gave oral instructions (a) confirming the financial position as between Cs and L+L (£85k received and £50.5k owing by L+L, no rent or insurance paid), and (b) as to the proposed arrangements with Ds (who were not then identified but whose solicitor's contact details at SGC were provided) about both the business and the lease (£150k to be paid, a further £25k to be paid after 12 months and carry interest at 6%, the existing lease terms to apply save that the first rent review was to be after 6 years, completion sought by 1.1.11, and £50.5k + expenses + outstanding rent to be deducted from £175k before payment to unidentified parties);

(2) also on 21.12.10, OC wrote to SGC enclosing a draft loan agreement and a draft lease and describing the £175k as "a premium for the business et al";

(3) on 13.1.11, OC wrote to SGC responding to queries about the current tenant (none) and VAT (Cs not registered), providing C1's bank details, and noting that completion and possession was proposed for 15.1.11;

(4) on 19.1.11, C1 had a credit balance on his bank account of £148,284.09 which included £145k received that day from Ds;

(5) on 28.1.11, SGC wrote to OC (a) noting that Ds had paid £150k to Cs and were in occupation of the Property, (b) seeking confirmation that the payment was held to Ds' order pending completion and an undertaking that the payment would not be distributed pending authority to utilise being given by SGC, (c) seeking confirmation that C1 had authority to enter into a contract for the sale of the business for £175k, and (d) on the stated assumption that only OC's client (ie C1 or Cs) had an interest in the business and the Property, raising enquiries about the business and the Property;

(6) on 29.1.11, OC replied to SGC that (a) £150k had been received by OC's client, (b) was being held by his client, and (c) OC's client was

the sole owner and the previous party (ie L+L) had no interest in the sale;

(7) on 3.2.11, SGC wrote to OC (a) requesting a draft business sale agreement with suggested apportionment of the £175k between goodwill, fixtures and fittings, the lease, and any other assets to be transferred, (b) chasing replies to enquiries, and (c) requiring a written undertaking from C1 that he would not distribute the monies paid and that the monies were being held to Ds' order pending completion alternatively that the funds would be held in OC's client account subject to an undertaking by OC;

(8) between 7.2.11 and 9.2.11, C1's bank account credit balance was reduced by (a) presentation of a cheque for £50k drawn in favour of PL on 2.2.11, (b) a transfer to EL of £63k (including charges), and (c) presentation of other cheques and a loan instalment payment totaling £10,657.23, with the result that the net balance on C1's bank account was reduced to £24,626.86;

(9) on 18.2.11, OC provided answers to many of the enquiries raised by SGC;

(10) on 21.2.11, SGC (a) suggested an apportionment of £175k as between fixtures and fittings (£95k) and goodwill (£80k), with the result that no value was attributed to lease premium, (b) enclosed a draft assignment of goodwill and identifying Cs as assignors and including non-competition clauses, (d) also enclosed a draft receipt in respect of the fixtures and fittings and (d) chased for a reply to their 3.2.11 requests;

(11) on 21.3.11, OC wrote to SGC agreeing to the proposed apportionment of £175k; and, on this basis the sale of business agreement was to be replaced by an assignment of goodwill and fixtures and fittings;

(12) on 3.5.11, SGC wrote 2 letters to OC by one of which (not in the trial bundle) complaint was made on behalf of Ds;

(13) on 20.5.11, OC replied, not expressly subject to lease and contract, (a) asserting for the first time that only £145k was paid by Ds, and

(b) taking exception on Cs' behalf to allegations of misrepresentation;

(14) on 5.7.11, SGC wrote a pre-action claim letter to OC claiming repayment of £150k to Ds and asserting a purpose trust alternatively total failure of consideration;

(15) thereafter, including in August 2011, attempts appear to have been made to salvage a deal and a draft sale of business agreement was prepared by OC; and,

(16) on 16.9.11 and/or on 5.10.11, OC replied to SGC's pre-action claim letter asserting that (a) D1 paid £145k to C1 without any prior agreement or undertaking as to use, (b) Ds knew that C1 intended to pay money from the £145k to L+L, and (c) to his detriment, C1 did pay away £145k to L+L immediately.

35 I pause here to note that (1) communications between C1/Cs and OC are not directly relevant to analysis of the position as between Cs and Ds; and, (2) during cross-examination, D1 accepted that he was probably sent copies of correspondence passing between the parties' solicitors and that he probably didn't think much about it; however, it does not follow from that that Ds are to be taken to be indifferent or careless as to what SGC wrote on their behalf or what SGC received from OC.

36 The factual conclusions that I draw from the contemporaneous documents in the trial bundle set in the context of the relevant background and facts drawn from the parties' cases and evidence are :

(1) as already found, in January 2011, Ds paid £150k to C1 in anticipation of acquiring the fish and chip business carried on at the Shop and a long lease of the Property;

(2) Ds were aware that L+L might have an interest in the fish and chip business and, before making the payments of £145k and £5k, Ds were aware that C1 might, or was likely to, pay ("distribute") some, at least, of the £150k to L+L;

(3) whatever the arrangements between Cs (or C1) and L+L, C1, by OC, assured Ds that L+L had no interest in the sale of the business

and were not tenants of the Property. Cs proceeded on this basis from, at the latest, 29.1.11, and Ds proceeded on this basis from, at the latest, 3.2.11;

(4) although no formal undertaking was given, as at 29.1.11 C1 is to be taken as (a) having understood that Ds required him to hold the £150k to their order and (b) having given an assurance that he held £150k at that time. The assurance to this effect, given by OC on behalf of C1, predated the drawing of cheques by C1 and all payments out of C1's bank account over the period 7 – 9.2.11;

(5) the common intention of the parties (of course, subject to lease and contract) was that the lease would be granted for rent only and that the entire sum of £175k would be attributed to goodwill and fixtures and fittings in the proportions stipulated by Ds;

(6) the factual basis for a tripartite arrangement or separate agreements by which the business was to be sold by L+L and a lease granted by Cs is not made out;

(7) there is nothing to suggest that the sale of the business carried on at the Shop and the grant of a lease of the Property were independent transactions. On the contrary, the evidence is overwhelming that they were to be inter-dependent aspects of a single transaction between Cs as vendors/lessors and Ds as purchasers/tenants; and,

(8) C1's payments from the £145k transferred into his bank account by Ds were made from monies received in anticipation of completion of that single transaction by the execution of formal documents (a lease, a business sale agreement and an assignment of goodwill).

37 With these facts in mind, I turn to the issues which may be summarised as :

(1) are Ds liable to pay a sum for use and occupation of the Property or as damages for trespass; and, if so, what sum?

(2) are Cs entitled to retain the monies received from Ds or any part thereof? If not, are the monies held by C1 on trust for Ds?

(3) are Cs entitled to be paid a further £25k/£30k?

(4) in the light of the answers to (1) – (3) above, what, if any, sums are due for interest?

(1) Are Ds liable to pay a sum for use and occupation of the Property or as damages for trespass; and, if so, what sum?

38 The sum, if any is due, was agreed between the parties during the trial at £31,650. The basis of calculation is the period of occupation, 15.1.11 – 3.4.12, and a rate of £500 per week, taken to the nearest round figure.

39 Ds were permitted occupiers of the Property in anticipation of the transaction being formally completed and, implicitly, on the basis that such occupation would not be gratuitous, not least because they were to operate a business from the Shop and were able to occupy the Flat. This arrangement may be characterised as a tenancy at will. Whatever the characterisation, the circumstances suffice for a decision that Ds are liable to pay Cs £31,650 for their occupation and use of the Property.

(2) Are Cs entitled to retain the monies received from Ds or any part thereof? If not, are the monies held by C1 on trust for Ds?

40 I have rejected the factual basis underlying Cs' contention that there was a tripartite arrangement or separate agreements. I have also rejected the possibility that there were two separate agreements, one concerning the business, which could be oral, and one concerning the lease, which - to be more than a nullity - had to be in writing and compliant with the merciless terms of s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989.

41 At paragraph 9 of his skeleton argument and in his oral submissions, Mr Harper, Cs' counsel, develops an argument based on estoppel as between Cs and L+L. The essence of this argument is that, having accepted £86k from L+L in respect of the works at the Shop and given the expectation between those parties that a lease would be granted by Cs to L+L (in fact to PL and Stella Louca - who has played no part at all in this litigation - rather than EL), it would be unjust to allow Cs or C1 to resile from the expected grant of a lease and that C1 or Cs is/are estopped by convention from so doing.

42 This argument seems to me to ignore some fundamental facts : (1) L+L, or PL +Stella Louca, are not parties to the litigation and estoppel between them and C1/Cs is not an issue in this action; (2) on PL's evidence it was clear to him before he went into possession of the Property that he would not be running the business for long, from which it follows that he had no incentive to enter into a formal lease; (3) also on PL's evidence, L+L were of the view that because they had not signed a lease they could simply "drop out" of the matter, and C1 had accepted their position. So, far from C1/Cs being estopped from resiling from the expected grant of a lease to L+L, L+L had no interest in being granted a lease gave instructions to that effect to their solicitor who closed his file; (4) on Cs' amended case, verified by C1, by early December 2010 C1 had confirmed to L+L that he was prepared to grant a lease directly to Ds; and, (5) the notion that L+L had paid £86k to their detriment thereby locking C1/Cs into an irrevocable obligation to grant a lease is negated by (a) L+L's own change of position to positively eschewing the opportunity to be tenants under a 21 year lease, and (b) an arrangement between C1 and L+L for them to be reimbursed at a profit out of whatever monies C1/Cs receive on the sale of the Shop business and grant of a lease.

43 There is no allegation by Cs of an estoppel as between Ds and Cs and Mr Harper concedes, rightly in my view, that were I to reach the conclusion that the arrangement(s) were bipartite, Cs would not have an answer to s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989.

44 In case I have misunderstood Mr Harper's submissions, I should express my conclusion on Mr Harpers submissions that "the deal is about getting trading" and that Ds payment of £145k was made for "the opportunity to trade" from the Shop. The detail of these submissions includes that Ds acquired and made use of the stock at the Shop, that the fixtures and fittings are Ds' to strip out of the Shop if they so wish, that the courts are not generally concerned with the adequacy of consideration, and that it is immaterial that there is no lease or enforceable right to a lease in circumstances where at all material times Cs have shown themselves willing to grant a lease.

45 As I see it, the parties reached an oral agreement as to price for a business and duration and rent (including review) terms of a lease. However, there was no discussion between the parties or their solicitors about Ds buying the fixtures and fittings installed at the Shop and/or taking over the goodwill of the Atlantic Fish Bar with a view to removing the same to some other location; and, there is no evidence to support a finding that Ds were, or were thought by Cs to be, interested in a lease of the Property independently of the fixtures fittings and equipment installed for a fish and chip shop business. On the contrary, the point of the transaction was the sale of an existing business together with and subject to a lease conferring a right to continue that business, or that type of business, at the same location for 21 years.

46 That is not the end of it. In addition, and before any payment was made by Ds, the parties decided to instruct solicitors to set out appropriately the terms which were to give legal effect to their oral agreement and, in order to prevent a binding agreement coming into existence before all the parties were agreed upon all the terms, the solicitors corresponded with each other expressly "subject to lease and contract" at all relevant times.

47 The conclusion I draw from the facts is that the parties mutually agreed that they were not to be legally bound to the transaction agreed orally unless and until they had committed themselves to a lease of the Property and a contract and assignment for the sale and transfer of the business or the assets, including goodwill, of the business carried on at the Shop by signing the same.

48 My findings and conclusions are that Ds paid £150k to C1 in anticipation of a contract (strictly a lease and a contract and assignment) which has not been concluded. In general terms, in such circumstances the paying party has a restitutionary right to recover the payment on the ground of total failure of consideration, the consideration being the expected formation of the contract. Without more, such a right will be personal, not proprietary. This is Ds' alternative claim (total failure of consideration).

49 That being said, Mr Tabari, Ds counsel, accepts that, although not pleaded, adjustment may be made for the value of the stock at the Shop on 15.1.11 and further accepts that the only evidence as to that was C1's evidence that its value would not have exceed £5k. This concession does not undermine the total failure of consideration or negate the personal restitutionary remedy.

50 The principal sum sought on this basis is not less than £113,350[2] after set off of payment due for occupation of the Property and for the value of stock appropriated by Ds to their business. Ds are entitled to recover that sum from C1.

51 However, Ds primary claim is that the money was paid to C1 subject to a purpose trust, that is a resulting trust where the money has been paid for use exclusively for a stated purpose and the purpose fails. The basis for the existence of a trust is said to be the that £150k was paid for a purpose and held subject to the terms of the letters passing between SGC and OC of 28-29.1.11 (see the Defence paragraph 11). However, Mr Tabari puts the case differently in his submissions on the basis that £150k was paid on the express condition that it was to be held until a lease was completed.

52 Mr Tabari refers to Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 and to Twinsectra Ltd v Yardley [2002] 2 AC 164, and in particular to the speech of Lord Millett in Twinsectra at paragraphs 74, 76 and 100, which are set out in Mr Tabari's supplemental skeleton argument.

53 In both these cases there were express stipulations, made in advance of money being paid over, as to the sole purpose for which money to be paid over was to be used.

54 In contrast, as between Cs and Ds, while it was obvious that the payments were made in anticipation of the transaction completing, at the time of payment (at least of the £145k and, on the available evidence, probably also of the £5k) there was no express stipulation restricting the use by C1 of the particular funds paid over. Indeed, had they thought about it either at the time when the cheque was handed

[2] £150k - £31,650 - £5k

over (at which point it was left to C1 to fill in the name of the payee because, on Ds case, Ds were unsure as to the spelling of C1's name) or at the time when they met C1 at their bank to arrange a transfer into his current account, they would have realised that their money would immediately be mixed with C1's and might be absorbed in clearance of an overdraft or by other debits to C1's account unrelated to their transaction.

55 At the point in time at which the monies were paid over by Ds to C1 there was no express stipulation restricting the free use of the monies. Having regard to the circumstances known or apparent to Ds, it would not be right to infer, by objective ascertainment, that there was a mutual intention on the part of the parties that C1's use of the monies was restricted to holding the monies exclusively to Ds' order pending completion of the transaction. Further, viewed objectively the circumstances would not justify the implication of such a condition.

56 What appears to have happened is that when Ds gave instructions to SGC, their solicitor realised that there was a risk or likelihood that C1 would pay away ("distribute") some money and then sought to protect Ds against such a risk or likelihood.

57 It is therefore necessary to consider the precise terms of the communications between the parties solicitors and consider the effect of those communications upon C1's freedom to use or dispose of the monies set in the context of the surrounding facts as apparent at the time.

58 First, by letter dated 28.1.11, SGC asked OC to "confirm that [C1] is holding [the sum of £150k paid by D1] to [Ds'] order pending completion of this matter and undertakes not to distribute the same until we have provided confirmation that the same can be utilised". There is no distinction drawn between the monies transferred into C1's current account and the monies paid to C1 in cash; there is no requirement to pay the monies into a separate account; and, there appear to be two pre-conditions to use (1) completion of the transaction and (2) SGC's permission.

59 OC's response that £150,000 "is being held" by C1 was plainly understood to fall short of the required response because it prompted a follow up letter, dated 3.2.11, noting that the money was being held by C1 and "requir[ing] [C1's] written undertaking that he will not distribute the funds and is holding them to [Ds'] order pending completion of this matter or alternatively, the funds must be forwarded to [OC's] Clients Account and [OC] must provide such a written undertaking regarding the retention of these funds". The second condition stipulated in the letter of 28.1.11 was not repeated.

60 On 2.2.11, C1 had drawn a cheque for £50k in favour of PL.

61 It appears from the material in the trial bundle that OC did not reply to SGC, and that SGC's letter dated 21.2.11 chasing a reply to their letter of 3.2.11 (which also raised enquiries which had not been fully answered) also went unanswered.

62 The passages from Lord Millett's speech in Twinsectra relied upon by Mr Tabari include, at paragraph 76, that "It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it … The duty is fiduciary in character because a person who makes money available on terms that it is to be used for a particular purpose only and not for any other purpose thereby places his trust and confidence in the recipient to ensure that it is properly applied. This is a classic situation in which a fiduciary relationship arises, and since it arises in respect of a specific fund it gives rise to a trust". On this statement of the law, the recipient's conscience is affected prior to or at the point in time at which the money is received.

63 At paragraph 81 Lord Millett considered the position of the person making the payment and concluded that, on analysis, a Quistclose trust is akin to a retention of title clause, enabling the recipient (borrower) to have recourse to the paying party's (lender) money for a particular purpose without entrenching on the lender's property rights more than necessary to enable the purpose to be achieved. Lord Millett continued "The money remains the property of the lender unless and until it is applied in accordance with his directions, and insofar as it is not so applied it must be returned to him".

64 Reviewing the obligations of the borrower, Lord Millett continued, at paragraph 83, "The borrower's interest pending the application of the money for the stated purpose or its return to the lender is minimal. He must keep the money separate; he cannot apply it except for the stated purpose; unless the terms of the loan otherwise provide, he must return it to the lender if demanded; he cannot refuse to return it if the stated purpose cannot be achieved; and if he becomes bankrupt it does not vest in his trustee in bankruptcy. If there is any content to the beneficial ownership at all, the lender is the beneficial owner and the borrower is not".

65 Applying these principles to the facts of Twinsectra, Lord Millett concluded that the money in question, which had been paid to a solicitor representing the borrower against an undertaking to retain the money until applied in the acquisition of a property for the borrower and to use the money only for that purpose was subject to a Quistclose trust because the money "was never held to [the borrower's] order by [the solicitor]".

66 Lord Millett's concluding words appear to me to leave open the possibility that a purpose trust may arise after the payment of money. However, before holding that such a trust had arisen, the party alleging the trust would have to satisfy the court that the three certainties of a trust were established and that the recipient appreciated (or objectively ought to have appreciated) that new terms applied to the money received and still held.

67 Mr Harper relies upon the recent judgment of the Court of Appeal in Bieber v Teathers Ltd [2012] EWCA Civ 1466, and in particular to a passage in the leading judgment, given by Patten LJ, with which Arden and Sullivan LJJ agreed. At paragraph 14 of his judgment, Patten LJ set out the first instance judge, Norris J's summary of the principles to be derived from Quistclose and Twinsectra which Patten LJ endorsed adding, at paragraph 15, that "in deciding whether particular arrangements involve the creation of a trust and with it the retention by the paying party of beneficial control of the monies, proper account needs to be taken of the structure of the arrangements and the contractual mechanisms involved".

68 The particular passage on which Mr Harper relies is Patten LJ's conclusion that "it is therefore necessary to be satisfied not merely that the money when paid (*emphasis added*) was not at the free disposal of the payee but that, objectively examined, the contractual or other arrangements properly construed were intended to provide for the preservation of the payor's rights and the control of the use of the money through the medium of a trust".

69 It was critical in Bieber that the court had to be satisfied that the intention of the parties was that the monies transferred by investors should not become the absolute property of Teathers, subject only to a contractual restraint on their disposal, but should continue to belong beneficially to the investors unless and until the conditions attached to their release were complied with.

70 In my judgment, it is significant in this case that at the time when C1 received the monies from D1 (1) Ds or D1 were aware that there was a risk that some part, at least, would be paid away ("distributed") to L+L, (2) there was no express requirement to keep the monies separate, (3) there was no express requirement to hold the monies to Ds' order, and (4) Ds knew or are to be taken to have known that £145k was transferred into C1's current account and they knew that £5k was handed over to C1 in cash. It is significant that no attempt was made to impose a fetter on C1's freedom to use or dispose of the monies for 2 weeks after payment of £145k. It is also telling that when seeking to impose restrictions on C1's use of the monies, there was no enquiry as to how it was held and, most importantly, there was no requirement to keep the monies separate from C1's general funds.

71 Viewed in the context of the factual background I am not satisfied that the arrangements between the parties were intended to provide for the preservation of Ds' rights through the medium of a trust. There are a number of weaknesses in Ds' case as identified above; and, in my judgment, the fatal blow is the failure to stipulate at any time that the monies held by C1 were to be kept separate from C1's own or other monies.

72 In my judgment, C1's position was and is closer to that of the estate agent who received money as a 'stakeholder' in Potters (a firm) v Loppert [1973] Ch 399

(which obviously postdated Quistclose); Sir John Pennycuick V-C there held that a pre-contract deposit paid by a prospective purchaser was received subject to an obligation to repay the money on request unless and until a contract was concluded, but the recipient was not a trustee. Material considerations included that until the event was known the recipient was to keep the money in his own hands, but if the recipient employed the money he was entitled to any profit and answerable for any loss.

(3) Are Cs entitled to be paid a further £25k/£30k?

73 On the findings that I have made the answer to this issue is : No.

(4) In the light of the answers to (1) – (3) above, what, if any, sums are due for interest?

74 In relation to the sum which C1 is obliged to repay to Ds, namely £113,350, Mr Tabari accepts, by reference to the decision in Potters, that if C1 is not a trustee but is merely holding money unless and until completion of the transaction then C1 is not liable for interest.

75 As to interest on C1's entitlement to £31,650 pursuant to a tenancy at will or for occupation and use and to £5k for stock, C1 might ordinarily have a claim to interest. However, as he has had the use of this money, and has in fact made use of this money and more, he would be doubly compensated if he was also to be awarded interest.