

Neutral Citation Number: [2019] EWHC 491 (Ch)

Case No: D30BM177

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS IN BIRMINGHAM**  
**Property Trusts and Probate List (ChD)**

Birmingham Civil Justice Centre  
Bull Street, Birmingham B4 6DS

Date: 13/03/2019

**Before :**

**HHJ DAVID COOKE**

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**Between :**

<b>Anthony Keiron Clough Downes</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Peter Robert Downes (1) and Angela Downes (2)</b>	<b><u>Defendants</u></b>

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**Noel Dilworth** (instructed by **Birkett Long**) for the **Claimant**  
**Helene Pines Richman** (directly instructed ) for the **First Defendant**  
The **Second Defendant** appeared in person

Hearing dates: 4-7 December 2018  
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**Approved Judgment**

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

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HHJ DAVID COOKE

## **HHJ David Cooke:**

1. The claimant Mr Anthony Downes (known as Tony) claims that he is the sole beneficial owner of three properties and seeks declarations to that effect, orders that they be transferred into his sole name and consequential relief. The properties in issue are:
  - i) A house at 33 Victoria St Lincoln ("33 VS"), presently registered in the sole name of the first defendant, Mr Peter Downes, who is the claimant's brother
  - ii) A house at 35 Victoria St Lincoln ("35 VS"), presently registered in the joint names of the first defendant and his wife Angela Downes, who is the second defendant, and
  - iii) The Old Rectory, 19 Newport, Lincoln ("TOR"), presently registered in the joint names of the claimant and the first defendant.
2. It is the defendants' position that the present registered legal ownership reflects the true beneficial ownership. If however Tony would otherwise be entitled to any relief, it should be refused on grounds of delay or laches. By counterclaim the first defendant seeks a declaration that he is the sole owner of a vintage Armstrong Siddeley Hurricane motor car and an order that the claimant, who is presently the registered keeper, transfer that registration to him. The claimant's case is that he is a joint owner of the car.
3. As this case involves a number of members of the Downes family I will generally refer to them by their first names, as they were during the trial. Mr Dilworth appeared for the claimant. The defendants act in person, though Mrs Pines Richman appeared at trial, as she has at earlier hearings, instructed on a direct access basis for the first defendant (who is a solicitor). She was not instructed by the second defendant, though Mrs Downes' interests are aligned with those of her husband.
4. I heard witness evidence from the parties themselves. In addition Mr David Markham (a cousin of Tony and Peter) and Mrs Beatrice Bell (a friend of Tony and former employee at the guest house) gave evidence on behalf of Tony, and Mrs Erica Frost (a sister of Angela) gave evidence for the defendants. A witness statement by Mrs Angela Finn (sister of David Markham) was served for the defendants, but she declined to attend the trial.

## **Relevant Legal Principles**

5. There was little between counsel as to the relevant law to be applied. In general, it is to be presumed that the beneficial interest in land follows the legal estate, and the onus is on a party who claims that this is not so in a particular case to establish the facts necessary to make out that claim (*Stack v Dowden* [2007] 2 AC 432). In this case, the nature of the allegations on both sides is of express common intention constructive trusts. Mostly these are said to have come about at the time of acquisition of the legal estate, ie an agreement or understanding expressly discussed and reached at the time that notwithstanding transfer of a property to one person it would be beneficially owned by (or jointly with) another. In relation to 35 VS Peter alleges an express agreement in 1994 that the beneficial interest in that property, which he acknowledges was previously held by Tony, would be transferred to him.

6. In all such cases therefore the onus is on the person propounding the alleged agreement to prove it, on the balance of probabilities. In the absence of any contemporary documentary evidence referring to such agreements, or evidence of witnesses other than the parties present at any such discussion (and there is none in this case) the court may have regard to evidence of how the property has been dealt with, at the time of acquisition or subsequently, and how its ownership has been subsequently presented to others, for the purposes of assessing the relative credibility of the oral evidence of the parties as to whether the agreement alleged was or was not made.
7. In some circumstances, such evidence (particularly if it relates to contributions to the purchase price) may support an inference of an intention that a person should have a beneficial interest, even if the parties have not expressly discussed or agreed that he should. But that is not in issue here; both sides contend that there was express discussion and agreement about the beneficial ownership, though they differ radically on what terms were agreed. The court's task is to make findings between their respective contentions, and in doing so it may rely on circumstantial evidence to support or undermine those contentions.
8. In considering such evidence, particularly in relation to transactions with third parties and events after the purchase or alleged change of beneficial ownership, the court must bear in mind that if the parties had reason to agree that beneficial ownership would not be reflected in, or would depart from, the apparent position shown by the legal title, they may also have had reason not to reveal that to third parties, or not to wish to explain their private arrangements to others. A significant consideration for the court therefore in evaluating evidence of events subsequent to the alleged agreement is whether those events are likely to show the true understanding between the parties or perhaps simply that they were content for whatever reason to allow those events to follow through the course dictated by the apparent position.
9. For completeness, I should note that in order to establish a common intention constructive trust, the person propounding it must in addition to proving the relevant common intention show that he relied on it to his detriment, but neither counsel has made any case that, if I found the relevant common intention, the trust alleged would nevertheless not arise for lack of reliance.

### **General background**

10. None of the properties in issue is occupied by any of the parties. 33 VS and 35 VS have at all material times been let to various tenants. TOR was acquired with a sitting tenant in a ground floor flat and has otherwise been converted into a guest house, which was run by the claimant, originally with the brothers' mother, Mrs Norah Downes. Norah Downes is now quite elderly and infirm to the point that she was not considered capable of giving evidence by any of the parties.
11. Tony is the elder of the brothers by two years. They grew up in Lincoln with their parents Robert and Norah. It is common ground that the parents owned a number of properties in Lincoln that were let to tenants, and that much of the work in managing those properties, dealing with the tenants and particularly keeping financial records was done by Norah, especially after her husband died in 1974. Both brothers say they were encouraged by their parents to invest in properties for letting on a similar basis, and were interested in doing so from an early age.

12. Tony went to university in 1973, studying materials processing, and afterwards worked for a period as an engineer and later as a part time lecturer. He owns and runs a business renting out canal narrowboats. He has also derived an income from letting properties; in addition to 33 and 35 VS there have been various others, some held in his own name and others from time to time in the names of other family members. He also earned an income from the guest house business at TOR.
13. For much of the time since university Tony lived with Norah at her home (after her husband died) at Arch Cottage, a historic property in Lincoln also known as 52 Bailgate. His evidence was that he also from time to time lived with various girlfriends at their houses, though using 52 Bailgate and/or TOR as correspondence addresses. Tony married his wife Mo (formerly Wotke) in November 2011.
14. Peter studied law at university and became a solicitor, undertaking Articles and later practising at various firms in Lincoln. He too has owned and let out a number of properties in addition to those now in issue.
15. It is common ground that for many years the brothers got on well and helped each other out in relation to their various properties and business affairs. Peter has performed legal work free of charge for Tony and other family members. Both brothers are clearly very practical and have performed a great deal of building and maintenance work on the various properties, whether or not in their own names. Both undertook restoration work on the Armstrong car, as well as on other cars and narrowboats, although they now disagree on their respective levels of contribution.
16. More recently however they have seriously fallen out. Much of their disagreement seems to centre on how best to look after Norah, who is now in her nineties and suffering from dementia. This has led to counter accusations and arguments between themselves and their respective wives about Norah's treatment and other related matters. I do not have to resolve these disputes, and although some evidence was devoted to them, including a video recording of a disputed incident, I do not consider it will assist me to seek to do so.
17. In the following section I summarise the factual background in relation to each of the properties in dispute, so far as is agreed or apparent from the documentary evidence, and the parties' respective contentions. Page references are to pages in the trial bundle. Many documents, unfortunately, appeared in multiple places but I have endeavoured to use the same reference on all occasions I refer to any one document.

### **33 Victoria Street**

18. On 1 March 1972 Tony signed a written contract to buy 33 VS from a Mr Shephard for a price of £650, to be paid as to £100 immediately and the balance by monthly instalments of £10 (p 239). The initial £100 was paid by cheque drawn by Norah on her joint account with her husband (p 240). It is not disputed that the balance was paid by instalments, and both brothers appear to agree that these were paid out of the rents received from letting out rooms in the property.
19. In January 1979 the sale was completed by transfer to Tony. He was registered as sole proprietor (on first registration of the title) and the solicitors acting at the time sent their invoice to him (p 241).

20. It is Tony's evidence that at the time he signed the contract he was then aged 19 and working during a year off between school and university; that he saw a card in the window offering the house for sale with a 'private mortgage' and, with the encouragement of Norah, went to see Mr Shephard and agreed the sale, on the basis he would get immediate possession of the property but it would only be conveyed once the instalments had been paid (being the 'private mortgage' arrangement referred to). He did not have a bank account so gave Norah £100 from his cash earnings and she wrote the cheque, which was posted to Mr Shephard. He refurbished and redecorated the property with help from his father and let rooms in it to Irish workmen. He collected the rents himself until he went to university, after which Norah did so when he was away, though he came home frequently and did his own collections. Peter he said had no involvement either in the purchase decision, being then at school, or in the management of the property save that he occasionally collected rent. Tony said he paid the instalments from the rent, though his mother would use some for 'household costs', ie those of her own household, which he did not object to. This would appear consistent with what seems to be an accepted pattern of Norah receiving money collected by various family members from tenants of various properties, paying expenses from it and in due course accounting to her sons. According to Tony anything left was his income. There are no records of any accounts kept by Norah at that time, or what happened to the rent.
21. Peter's account is that it was he, not Tony, who saw the card advertising sale, and he who he went to Mr Shephard and agreed the terms, but Mr Shephard would not sell to him as he was then only 16. He tried to get his parents or his brother to buy it for him but they were not initially interested. After some time he persuaded them to have a look at it and his parents agreed to buy it, on the basis it would be for both of them. They said they would arrange for Tony to be the purchaser, rather than themselves, for tax reasons (which he understood to be because the rent income would be offset by Tony's personal allowance). The parents had paid the £100, not Tony. He had worked on the renovation before the house was let, doing more work than Tony. He said he "usually" collected the rent, at least until he went to university, but he handed it to his parents. He did not say that any arrangement was made to pay any part of it to himself, save that she would from time to time give him money for expenses such as petrol from what he described as "the family pot" (p 796). His witness statement says very little about any other involvement of his with 33 VS until a major renovation project that was undertaken some 10 years later in 1982.
22. There are no documents, either contemporaneous or produced later, referring to any arrangement for Peter to have any share or interest in 33 VS or the rents it produced, either at the time of purchase or in the ten years thereafter.
23. In 1982 an application was made to the council for an improvement grant for works at 33 VS. The application was made by a local builder, a Mr Cave, describing himself as agent for Tony who was "Owner" of the property (p 250). It was based on a quotation by Mr Cave for the work required, which he priced at some £10,400 (p 244). The council determined that the allowable cost of the work qualifying for grant was £7,844, of which 75% or £5,883 would be paid on completion of the work (p 254). Tony paid the application fee from his own bank account.
24. In due course in March 1983 Mr Cave submitted an invoice stating that the work had been completed, seeking the quoted price and a small amount for extras. The full

amount of the grant was paid by cheque to Tony. The remittance advice (p 360) is undated but presumably followed soon after Mr Cave's invoice.

25. Tony's account is that he was aware of the availability of such grants, but Peter recommended that he apply for one, assisted him in preparing the application and introduced him to Mr Cave, who was a client of his, through whom the application could be made.
26. Peter's case is that it was he who initiated the renovation project and he approached Tony who agreed to help with the work and to sell him his share in the property, once the work had been completed, for a price equal to half its value as improved. He intended to obtain a mortgage to pay that amount. According to his witness statement (p 800) Tony signed an agreement to that effect, but no such document has been produced.
27. Peter says that the grant had to be applied for in Tony's name as the registered owner, through an independent builder, and for that purpose he introduced Mr Cave. Tony had assisted with the plans, but most of the building work was done by himself. He says in his witness statement (p 800) that he wanted to renovate to a high standard as he intended to keep the property and so that it "would be more desirable to tenants". In his oral evidence however he gave the reason as being that he had intended to live in the house himself, although he has never actually done so. This, he said vehemently, had always been his intention and was the reason why he made the extensive improvements he did. There is some indication that he may have considered this at one time, since he made enquiries of the council whether the grant would be repayable if the property was sold to a buyer who lived in it as his own home (p 3225).
28. There is no indication however that this was taken any further; despite the council's response that the grant would not become repayable letting of the property for multiple occupation resumed as it had been done before the work. I do not consider it likely that it had been a serious intention given that it is not Peter's pleaded case and there is no mention of it at all in his witness statement, despite the great length and detail in which he sets out his account of matters both relevant and peripheral to the case.
29. Both brothers agree that their mother kept a running account in a notebook of the various amounts the three of them had respectively spent on the project. That is at p 362 in the bundle, and is in manuscript in sections headed "Peter" "Tony" and "NKD". The totals appear to be £2890 for Peter and £2904 for Tony (p 370). I cannot make out any total on the page for "NKD" (p 369). There are some further figures on following pages, but these appear to relate to another property of Tony's (174 West Parade). The parties have produced a considerable number of invoices from builders merchants and the like said to relate to this project, but there has not been any reconciliation with Norah's record. None is necessary given that they both seem to accept that record as accurate. I do note however that:
  - i) One of the entries in Tony's ledger is for the £72 fee he paid, so he was credited for that, and
  - ii) Although there are some small amounts labelled as "Cave" or "Builder" neither they nor the total spent correlate in any way to his invoice, and given the evidence that the brothers did most of the work and the family paid for

materials I infer that that invoice is likely to have been a fiction for presentation to the Council.

30. On the first page of this book is a calculation in which the sum of £5,883 (evidently the amount of the grant) is split into three amounts of £2600, £2700 and £583. Under that are notes:
- “Pd Tony £1000  
[ditto] Mum £580  
Owe Tony £1700”
31. Tony's position is that this shows that the grant money did not cover the total cost but was distributed roughly in proportion to the amounts spent by each family member, with £2700 going to him and £2600 to Peter.
32. On 12 August 1983 33 VS was transferred to Peter (p 2741). This was apparently pursuant to a contract dated 21 July 1983 (p 375) stating an agreed price of £7500, of which £750 by way of deposit is stated to have been paid. It states that Tony sells as beneficial owner and makes no reference to any interest already held by Peter. Peter obtained a mortgage from Halifax BS for £6500 (p 2730) based on a mortgage valuation of £12,500 (2740). Peter's firm acted for both parties. £7500 was paid by the solicitors to Tony's Halifax account on 20 August (p 380), but the entire amount was paid back to Peter by cheque four months later on 16 January 1984, at which point Peter repaid the Halifax mortgage. Since then 33 VS has remained registered in Peter's sole name, mortgage free.
33. Peter's account of this is that he had expected to get the property valued and remortgage it on completion of the work, but Tony wanted his money early so he had arranged for the grant money to be paid directly to Tony, instead of to Mr Cave. When he had it valued the value came out at about £12,000, so Tony was due £6000 and he made a payment to make up the difference between the grant monies (£5883) and £6,000. Once the mortgage was received, the maximum he could borrow was £7500 (p 803) and that money was paid by him to Tony, but "passed back to me by Tony as he had already been paid for his interest in the property".
34. It does appear that the calculation referred to must have been done by Peter, since it refers to sums paid (or owed) to Tony and "Mum". That might suggest that the grant proceeds could have been in Peter's hands, or otherwise kept separate in some way and under his control from which to make payment, which would be some support for his general case that he was running the restoration project for his ultimate benefit. But I cannot reconcile that calculation with Peter's explanation in his witness statement, and his attempts to do so in oral evidence were incomprehensible.
35. Firstly, Peter's own evidence was that the grant moneys had been paid by the council to Tony and not himself, in which case there would be no question of distribution by Peter. A possible explanation, which would be more consistent with Tony's case than Peter's, is that the funds may have been held by Norah but with Peter calculating what was to be paid out from them.
36. Secondly, if it had been agreed that Tony would be paid £6000 as half the value after improvement, I can see that the brothers might have also agreed that as they had each

spent roughly the same on the works, no adjustment should be made for that expenditure and Tony would just be paid his £6000. Peter maintained that Tony had received £5883 from the grant and he had paid the balance to make it up to £6,000 in some other way, though he could not say, or produce any record, of how. But the calculation does not show that £5883 was paid to Tony, only £1000 with £1700 to come later. It cannot be assumed that the £2600 also went to Tony; if that had been the case the note would have recorded £3600, not £1000, as having been paid to him. Tony accepts that he must have received the further £1700 at some point, but Peter would still have to account for a further £3,300 payment to Tony (£6,000 - £2700) which he has not. This document is plainly not a calculation of what is required to pay Tony an agreed figure of £6,000.

37. Thirdly, if Tony only had to be paid £6,000 and had already received almost all of it, there would be no need to go through with any mortgage borrowing at all. A sale could have been recorded, if considered necessary, with a small cash payment and an acknowledgment that the balance had already been received. Peter's account in his witness statement of a mortgage loan of £7500 cannot be right; the documents show the advance was £6500.
38. Tony's alternative explanation is that Peter advised him that it would help to avoid Capital Gains tax in future if he were to sell the property to a family member at a price that would generate a gain within his own annual CGT allowance. He was assured the property would always remain his and be transferred back on request, eg if he wished to sell, in which case he would have an uplifted base cost. No money was intended to be retained by him, and consistent with that he repaid the stated price after a few months so that the mortgage could be redeemed. He points to the fact that, as Peter accepts, a considerable number of other such transfers were made later of various properties which were passed around family members at increasing stated prices but in circumstances that (as both brothers said in evidence) no monies were intended to (or did) change hands, for exactly that reason. Peter maintains that at the time of this transaction he was still in Articles and could not have come across any such scheme, but I do not find it at all implausible on that account. It is true that, as far as can be seen, this is the only such transaction in which third party mortgage monies were raised so that the stated price could actually change hands, but it might well be that, if this was the first such occasion, Peter could have considered it advisable to dress it up with more of a semblance of reality than was in subsequent cases deemed necessary.
39. As between the two explanations of the reasons for the transfer to Peter, I conclude Tony's is the more likely.
40. It is common ground that at all times since that transfer, the rents received from 33 VS have been accounted for as Peter's income for tax purposes. A number of his tax returns have been disclosed, each with a manuscript schedule prepared by Nora supporting the stated rent income, including rent (less expenses) for 33 VS.
41. It is Tony's case however that he has always been regarded as the owner of 33 VS and treated as the landlord in dealings with tenants and others, and that rents collected were accounted for to him by Norah. He points to a considerable number of tenants' rent books that name him as "collector" of rent, though that in itself is not of great weight since it is apparent that collection was done from time to time by various family members. Most rent books do not name anyone as "Landlord", though some have Tony's name entered and others Peter's name. In oral evidence Tony asserted



these may have been altered, but no allegation to that effect was put to Peter. Tony accepted that Peter had included the rents received in his tax returns since the transfer, but said that he had been reimbursed for any tax paid. Tony gave no details of how any such reimbursement was made, and there are no documentary records that refer to it or were put forward as showing payments made in reimbursement.

42. Tony also relies on various documents showing that he was represented as being the landlord in dealings with the local authority. At pages 192ff are a number of notifications of direct payment of housing benefit for tenants at 33 VS to Tony in 1995 and thereafter. This is some support for Tony's case, since there was obviously no need for Tony to be put forward as landlord or entitled to receive rent or benefit in payment of rent in circumstances where he was not the legal owner of the property. But I do not regard it as a particularly strong indication; neither tenants nor the benefit authorities would be likely to enquire about the legal ownership, so the fact that they were told that Tony was the landlord in respect of a particular tenant may indicate no more than that it was for whatever reason convenient to say so at the time the tenant took his lease, and not regarded as important within the family given the fluid and cooperative way in which the family's properties were administered. I note that in at least one case it was Peter who was named as payee for housing benefit, in 2010 (p 3336).
43. There does not appear to be any documentary evidence showing who ultimately received rents paid for 33 VS prior to about 1995. Peter says that insofar as he collected rent he passed it to his mother (p 803) but then asserts that "now that the property belonged to me I would retain all of the rent from 33 VS and...find tenants and manage the property myself". There are some records of calculations made by Norah in 1992 and thereafter, showing sums due to Tony from funds she administered, but these do not seem to refer to any money derived from 33 VS.
44. Both brothers referred to documentation showing invoices for outgoings such as purchases for repairs or landlords gas inspections, or payments of insurance policies, for the various properties. I do not consider these are of much assistance; they do not show any clear pattern of treatment of any of the properties and given that it is accepted that management arrangements for the various family properties were somewhat fluid but that insofar as necessary would be sorted out between family members by Norah, no great weight can be placed on evidence that one brother or the other dealt with any particular matter.
45. There were three particular matters that Mr Dilworth put forward from the documents as supporting Tony's case. Firstly, Tony has retained a number of envelopes marked with Peter's handwriting which show, Tony says, that the full amount of rent received for 33 VS was paid over in cash to Tony from at least March 2012. Most of these envelopes show a date, which Tony accepts was written by him for his own records. Some have a figure, generally £450, which also appears to be Tony's writing or possibly Norah's. The other writing is Peter's. It appears that from at least the end of 2010 both 33 VS and 35 VS were let to a single tenant each (as distinct from the letting of individual rooms). Some at least of the tenants were described by Peter as "gangmasters" who sublet to casual workers from Eastern Europe. Peter collected rents for both properties and kept a record of his receipts on the cover of a file at his firm (p3385ff). That shows that between December 2010 and September 2017 (at least) he received £450 monthly, plus £100 for Council Tax, for 33 VS.

46. The envelopes, assuming Tony's dates are accurate, cover broadly the same period. The earliest date (not all are dated) is March 2012 (p 627) and the latest May 2017 (p 658). Peter's notes on them vary, but typically they make clear that the contents are the rent received for 33 VS. Several describe this as "Tony's rent" (eg p 638) In some cases other matters are noted, eg on one dated June 2013 (p 630) Peter has written "Tony 1) Rent for No 33 Vict Street 2) Rent for No 3 Saxon St (less £300 council tax for May 2013 re Bredon Drive)". Both Saxon St and Bredon Drive are acknowledged to have belonged beneficially to Tony (although at that date both were in the names of Peter's family members) so this may suggest that 33 VS was regarded in the same light.
47. From about the beginning of 2017 (see p 654) Peter began to describe the contents (in some but not all cases) as "Tony's share of Victoria St Rent". Mr Dilworth points out this is after Tony had brought this claim and Peter had filed his defence setting out his explanation for the payments, as appears below.
48. Tony's account of these arrangements is sparse. In his witness statement (p 230) he says that "whilst Peter managed 33 Victoria St and 35 Victoria St for me, he continued to send me the rent. He used to put it in an envelope and I would collect it from his office...when I raised the issue of the properties being in the wrong names Peter changed the notes on the envelopes, including [reference to] 'Tony's share' and other qualifying comments which he had not put on the envelopes before. I believe this was to try to defend his position after he had been caught out". He also said (p 234) that he found out in 2008 that two years earlier Peter had, without his consent, mortgaged 35 VS to raise funds to buy out a partner from his law firm. He had agreed at that point that Peter could keep the rent from no 35 in order to service that borrowing, so from then on he had only been paid the rent for No 33.
49. Peter's account is also not straightforward. He said in his witness statement (p 818) that an agreement was reached in 1994 dealing with ownership of TOR and 35 VS, in which 35 VS (which he acknowledged had up to that point been beneficially owned by Tony) would not have to be returned to him. I refer to this alleged agreement in more detail below, but for present purposes, if made, it would imply that rents from No 35 would have been due to Peter from then on. However he says (p 825) that they had agreed that Tony would continue to receive the rent for No 35, manage that property, pay the bills and maintain it. There came a point however when significant work was required, he asked Tony for help doing that work and agreed that in return for that and his continuing assistance from time to time with other properties owned by Peter "I would continue to pay him an amount equivalent to the rent I received at 35 Victoria Street". At the same time, he says, Tony expressly confirmed he did not have any interest in the property itself. He did not say in his witness statement when this acknowledgment was given. It was not referred to in either his original or amended defence, though the latter states the date of the renovations as being from 2003.
50. Later in his witness statement he gives a slightly different account, saying (p 828) that Tony began to "refer to the payments he was receiving for services as 'his rent' " but this was not accurate and "the payments Tony received [were] equivalent to half of the rents from the 2 properties on Victoria St".
51. Neither of these versions fits well with the envelopes, on which it was Peter not Tony who referred to the payments as being for rent (not services) and as rent for No 33 (not for No 35, or as the equivalent of rent for 35 or as half the combined rent). For

most of the period they cover, the rents on the two properties were the same (£450) but for a short period £500 was received for No 35, so the basis of payment would have made a difference to the amount. Even if it did not, or was de minimis, and even if Peter for shorthand began to refer to payments "equivalent" to rent as just being made from the rent, there is no reason why he should consistently state that they were from rent of No 33 if they were intended to relate to receipts for No 35.

52. Further, Peter accepted in cross examination that amounts in respect of housing benefit for tenants at No 33 had been paid to Tony between 1995 and 2002 because "we'd agreed he would get the rent at that time", which would be inconsistent with an arrangement running from 1994 in which Peter received rent for No 33 and Tony received that for No 35 (or an equivalent amount). Peter also accepted in cross examination that insofar as it could be seen that rent for No 33 had been paid by cheque (most having been in cash) the cheques had been paid to Tony's account. He was taken to a small number of payments in 1995 and 1997. He said that he and Tony "had agreed to divide the rent" and "we were relaxed where it came from". In the absence of any apparent form of accounting, this does not suggest any clear agreement that Peter was entitled to rents of No 33.
53. Secondly, Mr Dilworth relies on the fact that Peter signed a document dated 24 August 1993 (p 142) headed "Loan to Peter Downes for purchase of Newport Manor House", the Manor House being a property he was then buying as his matrimonial home. Under that heading is:

“From Anthony Downes	£28,000
Debt. Norah Downes	£16,000
[ditto] 33 Victoria Street	<u>£5000</u>
Total	<u>£49,000”</u>

54. There are various subsequent writings on this note, including memos stating "9.1.95 Tony's debt repaid" and "Tony paid out 31800" and crossing through the lines relating to the amounts of £28,000 and £5,000. It was put to Peter that this shows him having received £5000 from funds relating in some way to 33 VS and acknowledging it as a debt, which would be inconsistent with his case that he had at that date been the beneficial owner of that property for ten years since the transfer to him in 1983. He did not, in my view, have any convincing explanation.
55. Peter said in cross examination that he had queried this at the time but "they reminded me we had had a swap of tenants". He said that he had been receiving rent from some tenants at No 33 as owner of that house, but they had moved to No 35 and started to pay rent to him for that property, though that was due to Tony as the beneficial owner (at the time) of No 35. Tony had then put some tenants in to No 33 and paid the rents received from them into a separate fund, and the £5,000 came from that. He accepted, he said "in general terms it was owed to them".
56. I could not follow this at all. If Peter had received rents at No 35 that he ought to have paid to Tony, he would either have retained the money himself or paid it to Tony (or perhaps Norah). If Norah had paid him £5000 from that money, or was intending to record that Peter had kept it and used it for his purchase instead of paying it to Tony, she would more likely have recorded it as deriving from No 35, not No 33. If Tony

had received rents from replacement tenants at No 33 which he regarded as due to Peter, and monies were paid to Peter from that fund, they would not have been recorded as lent to Peter (and nor would Peter accept that they were repayable). This account had not been put forward in Peter's witness statement, though he must have known he needed to deal with the IOU in his evidence since it was specifically relied on in Tony's Reply (p 32). Nor was it put to Tony in his cross examination. I formed the view Peter was making this up at a late stage to try and deal with an awkward document.

57. It is no doubt an oddity that, if everyone regarded Tony as the beneficial owner of No 33, the £5,000 would have been recorded differently from the £28,000 he also advanced, but it seems to me easier to envisage that there would be some reason to refer separately to funds belonging to Tony but coming from two sources than that Peter would refer to money of his own as being lent to him.
58. Thirdly, it is accepted that on 29 June 2008 33 VS was let for a fixed term of 6 months to a Mr H (I do not give his full name in light of the circumstances referred to below) pursuant to an agreement prepared by Peter (p 446) which names Tony as landlord but is signed on his behalf by Peter, describing himself in his own writing as doing so "as agent for the landlord". This is plainly on the face of it inconsistent with Peter himself being the owner and landlord, and cannot be explained as being simply a convenience in which whichever member of the family was to hand when a tenant moved in was named as landlord and signed the paperwork- Peter clearly prepared that agreement and could just as easily named himself as landlord. Further, Mr H paid the full 6 months rent in advance, some £2700, and it is accepted this was paid to Tony's account. In cross examination Peter said it had been taken into account as part of the agreement to split the income from the two properties, though of course there is no documentary record of any form of accounting to give effect to such an agreement.
59. Peter's explanation was that he had arranged the tenancy with Mr H who was a personal friend and in the process of divorcing his wife, whom Peter also knew. Mr H wanted to rent the property secretly in which to house his "other woman", and to pay the whole rent up front to dissipate his assets. Peter wished to distance himself from this arrangement so that if she found out about it he would not be regarded by Mrs H, whom he described as a 'strong minded woman', as having conspired with Mr H in setting it up. He said he was concerned the tenancy might be disclosed in the divorce, or that Mrs H, who worked nearby, might happen to meet him and ask about it.
60. I have no reason to doubt that this was a true account of why Mr H rented the house. But I did not find Peter's evidence that it explained why he described himself as agent as at all convincingly given. Further, it was riddled with logical inconsistencies. He said he was concerned that the tenancy would be disclosable in any divorce proceedings, and no doubt it would have been Mr H's obligation to disclose it, but if his motive was to have a secret bolt hole for his mistress it might be doubted whether he would be likely to comply with that obligation. It was not explained how, otherwise, Mrs H might happen to ask Peter about it. If its existence did emerge, the likelihood that a "strong minded" Mrs H would be willing to accept that Peter's role in setting it up was innocent if he had only acted as agent for his brother seems remote. If Peter wanted to pretend he had nothing to do with the tenancy, why not just get Tony to sign the document?

### 35 Victoria Street

61. This property was purchased by Tony in his sole name in July 1981. He paid £3,500, partly funded by drawing down £2,200 from a mortgage provided by TSB Bank. The mortgage facility included a further £1,800 available to fund renovations, but Tony was able to complete the work he wanted without drawing that amount. The mortgage was paid off, by Tony, in December 1982 (p 2794). It is accepted that Tony was both beneficial and legal owner at that stage.
62. In or about September 1984, 35 VS was transferred from Tony to his mother. The conveyancing was dealt with by Peter's firm. A note made by Peter (p 2664) states that this took place on 28 September 1984. The stamp duty return records the price as being £9,500 (p 2797), but it is common ground that no moneys changed hands and the property continued to be regarded as beneficially owned by Tony until at least 1994.
63. Tony's evidence was that he was not aware of any such transfer, though he accepted one had been registered. I find it unlikely that Tony was not aware that the transfer had taken place. It was part of his case (and not in dispute) that at least until 1994 Norah had administered the receipt of rents and outgoings of No 35 and kept scribbled notes showing the balance due to him, which she paid over. When it was put to Tony that he should have paid tax on this income, he was quick to say that that was not his liability but his mother's, which could only be so if the income was treated as hers, and most likely (and consistently with the tax accounting for other properties such as No 33) to mean he knew she was the registered owner.
64. In 1994, according to Peter, he made his agreement with Tony and Norah in relation to 35 VS and TOR. I deal with this in more detail below, but in relation to 35 VS, according to Peter the agreement was that although up to that point it had remained beneficially owned by Tony, "Tony would not require his house at 35 VS to be transferred back to him which would provide me with some recompense for my loss of capital [on transferring a share in TOR to Tony]" (witness statement at p 819). This presumably implies Norah would thenceforth hold 35 VS for Peter not Tony.
65. However it is accepted that notwithstanding this alleged agreement Tony continued after 1994 to receive the rents for No 35. Insofar as there are records disclosed from those kept by Norah they show that both before and at least shortly after 1994 she continued to account to Tony for income from 35 VS (see p 1384 and 1386) but she declared the income as her own on her tax return (see eg p 1893). Peter's explanation for this is "we agreed that the capital value of the property would be mine and dealt with the income separately in that Tony continued to receive it after 1994 and to manage the property, pay the bills and so on. I did not therefore include the income from this property in my tax return" (p 825). He said in cross examination that he was under no obligation to Tony to ensure this continued, so he could have sold the property at any time and kept the proceeds: "It [the agreement for Tony to have the rent] was a gift, I felt a responsibility to help him".
66. In his Defence (p 22) Peter pleads that at an unspecified date Nora transferred No 35 to himself, and on 20 June 1995 he transferred it to Angela. I have seen no documents evidencing such transfers. Tony's evidence is that he was not aware of either of them.
67. On 29 May 2001 a transfer of 35 VS to Norah's sister Josephine Markham was registered (p 2798). It is recorded that the transfer took place on 23 March 2001 at a

price of £24,000. The transferor is not named, but if Peter's Defence is correct it must have been Angela. Tony says he had no knowledge of this transfer either. Peter does not suggest Mrs Markham became the beneficial owner. It appears to have been another arrangement for a collusive transfer without any money changing hands with a view to bumping up the CGT base cost of the property.

68. On 25 January 2006 Mrs Markham transferred 35 VS to Peter and Angela Downes, at a stated price of £40,000 (p 2802). Peter and Angela borrowed £34,000 on a mortgage from Cheltenham & Gloucester in connection with this transfer, though it is accepted that the funds were not paid to Mrs Markham but used by Peter to fund the buying out of Mrs Siddall, his partner in the law firm. Tony says that he knew nothing of this at the time.
69. Tony's evidence (witness statement at p 233) is that he had been paying for insurance at No 35 but in 2008 he found a letter from an insurance company addressed to Peter. On questioning Peter said that he had transferred the property to himself and his wife in order to raise a mortgage to pay out his partner in the law firm, and had forged Tony's signature to do so. The allegation of forgery was not pursued at trial, and I observe that Tony's signature would not in fact have been required on any transfer made since 1984. He was not happy but was persuaded by Peter that the property would be transferred back when the mortgage was paid off, and even agreed that Peter could "use half the rent from the Victoria St properties to pay off this mortgage as he said they were desperate". He regarded that as a gift to them.

### **The Old Rectory**

70. An estate agent's memorandum (p 2880) shows that on 30 December 1987 a sale was agreed from the estate of the deceased owner to Peter, subject to contract, for £85,000. Peter's firm dealt with the conveyancing.
71. On 1 February 1988 Peter met his bank manager at Lloyds Bank to discuss a loan to finance the purchase. The bundle contains a copy of the manager's manuscript notes of that meeting (pp 3249 and 3248) and the branch's typed records of the loan application (p 3250, the dates of the entries are in February 1988 though the day is obscured). The manuscript notes evidently record what Peter told the manager and what they discussed about finance and security.
- i) The first note is "£85,000 £40,000 self + borrow £45,000". Clearly this means that Peter said he could raise £40,000 himself and wanted to borrow £45,000 from the bank.
  - ii) The next line appears to be Peter's proposal for security for the loan: "Security 14 Ashlin Grove £40,000. 45 Millman £20,000". 45 Millman Rd was Peter's current home. 14 Ashlin Grove appears to have been registered in Peter's name. but according to Tony's witness statement (p 231) was a property "which I owned with Peter and my mother".
  - iii) The next line appears to be Peter's description of the property and his intentions for it "3 flats at present- convert B+B?".
  - iv) The next section appears to deal with a question whether the bank could make an advance as a domestic mortgage, in light of two matters,

- a) First, Peter had an existing mortgage on which he was obtaining Miras relief (available for a borrower's main residence), and which he would maintain for a period before he could move in to TOR. The notes include "2 together OK? Til[l] move Aug – 2 Miras- can overlap and after 12 months [illegible] & move in expected". Thus it seems Peter told the manager he was expecting to move into TOR either by August (when he was due to marry Angela) or within 12 months. The delay appears to be due to the need to convert the property from its existing layout; another note is "Estimates etc for conversion?".
- b) Second, it is common ground one of the flats was let to a tenant protected under the Rent Acts, Mr Scruton, who could not therefore be removed. Peter's evidence is that this meant the loan would not satisfy the bank's criteria for a domestic mortgage. That is borne out by this section, which includes "Our survey [could] show mult[iple] occup[ation]...need restore to single dwelling... Tenant does blow it immediately... Must be vacant possession- B+B/stu[dents] OK but not tenanted."
- v) The next section considers an alternative form of facility: "Bank Loan??- Yes, as home + flats" and "Home + bedsits?- NO!- BG only" and on the following line "Or guest house". Evidently, different alternative uses were discussed. It is not clear why "home + flats" would have been acceptable but "home + bedsits" was not, or what "BG only" means in relation to the latter. "Or guest house" without a question mark suggests that was an acceptable use instead of "home + bedsits". Although use for bedsits must have been discussed at this meeting Peter said in cross examination he never had any intention to use TOR for that purpose as he considered it was in too expensive an area.
- vi) The following sections contain notes of Peter's income, the security available to support a loan and the interest and other terms of any loan. Peter evidently told the manager he had three properties in his own name that could be offered as security, and that there were others in which family members had interests, that would require their agreement. Under a heading "Collateral" and with a marginal note "3 Sole" the manager lists 33 VS, 19 Victoria Terrace and 14 Ashlin Grove (but not 45 Millman Rd, mentioned on the previous page). Further down he notes "Other prop. (if family agree on same)" and lists four, with notes presumably of what Peter told him about their ownership: "3 Saxon St – T[ony] 12 Ashlin - Mum 69 Portland St - me 35 Victoria St - T[ony]" and against this he notes "Informal? U/t perhaps". At the time 3 Upper Saxon St was in Tony's name. Peter appears to have said that he was the registered owner of 69 Portland St, but that he would need family agreement to charge it- that is another property Tony says (witness statement at p 231) he owned jointly with Peter and Norah. 35 VS was registered in Norah's name but, as this entry shows, acknowledged to be beneficially owned by Tony.
- vii) It appears Peter told the manager he received two sets of rental income; these are noted as "3,000 pa rents" and "2,250 pa rents", with no indication which properties they relate to. One of them seems to have been 33 VS however; the typed notes (only part has been copied) include "[rent] from 33 Victoria St goes to Halifax B/S balance £1500". £2,250 may have related to Mr Scruton's

rent at TOR; in his tax return for 1988-9 Peter disclosed rents received of £3425 for 33 VS and £2541 for TOR.

- viii) The typed notes confirm the manager made an application for sanction for a business loan and that it was approved. A letter of offer was sent on 12 February 1988 (p 3251) setting out the terms. The security requirements were less onerous than had been discussed; as well as a charge on TOR itself they required only deposit of deeds "without formal charge" of 33 VS and 19 Victoria Terrace.
72. Peter seems to have been told about the approval of the loan just before that letter was written; on 9 February he wrote to the agent to "confirm that I have now arranged the necessary funds to proceed with the purchase..." (p 2884). A deposit of £1900 was paid on 23 February from Tony's Halifax account (p 668).
73. Peter obtained access before exchange of contracts on or about 4 March, when he wrote asking for a key "to facilitate measurement for curtains" (p 2888).
74. Contracts were exchanged and completed on 8 April 1988 (p 2892 and 2894). Of the balance required to complete, £45,000 came from the Lloyds loan and £37,500 from Tony's Halifax account (p 669). It is accepted this came from the proceeds of sale of a property solely owned by him at 174 West Parade Lincoln, which had just completed. I have no evidence as to the remaining £600.
75. On 4 May 1988, less than 4 weeks later, an application was submitted for planning permission to convert the property to a guesthouse. It was sent by Peter in the name of his firm "on behalf of Mr A Downes who will be leasing the property and carrying out the day to day running of the business". It is accepted that Peter prepared the application itself, using plans drawn up by Tony. The application was approved, and it appears the work of conversion took until about November 1989 when Peter informed the fire authority that work required for a fire certificate for the "Proposed Guest House" was complete (p 2923). In the meantime Peter told his accountant (p 2921) he used the whole of the property for letting, although only part could be let due to the work being done. He treated the rent received as his income and sought a deduction of the interest paid to Lloyds. In cross examination he said these lettings were a "stop gap" until the fire certificate could be obtained and the guest house could open.
76. The loan from Lloyds was relatively swiftly repaid. On 31 January 1989 Peter's firm sent a cheque for £15,000 in partial reduction (p 2915). He accepted in cross examination that this came from the sale of 69 Portland St, but maintained he was the sole beneficial owner of that property so that should be seen as a payment by him. Tony's case is that he had a beneficial share in 69 Portland St and this money came from his share of the proceeds. Tony's account appears to be supported by a manuscript note, which I refer to below.
77. Apart from that £15,000, it is accepted that all payments of interest or capital on the Lloyds loan were made by Tony. The regular monthly payments were made by Norah, using a paying in book she kept, from income of the guest house. Although she was involved with Tony in running the guest house, its income was always treated as Tony's and shown on Tony's tax return. In that return, these payments were described as "rent" for which a deduction was claimed. In Peter's tax returns they were shown as rent received, and he claimed a deduction for the interest paid to Lloyds. He accepted that there was never any written lease, and that the payments



made as "rent" were never more than the Lloyds repayments, that they were made "to cover the mortgage" and "so that I was not out of pocket", and that the amounts reduced when the mortgage payments went down as a result of the capital repayments made to Lloyds.

78. Between 1989 and 1994 various capital payments were made as a result of which only a small balance was outstanding. On 17 October 1994 Lloyds provided a redemption figure of £52.75 and Tony or Norah paid that amount. The charge certificate and a Form 53 acknowledging discharge were sent to Peter (at Norah's address) on 21 October (p 2952).
79. Thus, Mr Dilworth submits, subject to the dispute about entitlement to the £15,000 that came from 69 Portland St (and apart from the £600 unaccounted for at completion) all the funds required to finance the purchase and to repay capital and interest on the mortgage came from Tony. Peter accepted that in cross examination.
80. In his witness statement and in cross examination Peter accepted he had not been told about these repayments when they were made, that the request for a redemption figure must have been made by Tony in his name, and that he had been surprised to find that the loan had been redeemed. He must have been told about it fairly soon after, because on 30 November he wrote to Lloyds seeking the return of the deeds to 33 VS and 19 Victoria Terrace that had been deposited as collateral (p 2953).
81. Shortly after that a transfer of TOR into the joint names of Peter and Tony was executed. No copy has been produced. The register records the date of the application for registration (19 December 1994, see p 2954) but not the date of the transfer document itself. Peter applied for a copy in 2017 but the Land Registry told him it had not retained one (p 2959). He maintains that his firm did not keep a copy itself, and he has been unable to locate any document sent to Tony advising him of the transfer or showing that he was aware of it. Peter's evidence was that he believes Tony would have signed the transfer, but without a copy he is unable to demonstrate that. What can be said from the register is that it does not record any declaration of beneficial interests (and Tony would have been required to sign if there had been such a declaration) and it does contain a standard form restriction against dealing by a sole proprietor (which would be entered unless all joint proprietors had signed a request to exclude it). The register is thus at least not inconsistent with a transfer having been signed by Peter alone, and there is no documentary evidence that Tony was told about the transfer.
82. Thereafter, it is accepted, Tony and Norah continued to run the guest house, all the income being treated as Tony's, without making any further payments to Peter, whether described as "rent" or otherwise.
83. Peter's account of these circumstances is as follows (witness statement from p 808, together with his oral evidence):
  - i) His mother telephoned him one morning and told him the house was for sale. She may have been told about it by Tony. He was keen to buy a larger family home for himself and Angela and immediately went round to view, decided to pay the asking price and, because he was about to go into court, rang Tony and asked him to speak to the agent and make the offer on his behalf. He later spoke to the agent and assured him he could raise the whole price quickly without having to sell any property. The sellers accepted his offer.

- ii) He would have been able to borrow the whole amount himself, and/or raise funds by selling 45 Millman Rd to Angela who could get a mortgage, but Norah told him she and Tony would help out with a loan of £40,000 from the "family pot" by realising investments. He was in the process of selling 69 Portland St and intended to sell 45 Millman Rd.
- iii) There was no discussion of Tony having any share in the purchase, nor was it related to selling 174 West Parade. He denies telling Tony that Tony would not be able to get a mortgage; Tony simply was not interested in buying the property.
- iv) Peter viewed the property before exchange of contracts with Angela, who was excited at the prospect of having a house of their own. He approached two building societies and Lloyds for finance, and Lloyds offered the best terms. He met the manager and told him the property would be his family home but they might let out rooms to students or as B&B for tourists in the summer.
- v) He accepted the offer and paid a 5% deposit, with partial help from Tony. 5% would be £4,250, but I was not shown any document referring to a payment of that amount. It is not mentioned in the contract or conveyance (nor is the £1900) though as there was simultaneous exchange and completion there would be no need to do so. It would have been plausible that Peter had made some contribution to a deposit; the total funds seen to have been provided by Tony and Lloyds (£1,900 + £37,500 + £45,000 = £84,400) were not sufficient to fund a price of £85,000 plus stamp duty (1% = £850 was paid) and the other inevitable disbursements for searches and registration fees. However, by the time of his cross examination Peter seemed to have forgotten this, and accepted that, apart possibly from the £15,000 he "had not paid a penny towards the purchase" and that the sums he said he regarded as a loan to him must have covered the price and disbursements.
- vi) He set about work to modernise the property so that he could move in. One day after completion however to his surprise Tony and his mother came while he was working and told him they considered the property too big for him and Angela and that it should instead be converted for use as a guest house, which would be a joint family project but run by them. They would ensure they paid rent at least sufficient to cover the mortgage payments so that he need not worry about them. He had wanted a formal lease but they said it was unnecessary between family members. He would have nothing to lose as the house would still be his and if the guest house failed he could still move in as originally intended. Tony told him its value would be increased because he (Tony) would modernise the property.
- vii) He told them Angela would be upset but nevertheless agreed on the spot without discussing it with her. Angela's evidence too was that she had been expecting to move into the house as their home and she was very angry that Peter had given up this opportunity without discussing it with her. Her sister Erica also said she had been told the intention was to move in and was surprised to learn this would not happen.
- viii) He agreed to make the planning application and was heavily involved in the conversion works. He sold 69 Portland St in January 1989 and paid £15,000 from the proceeds in reduction of the mortgage debt. Peter did not in his

witness statement give any other details of the sale, though Tony has, as referred to below. Peter did however in his witness statement say that he had paid the proceeds of sale to Norah to be administered in the "family pot", which does not easily fit with his having retained £15,000 and used it for his own purposes.

- ix) In late 1994 Tony and Norah unexpectedly told him they had paid off the balance of the Lloyds loan. He had not been expecting this and had no knowledge of the payments they had made in reduction of the debt. They wanted a half share of TOR to be transferred to them jointly. He was minded to refuse as the guest house venture had been sold to him on the basis he would benefit from being the owner of the capital asset at TOR, but they pressed him on grounds of family loyalty and said that he would not have to repay any of the money that had been lent to him to buy TOR and that Tony "would not require his house at 35 Victoria St to be transferred back to him which would provide me with some recompense for my loss of capital".
  - x) He eventually agreed. Tony then asked that the half share be transferred to him alone, to avoid IHT if Norah held any interest at her death. Tony only ever expected a half interest and would have been aware from the transfer deed that that was all he was receiving. As noted above however there is no documentary evidence Tony signed or ever saw this deed.
84. In cross examination Mr Dilworth put it to Peter that the deal he said had been agreed made no commercial sense, and it would have been a swindle to exchange half the equity in TOR for giving up repayment of all the money paid by Tony plus the value of 35 VS. He denied this and there are no firm figures on which the suggestion can be assessed. Insofar as any inferences can be drawn however there seems to be some force in the point. Peter himself estimated that TOR was worth about £200,000 in 1994, so the equity he says he gave up would have been worth about £100,000. Tony gave up repayment of about £85,000 lent (£70,000 on Peter's account but as appears below I consider Tony is likely to be right about the source of the £15,000) and 35 VS. There is no valuation of No 35, but it seems to be similar to the next door property No 33, which Peter told the bank was worth £25,000 in 1988. If that had increased in value in the same proportion as TOR (it was a period of substantial house price growth) it would have been worth about £58,000, suggesting Tony gave up something of the order of £143,000. No doubt these figures can only be highly approximate, but they would have to be very different to produce anything like parity.
85. Tony's account is as follows:
- i) He said in his witness statement he had seen TOR for sale in early 1988. In cross examination he said on thinking back it must have been in late 1987, during the Christmas holidays. He had rung the agent and made an offer, telling them Peter would act as his solicitor. Thereafter Peter had handled the paperwork. He denied any earlier offer by Peter, or any intention by Peter to move out of 45 Millman Rd.
  - ii) He was keen to buy and convert the property into bedsits to let. He had done this successfully at 174 West Parade but TOR was in a better location. He intended to fund the purchase by selling that property and also 14 Ashlin Grove and 69 Portland St, which were jointly owned between himself, Peter and their mother but which were not very profitable and which he and Peter

had agreed to sell. Norah agreed the sale proceeds would be split between the two of them, which would provide sufficient funds.

- iii) 174 West Parade had sold but "in the end the jointly owned properties did not sell in time so I had to buy ...with a mortgage...". Peter told me I would not qualify for a mortgage as I only worked part time. He suggested that I buy TOR in his name and that he would raise a mortgage. By this time he was well established as a solicitor and could obtain a mortgage".
  - iv) He paid all the regular repayments to Lloyds from his own building society account or from monies Norah held on his behalf. 69 Portland St was eventually sold in January 1989 and he and Peter agreed with Norah that as they had done all the renovation work they would receive half the proceeds each. £15,000 from his share was used to pay down the Lloyds loan and the rest was accounted for to him in 1995, presumably having been kept by Norah in the meantime.
  - v) He also paid all the capital payments made in reduction of the loan. The documents show that most of these were made in 1992. He paid the final amount to redeem the mortgage, and had not paid anything further to Peter by way of "rent" since that was done in 1994.
  - vi) He denies any discussion of a deal such as Peter refers to in 1994. In his witness statement he said he expected TOR to be transferred to his name once the mortgage had been paid off, but said nothing about any steps to achieve this, save that Peter never claimed any interest in the property until Tony began to challenge him about properties being in "the wrong names", apparently after 2008. Peter reacted with hostility and told him TOR was in joint names and that he (Peter) was entitled to half because of work he had done on a pathway.
  - vii) In cross examination Tony said that he had told Peter when the mortgage was paid off and asked him to transfer TOR to himself. Peter said he would do so and Tony assumed he had until he found out, much later, that it had been put in joint names. He denies ever seeing the 1994 transfer.
  - viii) There had been no suggestion Peter would live at TOR and no persuasion to give up that and allow it to be used as a guest house. There was never any lease of the property, though for tax reasons the payments he made to the mortgage were described as rent (allowing them to be deducted by him and treated as Peter's income but offset by mortgage interest).
86. Tony exhibited a manuscript note (p 770), which he said was made by him and Norah in 1995 to show how the proceeds of Portland St were dealt with. He was not questioned about this and it is not entirely easy to follow (in part because the top of the page is missing), but I observe that:
- i) It refers to 14 Ashlin Grove, saying "sold £59,000, Peter took 5,000 Tony 54,000". No date is given. I note that among the notes on the IOU (p 142) is "Feb/94 (14) 53942 59,000" which could refer to a sale of that property for £59,000, of which £53,942, in round terms £54,000, was dealt with in some way.

ii) There is a note "Portland £44,000" consistent with Tony's evidence that was the sale price. There is also an entry on the IOU "Dec/88 69 sold 40,000 cash 4000" which could be consistent with a sale of 69 Portland St (in fact completed in January 1989) for £44,000 of which £4,000 was received in cash.

iii) An amount is calculated as due to Peter:

"To Peter from Ashlin 10,000 + 2,400

To Peter from Portland St 20,000

"Cash 4,000 in tin. Peter ½ 2,000

34,400"

iv) From that is deducted an amount "Peter owes Tony 31,800" leaving a balance of 2,600. That appears to correspond with notes on the IOU reading "9/1/95 Tony's Debt repaid" and "Tony paid out 31,800"

v) The balance of £2,600 corresponds with one of the figures on the note relating to distribution of the grant monies. It was not suggested to any of the witnesses that it explained that figure, so I draw no conclusion from what may be nothing more than coincidence.

87. What I take from this note is:

i) It appears these entries were made by Norah and represent an accounting by her, in part at least from funds she was holding but also reconciling past payments between the brothers. It is likely it was made at or about the beginning of 1995. There are other figures on the page, in different hand, which may have been made by Tony.

ii) It is consistent with 14 Ashlin Grove and 69 Portland St being regarded as beneficially jointly owned by Peter and Tony as Tony said, and not with their being Peter's sole property, as Peter maintained.

iii) Given that a deduction is made from the sum due to Peter to satisfy what he "owes" Tony, that sum must be a calculation of an amount Peter has not yet received, not a reconciliation of what he has already received. Accordingly the £20,000 representing Peter's share of Portland St cannot already have been previously paid to him, and the £15,000 used to pay down the Lloyds loan in 1989 must have been treated as coming from Tony's share, not Peter's.

88. Tony's witness statement set out to give the impression he had initially pursued the purchase of TOR in his own name, to be funded from property sales, but had to switch to buying through Peter with a mortgage when the properties did not sell in time. I do not consider that can be correct, at least in terms of the timeline. The agent was clearly told from the beginning that Peter was to be the buyer, since his name is in the sale memorandum. Since both brothers say it was Tony who initially spoke to the agent, and it was not put to Peter that he had in effect hijacked an offer made in Tony's name, I conclude both must have agreed Peter would be the buyer at the date of the offer, ie at the end of December 1997.

89. Further, the fact Peter was speaking to the bank by 1 February does not suggest any prolonged period of Tony seeking to fund the whole price from sales of other properties. It is likely that Tony knew part of the price would have to be funded by a mortgage in Peter's name shortly after the offer was made; at latest by the end of January 1998.
90. On the other hand it is also clear that by the same date Peter was expecting £40,000 to be provided by Tony (and/or Norah) and not himself. His own evidence was that although he had considered funding part from sale of 69 Portland St he accepted Tony and Norah's proposal to pay £40,000 from investments. I have not seen any evidence of such investments, but Peter did not question their existence. As it turned out, Tony had funds available from the sale of 174 West Parade when completion happened, so there was no need to realise any investments.
91. I do not find it credible that Peter was approached by Tony and Norah out of the blue after completion and persuaded on the spot to abandon his plan of moving in to a family home, without discussion with his fiancée. Nor is it very plausible that in the period from that approach (necessarily after 8 April) to 4 May a scheme to redevelop as a guest house, never before discussed, could have been put together sufficiently to make an application for detailed planning permission. The bank manager's notes show that Peter himself discussed on 1 February not only the possibility of letting rooms for B&B or to students, but also use as a guest house. I accept Peter also told the manager he intended to move in with his wife; conceivably that may just have been a pretence while he was seeking a mortgage with MIRAS tax relief, but it may equally have been that it was not yet settled within the family what use the property would be out to or who would run any guest house, if that was the course adopted. I note that the plans submitted included provision for part of the property to be occupied by the owner.
92. I think it more likely that the position was in fact somewhere between the two rival versions now put forward, and that at the time the offer was made the purchase had been discussed among the family and initial agreement reached to buy in Peter's name using funds from Tony and a mortgage to be raised by Peter, but that at that stage the eventual use to which it would be put had not been finalised. There may have been various options considered, including some in which Peter would live there while part was let out. Thus it may well have been the case that Angela was told that was what Peter wanted, that she was excited by the prospect and discussed that with Peter on site while being shown round as she said, and naturally would have told her sister Erica the same. But ultimately the decision, which Peter may well have been reluctant to accept (and Angela may well have been upset about) was to use the whole property as a guest house, perhaps with a small owner's flat, such that it would not be suitable for Peter's family home. Peter presumably would not have been able to devote the time required to run the guest house, so it is understandable that such a decision would involve the property being used only by Tony.
93. That decision, in my view, is much more likely to have been reached before contract and completion than after. It may still have involved conversations on site and have taken place after Angela had been shown round such as she described, because Peter appears to have had a key for access for about a month before completion. That timeline fits much better with the submission of the planning application at the beginning of May.

## **Other properties**

94. I set out brief facts relating to some other properties that are referred to in the documents, though not directly in issue in these proceedings

### **15 Breedon Drive Lincoln**

95. This was bought on 8 April 2002 for the sum of £65,000 from a (presumably) unconnected party and transferred into the joint names of Peter and Tony (p 2992).
96. On 25 November 2011 Peter and Tony transferred the property to Peter's daughter Camilla. The transfer document copied at p 2993 does not include the page stating the consideration. On 6 December 2013 Camilla transferred it into Tony's sole name, for a stated consideration of £94,000.
97. Peter's evidence (witness statement at p 830) is premised on this property having been Tony's throughout, despite the purchase in joint names. Tony had left it vacant and unrepaired for almost a decade, and the local authority were threatening action which he refers to as repossession. To prevent that it was transferred to Camilla's name and, apparently, represented to the council as being her home. It was transferred into Tony's name at his request and with his mother's agreement.
98. It does not appear from this that Camilla ever acquired any beneficial interest in the property, and the transfer to her was a sham. It seems highly unlikely that the consideration stated was actually paid.

### **3 Upper Saxon St Lincoln**

99. This was bought in Tony's sole name on 7 April 1986 from an apparently unconnected party for £13,750 (p 3000). On 20 January 1989 it was transferred to Norah for a stated consideration of £28,000 (p 3002). Neither party suggests this was a genuine sale. On 31 October 1996 Norah transferred it back to Tony for a stated consideration of £34,000 (p 3003). The property was let to tenants who in 2012 intimated a claim for damages arising from damp conditions, which Peter responded to, acting as Tony's solicitor.
100. On 11 February 2013 Tony transferred the property again to Norah for a stated consideration of £40,000 (p 3020). On 5 December 2014 Norah transferred it into the joint names of herself and Tony, and on 8 January 2016 they jointly transferred it back into Tony's sole name, in both case also at a stated price of £40,000 (p 3024 and 3035). It is not suggested this sum was actually paid.
101. At p 3429 and 2430 are two handwritten notes by Tony to Peter. The first is undated and includes "I enclose £40 for you to sort out Saxon St", and the second is dated 9 February 2016 and says "Thanks for Saxon St paperwork". It is accepted that this property has throughout been beneficially owned by Tony, and apparent that Peter must have been responsible for the arrangements in which its ownership was transferred back and forth at fictitious prices.

### **2 East Bight Cottages Lincoln**

102. It is not clear when this property was acquired or in which name(s). A manuscript note signed by a Mr Paul Reed (p 3043, undated but with a subsequent note added reading "2006 approx") records Tony having paid £32,000 for an option to buy it for

£180,000. There is an undated contract for sale by Peter and Tony jointly to Tony alone, at a price of £180,000. On 25 November 2011 a transfer was registered to Josephine Markham, Norah's sister, noting a "value stated" of £180,000, so presumably this was not treated as a sale for value. Peter stated in his letter to Tony of 11 February 2015 (p 2627) that this was something Tony had agreed to to ensure that if he died the property would not "go outside the family", ie be inherited by Mo or her children.

103. On 11 November 2013 a charge was registered in favour of Peter's son Robert (p 3050). Robert executed a promissory note dated 25 October 2013 (p 3051) promising to pay to Tony any money he received on redemption of this charge. It appears this was part of a scheme set up by Peter in which Tony was assured he could get its value back when the property was sold; in his letter in February 2015 Peter said the object was to avoid CGT as a sale would be treated as Mrs Markham's home but "I set up a mortgage and promissory note as the best way of giving you a free hand as to how to deal with the money from it...". The debt recorded to Robert in the mortgage was for £240,000 plus interest, but from Peter's description of the arrangements in that letter it appears that was a fictional amount designed to enable any likely sale proceeds to be channelled (via Robert) to Tony.
104. It would appear Tony was not content that that arrangement was sufficient however, because on 14 December 2015 Mrs Markham signed an agreement giving Tony the option to purchase the property for £180,000 (p 2633).
105. Peter provided after trial a note from Tony dated 10 February 2016 in which he says "I have given much thought to your recommendation that to 'reassure' Josie that she was safe in East Bight the house should be in her name. She knows we would never ask her to leave". He expresses concern that the supposed mortgage arrangement Peter has set up creates an apparent income for Robert of about £10,000 pa which he is not declaring and may constitute tax evasion and says "I therefore think it is everyone's interest that 2 East Bight be transferred back to me at its market value (1 East Bight for sale at £315,000)".
106. On 17 March 2016 this property was transferred, presumably by Mrs Markham, to Tony and his wife Mo jointly for a stated consideration of £340,000. This cannot have been a genuine transaction; if Tony had an option to buy at £180,000 there would be no reason to pay £340,000. It does not appear that any price was in fact paid; Peter said in his witness statement (p 830) "[Tony] wanted those properties owned by him to be transferred back into his sole name... the property at 3 Upper Saxon St was transferred to him as was the property that my Aunt Josephine Markham lives in at 2 East Bight... Tony instructed me...that I should place this property into the joint names of himself and his wife Mo...". By this he seems to be accepting that 2 East Bight was beneficially owned by Tony, a further indication that all the arrangements he had set up for a mortgage, promissory note and option were shams. The implication of Tony's note is that Peter had persuaded him to transfer the property to Mrs Markham on a pretext that it would give her "security" but had to back down when Tony insisted on having title transferred back to himself.

## **2 Foss Bank Lincoln**

107. This was acquired in Peter's sole name on 24 December 2007 from an apparently unconnected party for £106,000. A charge in favour of Tony was registered at the same time. It is common ground that Tony lent Peter £90,000 to make this purchase;



he later complained that Peter had agreed to give him a promissory note to acknowledge that loan (and another of £70,000 to acquire a property at 14 West Parade) but prevaricated when pressed to do so. Peter acknowledged the loan in a letter of 11 February 2015 (p 2627) and eventually did provide a promissory note for the total of £160,000 on 13 February 2015 (p 2631).

### **Correspondence between the parties**

108. It can often be instructive in ascertaining the true understanding between parties who make informal arrangements, and the genuineness of the positions they subsequently take, to see how they referred to those arrangements in correspondence or documents before proceedings. I bear in mind of course that once a dispute has arisen, parties may write documents to suit their case, but even then it may be revealing to see how contentions are advanced or responded to, and whether a party has changed position over time on relevant issues.
109. With that in mind, I indicated to counsel at the hearing that I was surprised at the paucity of such correspondence in the trial bundle, and asked that a review be made of whether any such documents existed, disclosed or otherwise, relating to the properties but which had for whatever reason been omitted. In response I received several batches of documents from the defendants with lengthy submissions, but these were almost entirely devoted either to the disputes between the brothers about treatment of Norah or various property management expenses paid and not the subject I had raised.
110. It remains therefore the position that I have very little to go on by way of documents to show how the issues now before me arose and were responded to between the brothers.
111. As to when the dispute arose, Tony's evidence (witness statement p 235) was that he came to realise that certain properties "were all in the wrong names" in 2014 and challenged Peter who said he would "sort it" but did not do so.
112. There is however no correspondence or similar document that I have been directed to passing between the brothers referring to property disputes before Peter's letter of 11 February 2015 referred to above (p 2627). It is apparent from that letter that Tony had demanded promissory notes to evidence the £160,000 he had lent in 2007/8. In his letter Peter says:

“You say you now require legal agreements but you did not ask for these at the time or ...for the past 7 years... It is only recently you have wanted to separate our finances and put things on a formal footing because you say it is causing trouble between you and Mo if you fail to do so...”
113. Two days later when sending the promissory note Peter wrote "Bearing in mind 3 Upper Saxon St and Breedon Drive have been transferred to you recently I hope you will now be satisfied." This must be referring to the transfer of Upper Saxon St to the joint names of Tony and Norah in December 2014 as the transfer to Tony's sole name was not until early 2016. These documents are consistent with Tony having raised an issue about further properties in 2014 as he said. The hope that Tony "will now be satisfied" however suggests that what has been done does not comply with all the demands Tony had been making, though it does not say what else there might be that it is hoped he will not pursue.

114. The next relevant correspondence in evidence is the notes from Tony referred to above in early 2016 in which he provides £40 "to sort out Saxon St" (p 3429) and thanks Peter "for Saxon St paperwork" (p 3430). The former also refers to 2 East Bight and says "when this is sorted out I will sort out the Armstrong". Two relevant documents not in the bundle that Peter did provide after trial are a note from Tony dated "Jan 16" saying "Please let me have: Saxon St- Land Registry confirmation form. East Bight- mortgage agreement" and another undated chasing the same papers, on which Peter wrote that he had sent the Saxon St documents to the Land Registry and was waiting for them. These documents all appear to be contemporaneous, and suggest the £40 Tony paid may have been a registration fee, and Peter then completed the registration and provided a copy of the confirmation.
115. On 10 February 2016 Tony wrote the note referred to above demanding the return of 2 East Bight and the unwinding of the complex arrangements Peter had set up. Peter complied within a month (and Mrs Markham must have accepted she was bound to do so as well, since she signed the transfer form without apparently receiving any sale proceeds).
116. Some indication can also be gained from the letter Peter wrote to Dr Batty, referred to above, on 4 May 2016. This was mainly intended to justify his position in relation to treatment of Norah, but somewhat bizarrely includes a substantial exposition to the doctor of how property disputes arose between him and Tony and how Peter blames these, and arguments over Norah, on the influence of Mo Wotke after her marriage to Tony in November 2011. In that letter he says:
- “[After] the first year or so of their marriage ... my brother... started to dispute ownership of several houses owned by me... To appease him some properties have been transferred to my brother... As you will see from today's email received from my brother... He is also threatening action over properties...”
117. The email referred to is not in evidence. By the date of this letter, 15 Breedon Dr, 3 Upper Saxon St and 2 East Bight had all been transferred back to Tony. It would appear then that these were the "some properties" transferred "to appease him" so that this letter is further confirmation that the disputes as to ownership raised must have extended to other properties as well, and that the recent threats of action referred to must have related to such other properties. It was not suggested in the evidence that Tony had at any stage raised claims to properties other than the three now in issue before me, so it would seem that the other properties Peter was referring to must have been some or all of the three now in issue.
118. On 17 May 2016 a letter before action was written by Tony's solicitors, seeking transfer of 33 and 35 VS and TOR. That would seem to be the first explicit documentary reference to a claim to those properties. Remarkably, it is not in the bundle. There is however a copy of a letter of 4 August 2016 (p 3103) noting that no response had been received to the earlier letter and setting out in the form of a pre-action protocol letter a demand that the three properties be transferred to Tony's sole name within 14 days and his contentions as to the facts by which they came to be held as they are at present, in substantially similar terms to the claim now pleaded.
119. On 12 August 2016 Peter replied (Supplemental bundle p 14) stating that he had not received the letter of 17 May and asking for pre- action disclosure. He said that Tony's

claim was seeking to disturb arrangements that had been in place for some time, but did not otherwise dispute the facts alleged or put forward any alternative explanation.

120. On 6 December 2016 a letter before action was sent to Peter's firm. That too is not in the bundle, but it is apparent it must have alleged negligence by them in failing to ensure Tony's beneficial interest in the three properties was protected.
121. On 9 December 2016 the claim was issued, and on 23 December 2016 Peter signed his defence (p 9). That document appears to have been the first occasion on which Peter put forward his account of events in writing. In it he pleaded that:
  - i) 33 VS was acquired at his instigation with his parents arranging to "[place Tony's] name upon the title with [Tony] holding the beneficial interest for himself and [Peter]". It was then transferred to him in 1983 "at a price of £7,500". No mention was made of the agreement now alleged to pay Tony only £6,000 or that the £7,500 paid on transfer was returned to him.
  - ii) 35 VS was transferred by Tony to Norah in 1984 and "[Tony] has specifically confirmed to the first defendant that he holds no equitable interest in this property". No particulars are given of when or how this confirmation was given. No mention was made of the fact, now acknowledged, that Tony retained the beneficial interest until at least 1994.
  - iii) In relation to TOR, he had been provided with "bridging" finance by Tony and his mother for the purchase. When he had sold his properties at 69 Portland St and 14 Ashlin Grove, in which he denied Tony or Norah had any interest, they had "requested" a share of the proceeds in part "because [I] still owed to them the bridging loan" (p 12). If this was intended to indicate that some part of the bridging loan was repaid from those proceeds, he did not say that in his witness statement (cf p 817).
  - iv) The 1994 agreement had come about as a result of an approach by Norah and Tony who were concerned they had no share in TOR despite having run the guest house business and renovated the property and paid off the mortgage. "Also [I] was financially secure as [I] already held title to other properties including 33 and 35 Victoria St and also ran a profitable solicitors practice so did not require additional rental income and it was only fair if some income was earmarked for [Tony]... it being agreed [Tony] would receive one half of the income from the two properties on Victoria St and [I would] transfer one half of the legal and beneficial interest in The Old Rectory". That explanation (a) is plainly predicated on Peter being financially secure in part by reason of beneficial ownership of 35 VS, whereas he now acknowledges that at that time it was solely beneficially owned by Tony (b) makes no mention of the terms now alleged to have been part of the 1994 agreement that Tony would relinquish his beneficial ownership of 35 VS and that the "bridging" loan would not have to be repaid (c) is inconsistent with the fact that the rents for 35 VS (at least) were already being paid over to Tony as shown by Norah's accounts.
  - v) There was a reply from Peter's firm on 3 January 2017 to the threatened claim against it (p 2655A) which said:

“... As you will be the defence, it is not accepted that [Peter] acted in any way negligently or contrary to instructions from your client when these were required. Your client is now contending that he was wrongly divested of ownership of these properties but he was fully aware of the circumstances of acquisition by our client and raised no concerns at the time and he now does so very many years later. You contend that your client is the sole beneficial owner of these three properties but that is disputed so this is why they were not transferred following his recent request that we do so.

This firm has dealt with certain other properties where your client does indeed hold the beneficial interest and we have been content to transfer such properties in accordance with his instructions and with these including properties at 2 East Bight, Lincoln, 39 Cecil Street, Lincoln and 3 Upper Saxon Street, Lincoln.”

122. On 27 September 2017 an amended defence was filed (p 19) in which Peter:
- i) Again pleaded that 33 VS had been transferred to him for £7,500, making no mention of any refund of that amount or agreement to pay £6,000.
  - ii) Denied that he paid over any rent from 33 VS to Tony, asserting that he only paid him "for work and expenditure incurred in relation to this property". That is not consistent with the evidence that he consistently paid over the whole of the rent from No 33 from at least 2012.
  - iii) Now asserted that Tony had given up his beneficial interest in 35 VS as part of the 1994 agreement.
  - iv) But still made no reference to any provision of that agreement that the "bridging" finance to purchase TOR would be discharged.
123. There are two manuscript notes from Peter in the bundle relating to rents from Victoria St (p 2725). The first is marked (presumably by Tony) as received on 24 June 2017 and says:

“We agreed I would split the rents on Victoria Street with you but as I am paying tax on your half I think it only fair to collect it from you in the future... Do you agree?”

The second is dated 28 June 2017 and says:

“... I informed your solicitor you should be responsible for the tax on the £450 you get each month but got no reply yet. This will ensure the rent is divided equally...[because I pay the tax] ... You get £450 and I get £450 - £90 = £360. Is this the fair split you have in mind?”

124. This supports the suggestion of an agreement that there would be a split of the rents from Victoria Street, but does not in my view give any clear indication whether this

split arises from a concession by Peter that Tony should receive half of what would otherwise belong to Peter, or the other way round.

125. What can be seen from this history, it seems to me, is that Tony must have been raising his claim to these three properties in oral discussions at least since about 2014. Presumably he has done so consistently on the basis now advanced, since at no point in the documentary trail is any objection made that he has changed the justification for his claims or put forward new matters. Nor was any such suggestion put to him in cross examination (though it was suggested he had waited to commence proceedings until his mother was unable to give evidence against him). So far as can be seen from the documents, Peter did not put forward his account of events until his defence, though it might have been thought that if the dealings with the properties were the subject of clear agreements with Tony as he now alleges he would have said so immediately the issue was raised and consistently thereafter. Even when he has referred to Tony's claims, Peter does not, as might have been expected, object that Tony must know they are false because they go against agreements he made many years ago.
126. Further, the account of the alleged 1994 agreement Peter originally put forward in his defence has evolved significantly in his amended defence and in his witness statement, tending to suggest it may have been adapted to fill perceived weaknesses as the claim proceeded.

### **Summary and conclusions in relation to the Properties**

127. The nature of the family arrangements in this case, the length of time elapsed and the paucity of contemporary documentation make it very difficult to determine exactly what was in truth agreed between the family members. I have no doubt that the picture painted by the evidence is incomplete, such that it is necessary to fill gaps by inference from what can be seen. In general, as between Peter and Tony who are the two main witnesses and the only ones who could speak directly to the oral agreements alleged that are central to the issues, I consider Tony's evidence the more likely to be reliable. That is not to say I accept it on all points; I have indicated a number of areas in which his account cannot in my view be correct. But on the central issues, it is in my judgment more consistent with what can be gleaned from those documents likely to show the true nature of the family arrangements (in particular with the surviving manuscript notes and accounting by Norah) than Peter's account.
128. It is clear in my view that the family operated on a very flexible and co-operative basis, in which properties were acquired and moved around between them as appeared convenient from time to time. In some cases, such arrangements may lead to a finding that there was no clear common intention as to who would own what, but a general arrangement in which such matters would be agreed and varied from time to time for the general good, or perhaps as a senior family member might direct. In such cases, it may therefore be appropriate to conclude that there was no common intention to displace the presumption that the beneficial and legal ownerships coincide. But neither side has contended for such a position in this case, at least in relation to the three properties in issue before me.
129. Part of these arrangements was, I am satisfied, that substantial aspects of the finances for the various properties were controlled by or accounted for through Norah. It does not appear that she made all payments, though she evidently made many of them and kept a cash float to do so. What she did do was to keep records in some form of

payments made by one family member in respect of properties owned or considered to belong to another, resulting in periodic settlements of amounts due between them. How complete these records originally were I cannot say; it may well be that as was suggested they included items of personal spending such as petrol money, and it may also be the case that monies were paid out to family members to a greater or lesser degree as they required them and irrespective of their source. I have no doubt that if all these records had been provided, a clearer picture might emerge. But insofar as they are available, they tend in my judgment to support Tony's case and not Peter's.

130. Little weight in my view can be placed on evidence that one brother or the other paid particular invoices or expenses; it is apparent there was no clear separation of responsibilities in this respect but a great deal of pragmatic cooperation, which was presumably reconciled between them (eg in Peter's notes on the rent envelopes that he had deducted amounts paid by him) or though Norah.
131. Nor in my view is there any very strong indication to be derived on the facts in this case from the way in which matters were presented to the tax or other authorities. No doubt if for instance Peter was liable for tax on rental income not retained by him he would wish to be reimbursed for it, but it is perfectly plausible that the general family arrangements may have been such that he either was so reimbursed, for example by accounting through Norah or payment from funds held by her, or was content that he was receiving some other advantage he regarded as sufficiently equivalent not to press for exact recompense.
132. In relation to 33 VS, I am not satisfied that there was any agreement such as Peter alleges for that property to have been jointly beneficially owned when it was agreed to be bought in 1972. There is no documentary evidence to support such an agreement. Nor is there any support for it in the evidence (other than Peter's own statement) of the way in which it was administered in the period between 1972 and 1983. It is not of course inherently implausible that Robert and Norah would have wanted both their sons to benefit from investment in property, but if they did so they did not make any arrangement in relation to this property to reflect that wish. Nor did Peter, though even if he was too young (17) to insist on it when the contract was signed, by the time it was completed in 1979 he was 24, a graduate in law and on his own evidence keen to invest in property and so might be expected to wish to record a beneficial ownership if he had it. I find therefore that Tony was the sole beneficial owner from 1972.
133. As indicated above, I find Tony's account of the circumstances of the transfer into Peter's name in 1983 to be the more likely to be true. The contention that the transfer was a sham intended to secure a tax advantage is plausible, given the prompt repayment of the supposed purchase price and admitted frequent subsequent transactions of the same nature. Evidence of subsequent events likely to indicate the intended beneficial ownership is relatively sparse, but more consistent with it having been retained by Tony than transferred to Peter. In particular Peter agreed Tony had received and retained rents of No 33 since 1995, and this was not satisfactorily explained by his alleged agreement to split the Victoria St rents in 1994, because his contention as to that arrangement was that Tony would receive the rents from No 35, not No 33. Beneficial ownership by Peter is inconsistent with the IOU referred to above, and with Peter's execution of the tenancy to Mr H as "agent for the landlord".
134. I find therefore that the transfer of legal title to Peter was not intended to transfer beneficial ownership to him, being merely a scheme to increase the CGT base cost for

Tony's benefit. Tony therefore remained the beneficial owner after that transfer. Nothing has happened since to displace his beneficial ownership and he is accordingly entitled to have the property re-vested in him now.

135. In relation to No 35, it is accepted that Tony retained beneficial ownership until at least 1994 despite transfers of the legal title, and Peter's claim that he became the beneficial owner depends on establishing a common intention to vary that ownership in the deal he alleges was made in 1994. The onus is on him to establish that agreement and common intention, to the normal civil standard of the balance of probabilities, though in assessing that balance the court must have regard to the inherent likelihood, or lack of it, that a beneficial owner of property would agree to transfer that ownership by informal dealing.
136. I am not persuaded that any such deal was come to. Firstly, there is no direct evidence of the alleged discussion and agreement between Peter Norah and Tony other than from the oral evidence of Peter and Tony, and as between the two of them, for the reasons given above, in my judgment Tony's evidence is the more reliable. He denies any such discussion and agreement. There is no documentary evidence of it, or referring to it even by implication. Other witnesses gave evidence of their perception of how the properties had been managed, but none said they had been told of this alleged agreement.
137. Second. Peter's account of it appears to have emerged late and to have varied over time. If, as he appears to accept, Tony had been asking to have No 35 transferred to him since about 2014, Peter had ample opportunity to protest that this was going back on a clear agreement made in 1994, but does not appear to have done so (and does not allege that he did) until at least his defence was filed in December 2017. That document however described the 1994 agreement as being on the basis he already owned No 35, not that it was then agreed to transfer that ownership to him. It was not until his amended defence 10 months later that Peter developed this to say that in 1994 Tony "acknowledged he no longer had any beneficial interest" in No 35, implying that such interest had been lost at some point by virtue of the history of transfers of legal title and work he alleged he had done at the property. It was not until his witness statement that he adopted his final version, which was that in 1994 No 35 was still "his house" ie Tony's, but Tony had agreed he would not require it to be transferred back in return for being given a share in TOR. As appears below, I do not accept Tony was given such an interest in TOR at that stage in any event, but for the moment looking only at what is said in relation to No 35, these changes in Peter's description of the alleged deal do not give any confidence that his final version can be relied on.
138. I find therefore that there was no agreement to transfer beneficial ownership of No 35 in 1994. Although there is a reference in Peter's witness statement to an acknowledgment by Tony in or about 2003, that is put forward as a confirmation of the position allegedly agreed in 1994 and not as a separate act effecting a change in the beneficial ownership. In any event, given that I am not satisfied the alleged agreement was reached in 1994 I consider it unlikely that any statement amounting to an acknowledgment was made in 2003. It is not contended Tony was deprived of his beneficial ownership by any other event and he is therefore entitled to have the property re-vested in him.
139. In relation to TOR, I find that the most likely position is that, whatever may have been discussed at the time the offer was made to buy the property in December 1987, by

the time contracts were exchanged and completed in April 1988 Peter, Tony and Norah had agreed that the purchase would be for the benefit of Tony, who would run the guest house business from it with Norah's assistance, and that Peter's involvement was to be by way of facilitation of the mortgage borrowing, which was always intended to be Tony's responsibility to discharge. Tony's evidence of that intention is supported by the fact he provided all the funds for the initial purchase, so far as can be seen (although a small amount is unaccounted for) but crucially also because he provided all the funds (including the first £15,000 capital payment) to repay the capital and interest on the mortgage after purchase and, with the exception of that first £15,000 (which as I find came from funds belonging to Tony) did so without any reference to Peter at all. It is not likely that Tony would have acted in this way if such payments were intended to be additional loans to Peter.

140. In other circumstances in which loans were made to Peter to assist with property purchase there were arrangements to document them- hence the IOU he signed in 1993 relating to purchase of the Manor House and Tony's demands, eventually conceded, that he be given a promissory note for loans made in 2007/8. These were later in time, but show that Tony and Norah were aware of the need to have some acknowledgment of substantial loans. There is no reason to think they would have been any the less aware of that in 1988/9, yet on Peter's account they advanced about £85,000 to buy a property for him, about £30,000 of which was paid without his even asking for or knowing about it, and did nothing to record any obligation on him to repay it. I consider that unlikely.
141. I am not persuaded there was any genuine lease arrangement in place for operation of the guest house. It was necessary to describe the payments made by Tony as rent in order that he (and Peter) could obtain a tax deduction for what was in effect his payment of the mortgage taken in Peter's name. There was plainly no intention that Peter would receive any rental income as a return on ownership of the property; nothing was ever paid other than to match the mortgage payments, so Peter never received any personal benefit at all. Insofar as Tony was presented as lessee to planning and other authorities, that was only to be consistent with the position on paper.
142. It follows that there was no foundation or need on Tony's part for the alleged deal in 1994. It would have been odd in any event if he had been prepared to make at least £30,000 of capital payments in 1989, for Peter's benefit but without discussion with him, but became concerned in 1994 that he had got nothing in return. In contrast, it would make sense if, as Tony said, having paid off the final balance on the mortgage, he would see no further purpose in the property remaining in Peter's name and request that it be transferred to him. It would of course be a substantial problem for his claim if he had been aware that the transfer was in fact into joint names and he had not objected to that, but there is no documentary evidence to show he was so aware. If he had in fact been made aware of that at the time, it is surprising that no record of it can be found. Peter's firm prepared the transfer, and although there are not many documents surviving from that period, there are some. They do not however include any copy of the transfer, or any correspondence with Tony referring to the terms of the transfer. In the circumstances I accept Tony's evidence that he believed Peter had transferred TOR to his sole name, and did not find out the contrary until he began to explore the position of the properties he considered to be his in or about 2014.



143. For these reasons and those above therefore I find that there was a common intention on purchase of TOR that it be beneficially owned by Tony. I reject the alleged agreement in 1994, and find that there was no agreement at that stage either to transfer a half share in the beneficial interest from Peter to Tony (as Peter alleged) or (for completeness) from Tony to Peter. It follows that Tony remains the sole beneficial owner and is entitled to have the legal title transferred to his sole name.

### **Laches**

144. Peter pleads in his defence that if Tony would otherwise be entitled to any relief in relation to the properties he should be denied it on the basis of the equitable defence of laches arising from his alleged delay and acquiescence in the arrangements under which the titles have been held since the 1980s. But in order to establish that defence, it is not enough that there has been a significant lapse of time before equitable rights are asserted, or even that there has been a significant delay in asserting rights after a need to do so has become apparent. There must be some additional factor making it inequitable for the claimant now to enforce those rights, see Snell's Equity para 5-011.

145. On the facts as I have found them, there was no need for Tony to take any action to establish the rights he now asserts at any point prior to 2014. Until then, so far as he was aware, the properties in issue were either acknowledged to belong to him notwithstanding the legal title was not vested in him (in the case of 33 and 35 VS) or had been transferred to him at his request (in the case of TOR). He had discovered in or about 2008 that No 35 was not in his mother's name as he had assumed, but on his evidence, which I accept, Peter assured him the property was still his and would be transferred back when Peter's mortgage borrowing had been repaid. He agreed at that stage that Peter could keep the rent from that property, so the fact he did not receive it himself was not any denial of Tony's rights. No such denial occurred in relation to any of those properties until after 2014, and taking matters at their highest any delay from 2014 to the issue of proceedings in 2016 could not found an equitable defence.

146. In some cases it might be inequitable to enforce rights if delay in doing so has meant that evidence is no longer available to resist a claim. There is no doubt in this case that the long passage of time means that much documentation that must have existed can no longer be located. But it is not said that there ever was any direct written evidence of the existence of the alleged agreements as to ownership that could have been produced previously but is now lost, with the possible exception of the 1994 transfer of TOR. It is true that Norah would have been able to give direct evidence of contemporary agreements and discussions but is no longer able to do so. But I have no reason to think her evidence would have assisted Peter rather than Tony, and I am unable to conclude it is now inequitable for Tony to insist on his rights because of her absence, in circumstances when he had no need to do so until at least 2014 and the unavailability of her evidence is at least as much due to Peter's apparent continuing acceptance of Tony's rights until that date as to any failure on Tony's part to have those rights explicitly recognised.

147. I accordingly reject any defence on grounds of laches.

### **The Armstrong Siddeley car**

148. It is accepted that Peter bought this car for cash in about 1978. It is of course personal property and was "delivered" to Peter at the time of purchase, which would operate to vest legal title in him.

149. Tony's case is that he had lent Peter his own Sunbeam Talbot car for the day, and it was when driving that car that Peter saw and agreed to buy the Armstrong Siddeley. Peter paid half the purchase price by selling, without Tony's permission, the Sunbeam Talbot. When he found out about this, Tony acquiesced in the loss of his own car in return for Peter's agreement he would be a joint owner of the Armstrong Siddeley.
150. Peter denies any such agreement. He bought The Armstrong Siddley with his own money, and later bought the Sunbeam Talbot for cash from Tony. Tony resented the fact he subsequently restored the Sunbeam Talbot and sold it at a profit, but there was no agreement to give him any share in the Armstrong Siddeley. He would not have been able to sell Tony's car on a whim as alleged as he would not have had the log book in his possession.
151. It is for Tony to prove the existence of the agreement he relies on. There is again no direct documentary or witness evidence of the making of any such agreement. Insofar as subsequent conduct may be relied on as being consistent with one position or the other, the evidence shows in my judgment that both brothers have contributed to some degree to restoration and other work on the car, and both have used it to some extent and paid outgoings for it, but that overwhelmingly such work and use has been by Peter, and it has been Peter who has for the most part paid the related expenses and been represented as the owner to third parties.
152. Tony is currently the registered keeper of the vehicle, and has at various times been named as the owner in insurance documentation. Peter's evidence is that he agreed these arrangements so that Tony could justify claiming a tax deduction related to the car. Tony denied this purpose, and the evidence does not permit it to be explored further. What can be seen however is that as noted above in early 2016 Tony promised that if Peter would provide the documents to transfer Upper Saxon St and Breedon Drive back to him he would "sort out" the car. In context, I have no doubt this meant he would transfer the registration back, and amounts to an acknowledgment that he had no basis to hold on to it except as leverage.
153. I am not satisfied that Tony has proved the agreement he relies on and find therefore that the Armstrong Siddeley is owned solely by Peter, who is entitled to have the registration transferred back to him.