Neutral Citation Number: [2020] EWHC 3439 (Ch)

Claim No: PT-2018-000094

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: 15 December 2020

Before:

ROBIN VOS
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

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Between:

MR THAIN-MICHEL KLEINHENTZ

Claimant

- and –

(1) MR MARK HARRISON
(2) MR CRAIG ANTHONY WHITE **Defendants**

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MR EDWARD BENNION-PEDLEY (instructed by direct access) appeared for the **Claimant**
the **First Defendant** and the **Second Defendant** appeared in person

Hearing date: 16-18 November 2020

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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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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 15 December 2020 at 10.30am

DEPUTY JUDGE ROBIN VOS:

Introduction

1. The Claimant, Mr Thain Kleinhentz and the First Defendant, Mr Mark Harrison lived together for most of the period between 1990 and 2011. Throughout the hearing, Mr Kleinhentz and Mr Harrison were referred to respectively as Thain and Mark and so I shall do the same in this Judgment.

2. In 2005, Mark purchased a house in Margravine Gardens in his sole name using money provided by his father. When Mark asked Thain to leave in 2011, Thain asserted that he had a beneficial interest in the property. However, on 24 September 2011, Mark and Thain entered into an agreement under which, subject to certain conditions, Mark agreed to pay Thain a minimum amount of £250,000 (the "2011 Agreement"). In return for this, Thain withdrew any claim that he had a beneficial interest in the property.

3. The house at Margravine Gardens was subsequently sold in 2015. Part of the sale proceeds was used to purchase a property in the name of the Second Defendant, Craig White, with whom, by this time, Mark had entered into a civil partnership.

4. Mark has not paid any money to Thain under the terms of the 2011 Agreement as he says that none of the conditions have been satisfied. In his defence he also argued that the agreement was either unenforceable or should be set aside on numerous grounds including lack of consideration, uncertainty, duress, undue influence and incapacity. He no longer relies on these defences but continues to argue that the relevant conditions have not been satisfied so that no payment is due.

5. Thain, on the other hand, says that the conditions were satisfied when Mark received the proceeds of sale of Margravine Gardens or, alternatively, that Mark waived or varied the conditions so that payment became due on receipt of the sale proceeds.

6. The reason that Mr White is a defendant is that Thain asserts that Mark held the proceeds of sale (or at least a relevant part of the proceeds of sale) as constructive trustee for Thain, so entitling him to follow/trace those proceeds into the house which is owned by Mr White and which was funded by Mark. This is important for the

purposes of enforcing any order in Thain's favour as he does not believe that Mark has any other assets out of which such an order could be satisfied.

7. As an alternative, Thain claims that Mr White holds the property as trustee for Mark on the basis of a resulting trust given that Mark provided funds for the purchase. However, having heard the evidence on this point, all parties now agree that the Court should not make any finding in respect of this issue.

8. One unusual feature of this case is that Thain asserts that he and Mark were in a committed relationship whilst Mark denies the existence of any such relationship. It is therefore necessary for me to examine the nature of their relationship, at least to the extent necessary to determine the issues which I have to decide.

Relevant issues

9. The first question I have to decide is whether, although Margravine Gardens was held in Mark's sole name, Thain had a beneficial interest in the property. Thain's case in relation to this is based on the existence of a common intention constructive trust. In examining this question, it will also be necessary to determine whether Thain had a beneficial interest in the previous property which they occupied, a one-bedroom flat in Comeragh Road which was also held in Mark's sole name.

10. Although Thain's primary case is that he is entitled to be paid £250,000 in accordance with the 2011 Agreement which settled his claim to an interest in the property at Margravine Gardens, the question as to whether he had a beneficial interest in that property is relevant should I come to the conclusion (as Mark asserts) that the conditions for the payment of the £250,000 have not been met. The reason for this is that Mr Bennion-Pedley submits on behalf of Thain that, if the conditions for payment have not yet been met, the 2011 Agreement may be of no effect. In this case, he suggests that Thain's disclaimer of any interest he might have had in Margravine Gardens would also be of no effect. Alternatively, he submits that Thain's disclaimer was conditional on being paid so that, if he has not yet become entitled to be paid, the disclaimer has not taken effect.

11. The next issue is the interpretation of the 2011 Agreement and, in particular, whether the conditions for the payment of the £250,000 have been met as a result of the receipt by Mark of the sale proceeds of Margravine Gardens.

12. Assuming the sale of Margravine Gardens and the receipt of the proceeds by Mark did not trigger the obligation to make the payment of £250,000 to Thain, I will need to decide whether Mark and Thain agreed to vary the 2011 Agreement so that the obligation to make the payment nonetheless became due following receipt by Mark of the proceeds of sale of Margravine Gardens.

13. If I find that Thain is entitled to the payment of £250,000, the final point which needs to be determined is whether Thain had an equitable interest in the proceeds of the sale of Margravine Gardens which would entitle him to follow/trace those proceeds into the property owned by Mr White. In this respect, Thain puts his case on the basis of proprietary estoppel.

Background facts

14. Before considering these issues, it is convenient to set out the key events in relation to which there is no dispute, other than possibly the precise date when those events occurred. In this respect, at the end of the hearing I invited the parties to provide me, for reference purposes, with a chronology setting out the evidence from both parties as to the dates of the key events. The chronology which has been provided is helpful. However, I should make it clear that I have based my findings in relation to any dates when events have taken place solely on the evidence which was available to me at the hearing.

15. Thain is South African. He arrived in England from South Africa in August 1989. He and Mark met at a gay nightclub in November 1989.

16. Thain moved into Mark's one-bedroom flat in Morpeth Terrace in February 1990. The flat was owned by Mark's father.

17. In May 1991 Thain married a German lady, called Kirsten Bragard as he was hoping to be able to get a German passport.

18. In 1992, the flat at Morpeth Terrace was sold and Thain, Mark and Kirsten moved to a two-bedroom flat in Beaufort Street.

19. Thain was unsuccessful in obtaining a German passport and he and Kirsten divorced in around June 1993.

20. At around this time, Thain and Mark moved out of Beaufort Street. Mark moved to a rented one-bedroom flat at 10 Redcliffe Gardens. Thain moved to a property in Ifield Road. However, after about three months, Thain moved into 10 Redcliffe Gardens with Mark.

21. After Thain moved into Redcliffe Gardens, Thain's mother came to visit from South Africa and met Mark for the first time.

22. At some point in 1994, Thain had to leave the UK due to his immigration status and return to South Africa. Mark visited him in South Africa for two weeks in February 1995, staying with Thain's parents.

23. In May 1995, Thain came back to the UK on a six month visitor's visa, returning to South Africa in November 1995. He came back to the UK again at some point in 1996, returning to South Africa in September 1996.

24. In 1997, Mark moved to Chicago for work. At some point in 1997, Mark sent money to Thain to enable him to come and visit Mark in Chicago, where he stayed for a month before flying back to South Africa.

25. Mark returned to London in March 1998, renting another one-bedroom flat, this time at 98 Redcliffe Gardens. Thain joined him there, coming back to London from South Africa in April 1998.

26. In August 1998, Thain and Mark consulted immigration lawyers about the possibility of obtaining permission for Thain to remain in the UK as Mark's partner given that the rules had recently been changed to make this possible for same sex relationships.

27. Mark and Thain moved to a one-bedroom flat in Comeragh Road in March 1999. Mark purchased the flat for about £160,000 using money given to him for the purpose by his father.

28. In April 2000, Thain applied for indefinite leave to remain in the UK on the basis of his relationship with Mark. This was granted on 2 April 2002.

29. In September 2002, Mark purchased the property at Margravine Gardens for £550,000. The purchase price was funded from the £250,000 sale proceeds of Comeragh Road with the balance again being provided by Mark's father.

30. Mark was diagnosed with HIV in early 2005.

31. In 2007, Thain met Darren Cooper who moved into Margravine Gardens sometime after he was made redundant in November 2007.

32. Mark met the second defendant, Craig White, in 2010. Mr White moved into Margravine Gardens in June 2011.

33. Around this time, Mark's father told him that he was planning to give Mark a significant amount of money as part of his inheritance tax planning. However, whilst Mark was on holiday with his parents in July 2011, Mark's father told him that he would not give him the money whilst Thain and Mr Cooper were living at Margravine Gardens and so, at the end of July 2011, Mark emailed Thain asking them to move out.

34. As a result of this, Thain instructed solicitors, claiming an interest in the property. Various discussions took place with a view to reaching a settlement. As part of these discussions, the solicitors produced a draft agreement. However, that agreement was not signed as Mark's father was paying his solicitor's fees and Mark did not want his father to know that he had agreed to pay anything to Thain.

35. Thain initially refused to move out but did eventually move out on 9 or 10 September 2011. Mark signed a handwritten agreement on 11 September 2011 agreeing to make a payment to Thain subject to similar conditions to those contained in the 2011 Agreement. On 24 September 2011, Mark and Thain both signed the 2011 Agreement in front of a witness. This agreement contained some additional provisions to those contained in the agreement Mark signed on 11 September 2011and was typed rather than being handwritten. Mark's solicitor was unaware of this agreement although Thain had shown it to his solicitor. The terms of the Agreement were as follows:

> "I, Mark Harrison, of 5 Margravine Gardens, Barons Court, London W6 8RL wish to help Thain-Michel Kleinhentz of 5 Margravine Gardens, Barons Court, London W6 8RL to put down a deposit, or preferably be able to buy him a house of his own. This is totally dependent on me receiving unmonitored or controlled funds from my father or receiving my Inheritance, whichever is earlier, so I can provide for him a deposit or preferably buy him a property to make him secure and stable in terms of accommodation that I can afford.
>
> I will give to Thain a minimum total of £250,000 when I receive sufficient funds as stated above. If I were to predecease Thain then it is my wish that this will be carried over and settled by my Estate. I request that the personal representatives of my Estate do pay to Thain a minimum of £250,000 or to buy him a house that reflects the standards of living we have enjoyed.
>
> I promise to Thain that I shall take out a will to reflect that this is my intention within 28 days from the date of the signing of this document and that I will not change my will until I have provided this to Thain.
>
> This document shall be governed by and construed in accordance with the law of England and Wales."

36. On 29 September 2011, both Thain and Mark wrote to their respective solicitors instructing them to terminate the dispute on the basis that neither would make a claim against the other. On the same day, Mark's solicitor wrote to Thain's solicitor as follows:

> "We have been instructed by our client to write to you to confirm that further to their recent discussion and agreement, our respective clients do not intend to proceed with the draft agreement. Mark will take no legal action against Thain and likewise Thain confirms that he has no interest in Mark's property and no intention to make a claim in this regard.

> Please confirm that you have received similar instructions from your client so that we might close our files in this matter."

37. On 17 October 2011, Mark signed a new will including a legacy of £250,000 to Thain as required by the 2011 Agreement. On the same day Thain's solicitor replied to the letter from Mark's solicitor as follows:

> "Thank you for your letter dated 29 September 2011.
>
> We confirm that we have received instructions from our client and following recent discussions and agreement our client's instructions accord with your letter."

38. Towards the end of 2014, Mark decided to sell Margravine Gardens as he was in financial difficulties. The property was put on the market and a sale was eventually completed at the end of May 2015. The sale proceeds were just over £1.2million.

39. Thain contacted Mark, Mark's sister/brother-in-law and his parents on a number of occasions after this to try and obtain payment of the money which he considered was due. In 2016, Thain consulted lawyers who wrote to Mark seeking payment which Mark refused. Nothing further happened until these proceedings were started in early 2018.

The Witnesses

40. I shall record any relevant findings of fact in my discussion of the various issues below. However, I should say something about my assessment of the witnesses who gave oral evidence.

41. Not surprisingly, the majority of the evidence was given by Mark and Thain. I have approached the evidence given by both of them with some caution. Partly this is because the evidence relates to events which took place between 10-30 years ago and, with the best will in the world, memories of such events can become unreliable and need to be looked at carefully in the light of the other available evidence. However, it is also clear to me that both Mark and Thain have presented facts in a way in which they no doubt consider supports their respective cases but which do not reveal the full picture or, in some instances, conflict with documentary evidence.

42. By way of example, Thain asserts that he discussed the possible sale of Margravine Gardens with Mark in November 2014 and that this is when the decision to sell was taken. However, it is quite clear from the documents that Mark had contacted estate agents and received advice with a view to a sale in October 2014.

43. An example from Mark's evidence is that he said that Thain would not move out of Margravine Gardens until Mark had signed an agreement to make a payment to him. However, it was agreed that Thain did in fact move out on 9 or 10 September 2011 which was before Mark had signed any agreement.

44. I also bear in mind that, not surprisingly as Mark was representing himself, Thain was only subject to limited cross examination and so his evidence was not tested as thoroughly as it might have been had Mark been represented.

45. Thain was of course represented and so Mark was subject to a much more rigorous cross examination. This did not undermine Mark's overall credibility but the way in which he answered some of the questions added to the impression that Mark, in an effort to try and tailor his evidence to best support his case was not being as straightforward as he might be in answering some of the questions put to him.

46. As far as Mark's evidence is concerned, I must also record an important point in relation to his defence. As I have already mentioned, Mark originally resisted the claim partly on the basis that the 2011 Agreement was invalid or could be set aside for various reasons including duress, undue influence and lack of capacity. Having dropped those defences, he accepted that some of the statements in his defence (which was supported by a statement of truth) were inaccurate. His explanation was that the solicitors who he had originally consulted had advised him to put forward as many different lines of defence as possible. This does not however excuse the pleading of facts in a statement of case which are not true. This is a further reason why I have approached Mark's evidence with some caution.

47. The other witnesses who gave evidence at the hearing on behalf of Thain were his partner, Darren Cooper and two friends, Michael Christoforidies and Jason (known as Rob) Williams. Their evidence was much more limited and, again, there was little cross examination. The evidence they gave was straightforward but of course has to be seen in the context of the other available evidence.

48. There are three other individuals who have provided witness statements in support of Thain's case, Jonathan Clein, Lance Drake and Simon Eaton-Walker. Mark chose not to cross examine these witnesses and so I have taken their evidence into account as it stands. That does not necessarily mean I have accepted the evidence each of them has given as proof of any facts on its own as it must of course be weighed up against all the other available evidence.

49. Thain's mother, Mrs Rene Kleinhentz also provided a witness statement which she signed on 24 December 2019. Sadly, she passed away earlier this year and so her evidence has not been tested by cross examination. Although her evidence is important and I have had regard to it, the lack of cross examination has inevitably affected the weight which I am able to place on her evidence.

50. Mr White came across as doing his best to answer the questions put to him. I have no hesitation in accepting his evidence although, for the most part, it does not address the key issues which I have to decide.

51. Mark's brother-in-law, Peter Gillingwater also gave evidence. I have significant concerns in relation to Mr Gillingwater's evidence. His witness statement contained some allegations in relation to a visit made by Thain and Mr Cooper to Mr Gillingwater's house in June 2017. In his oral evidence, Mr Gillingwater professed not to be aware of the allegations contained in his witness statement. Later on in his oral evidence, Mr Gillingwater then said that he did remember the events which were the subject of the allegations. It subsequently transpired that Mr Gillingwater had signed a previous witness statement which did not contain these allegations.

52. In addition to this, Mr Gillingwater did not give straightforward answers to the questions which he was asked. As a result of this, I have been able to place very little weight on the evidence which Mr Gillingwater has given.

53. The final witness on behalf of Mr Harrison was Edward Kingston-Jones. The answers Mr Kingston-Jones gave to some of the questions asked in cross examination were somewhat vague and, at times, gave the impression that he was simply saying what came into his head rather than his actual recollection of the events in respect of which he was being asked. I have not therefore placed a great deal of weight on Mr Kingston-Jones' evidence.

54. I should record that Mr Kingston-Jones contacted me after the hearing to say that there had been a muddle and the wrong draft of his witness statement had been used. However, given that he had confirmed that the contents of the witness statement which was before the Court were true when he started his oral evidence and was cross examined on the basis of that witness statement, it is that evidence which I have taken into account in reaching my decision. However, as I have said, I have in any event placed relatively little weight on what he had to say.

Burden of proof

55. As the claimant, the burden is on Thain to show that, where there is a dispute as to the facts, it is more likely than not that his version of events is correct. In reaching my conclusion on the facts, I must take into account all the evidence which has been put before me, including not only what the witnesses have said but also what the documents show.

The nature of Mark and Thain's relationship

56. Thain described his relationship with Mark as a committed relationship, albeit one where each understood that the other would, from time to time, see other people. This, he suggests, is not unusual in same sex couples. In his submissions, Mr Bennion-Pedley characterised the relationship as close and loving

57. Mark, on the other hand, denies that there was any romantic relationship by which he meant one where the other person could be described as a boyfriend and the relationship would ideally be exclusive rather than friends who from time to time slept with each other. Instead, Mark says that he and Thain were good friends who cared about each other but who also cared about other friends.

58. It is perhaps invidious to try and categorise a complex relationship such as that which existed between Mark and Thain. In many respects, it is not necessary for me to come to a precise categorisation given that the principal relevance of their relationship is its impact on the likelihood of Mark and Thain agreeing that Thain should have an equal interest in the houses which Mark subsequently purchased in the absence of any significant (or, in Mark's case, any) financial contribution from Thain.

59. Taking all of the evidence into account, it is clear to me that Mark and Thain had a long term, committed relationship which went well beyond good friends. That relationship started in 1990 and continued until at least 2005, possibly longer, but had certainly come to an end by the time Mr Cooper moved into Margravine Gardens.

60. The evidence on this aspect is voluminous and I will not try and mention everything which has been said but instead will highlight the main reasons for my conclusion.

61. Throughout the relevant period, Mark and Thain lived together with the exception of relatively brief periods when Thain was in South Africa due to his immigration status, Mark was in the US as a result of his job and for three months in 1993 when they decided to go their separate ways before Thain moved back in with Mark.

62. Mark attempts to portray Thain as a lodger, paying rent and contributing to household bills. However, even on Mark's case, Thain did not start paying rent or contributing to bills until he found a permanent job in around 2000. This does not therefore explain their shared occupation of five separate properties prior to that date and is inconsistent with Mark's assertion (supported by Mr Gillingwater) that any relationship he and Thain may have had came to an end by the time Mark returned to London from the US in March 1998.

63. There was much discussion about the sleeping arrangements in the various properties which were occupied by Mark and Thain. The first property, Morpeth Terrace was a one bedroom flat. Although Mark's defence states that he and Thain did not habitually share a bed or a bedroom, there is no mention of this in Mark's witness statement and no explanation of what the sleeping arrangements were if Thain did not share the bedroom. My conclusion based on this is that they did share a bedroom.

64. The next property was a two bedroom flat in Beaufort Street where Mark, Thain and Kirsten (at that time married to Thain) all lived. Thain's evidence is that Mark and Thain shared one bedroom whilst Kirsten had the other. Mark however says that he had one bedroom and Thain had the other (the inference being that Thain shared this room with Kirsten). He denies that he and Thain shared a bedroom in that property.

65. However, Mark is clear that Thain's marriage to Kirsten was purely a marriage of convenience in an attempt for Thain to try to get an EU passport. Mark also accepts

that, in the early years, he and Thain slept together on a regular basis. Based on this, it is in my view more likely than not that Mark and Thain shared a bedroom at Beaufort Street.

66. The next property in which Mark and Thain lived, 10 Redcliffe Gardens, was also a one bedroom flat. Again, although Mark states in his defence that he and Thain did not habitually share a bed or a bedroom, there is no suggestion in Mark's witness statement that he and Thain did not share that bedroom nor is there any explanation of where Thain slept if it was not in the same bedroom. On this basis, I think it is more likely that they did share the bedroom.

67. The property in which Mark and Thain lived when Mark returned from the US (98 Redcliffe Gardens) was also a one bedroom flat. Mark suggests that Thain slept on a sofa bed in the living room. He also suggested that this was the case in relation to the flat at Comeragh Road which, again, only had one bedroom. However, in cross examination he accepted that, to start with there was a Chesterfield sofa in the living room at Comeragh Road and that a futon was only purchased when Thain's mother, Rene came to stay in 2000. Based on this, I prefer Thain's evidence that he and Mark did in fact share a bedroom in both of these properties.

68. Both Mark and Thain agree that they had separate bedrooms in Margravine Gardens which was a three bedroom property. Thain explains this on the basis that he and Mark had different daily patterns (with Thain getting up earlier than Mark) but also on the basis that they slept better separately. Whatever the reason, I do not accept that this indicated that they were no longer in a committed relationship given the other factors which I shall refer to.

69. Mark draws attention to a succession of other partners who, he says, Thain spent time with. Thain of course played down his relationship with these individuals, describing them as just friends, although accepting that he slept with some of them. Mark referred to two in particular, Mike Makinson in the mid-1990's (although there is no evidence as to the period over which Thain and Mike Makinson saw each other) and Keith Pasea who Thain saw between 1999-2002.

70. Mark's evidence is that Thain went on a number of holidays with Keith. Some support for Mark's position is provided by Mr Kingston-Jones who states that Keith

was introduced to Mr Kingston-Jones as Thain's boyfriend and recounts an occasion when he says Thain came round to his house acting very aggressively and accusing Mr Kingston-Jones of making sexual advances towards Keith. Thain's version of events is that he was complaining not about Mr Kingston-Jones making sexual advances towards Keith but instead was upset about Mr Kingston-Jones supplying Mark with drugs.

71. The evidence also contains some photographs of Thain and Keith together which, in my view, give a clear impression of a relationship which goes beyond friendship.

72. I have concluded that it is more likely than not that Thain did have relationships with other men. Some of these were relatively short term whilst others, such as the relationship with Keith, lasted longer. It does not however follow that Thain ceased to have a meaningful relationship with Mark. Based on the evidence as a whole, I believe that he did. Certainly, Mark was a constant in Thain's life throughout the relevant period. His relationships with other men were relatively transient. The fact that Mark and Thain were free to see other men was simply part of the understanding which Thain and Mark had. It is notable that Mark admitted in cross examination that he had slept with Keith. The nature of Thain's other relationships does however have some bearing on the quality of his relationship with Mark.

73. Thain also relies on his application for indefinite leave to remain in the UK as evidence of his long-term relationship with Mark. Both parties signed papers for the Home Office confirming their relationship. Mark's explanation for this is that, as a friend, he agreed to help Thain with his application for leave to remain in the UK and that this was the basis on which he was prepared to state in the documents that he and Thain were in a relationship akin to marriage.

74. To my mind, the timing and circumstances of Mark's and Thain's return to the UK in 1998 sheds light on this. Thain's evidence is that Mark sent him money in 1997 so that he could go and visit Mark in Chicago for a month. Mark does not deny this. Thain then says that he and Mark agreed to return to London to live together. Mark arrived back in London in March 1998 and found a flat to rent. Thain joined him in April 1998. In early August 1998, Mark and Thain obtained advice from the

immigration lawyers who ultimately made Thain's application in 2000 with a view to obtaining permission to remain in the UK.

75. Whilst Mark says that his return to the UK had nothing to do with Thain, the combination of circumstances makes it much more likely that the return to the UK was indeed planned and that obtaining permission for Thain to remain in the UK on the basis of their relationship was all part of that plan. The fact that Mark and Thain planned to return to the UK to be together is supported by Thain's mother's statement as well as by the evidence given by Rob Williams. I do not therefore accept Mark's evidence that he only participated in the application for indefinite leave to remain in the UK as something he was just doing to help out a friend. The reality was that Mark and Thain continued to be in a committed relationship.

76. There were a number of postcards and greetings cards which also shed light on the nature of Thain's and Mark's relationship. Some of these are written by Thain or Mark; others are written by third parties.

77. There is for example a postcard written from Thain to Mark in January 2002 the contents of which can only be explained on the basis of a relationship which goes beyond friendship.

78. Perhaps more telling are cards sent jointly to Mark and Thain by Thain's mother and Mark's sister. Two of these are "New Home" cards and so are likely to have been written in 2002 or 2005. One is a Christmas card written in 2006 by Thain's parents and signed "Dad and Mom". It is clear from these cards that both Mark's and Thain's families saw them as a couple at this time.

79. Mark asserts that he only ever went abroad with Thain on three occasions. The first was a visit to Monaco (where Mark's parents lived), the second was the visit to Thain's parents in South Africa in 1995 and the third was an occasion when Thain was in Greece and had his money stolen and Mark had to go and rescue him. Against this, he says Thain has taken many overseas holidays with other men. This is not denied by Thain but I accept his explanation that this was simply part of the nature of Mark and Thain's relationship.

80. Thain accepts that his relationship with Mark started to change after Mark was diagnosed with HIV in 2005. He says he became more of a carer to Mark. Indeed, his evidence is that he gave up his job in 2005 to look after Mark. Mark did not deny this.

81. By the time Mr Cooper moved into Margravine Gardens, it seems clear that Mark and Thain were no longer committed to each other. They still cared for each other but they had moved on.

82. Based on all of this, my conclusion is that Mark and Thain had a committed and loving relationship from 1990 until at least 2005. In many ways, it was not akin to marriage, at least as marriage is normally understood, given their acceptance that each of them would be free to see other men even, on occasions, on more than a short-term basis. At some point between 2005 and 2008, the commitment ended and their relationship evolved into one which was more like good friends but who still cared very much for each other.

Did Thain have a beneficial interest in Comeragh Road/Margravine Gardens?

83. Mr Bennion-Pedley submits that Thain was entitled to an equal share of both, Comeragh Road and Margravine Gardens on the basis of a common intention constructive trust.

Common Intention Constructive Trust – Legal Principles

84. Mr Bennion-Pedley referred me to Lewin on Trusts (20th edition) which contains at [10-062] a convenient summary of the nature of a common intention constructive trust:

> "a constructive trust arises in connection with the acquisition by one party of a legal title to property whenever that party has so conducted himself that it would be inequitable to allow him to deny to another party a beneficial interest in the property acquired. This will be so where (i) there was a common intention that both parties should have a beneficial interest either at the date of acquisition or at a later date and (ii) the claimant has acted to his

> detriment in the belief that by so acting he was acquiring a beneficial interest. Some element of bargain, promise or tacit common intention must be shown in order to establish such a trust."

85. Lewin goes on to set out at [10-063] the questions which must be addressed when a claim is made by a person to displace the presumption that the beneficial ownership of property follows the legal ownership. These are as follows:

    85.1 Does the case fall within the domestic consumer context, such that the common intention doctrine applies?

    85.2 Is there evidence of an actual common intention, in the form of an agreement, arrangement or understanding between the parties that the beneficial ownership should not follow the legal ownership, either at the date when the property was first acquired or at some later date?

    85.3 In the absence of such a common intention, can an agreement, arrangement or understanding to this effect be inferred from the parties' conduct?

    85.4 Has the claimant relied to his detriment on the common intention relied upon?

    85.5 If there is an actual common intention, does it extend, either expressly or by inference, to the shares in which the property is to be beneficially owned?

    85.6 If the common intention does not extend to the shares in which the property is to be beneficially owned, what is a fair share having regard to the whole course of the parties' dealing in relation to the property, and to both financial contributions and other factors?

86. There was no dispute that these are the principles which should be applied and no detailed submissions were made in relation to the authorities from which the principles derive. At a general level, I accept that the summary in Lewin is accurate.

87. In relation to the first question, one issue which arises is whether the relationship between Mark and Thain is sufficient to bring into play the common intention constructive trust principle as opposed to, for example, considering the resulting trust

principle (which focusses primarily on the respective financial contributions of the parties). I should say at once that neither party suggested that the question should be approached on the basis of anything other than a common intention constructive trust. However, given my conclusion that, although Mark and Thain had a close and committed relationship, it might be seen as falling short of being one which was akin to marriage, it is a point which I have considered.

88. In *Stack v Dowden* [2007] 2 AC Lord Walker said at [31] that:

> "In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the names of one or two legal owners) the resulting trust should not in my opinion operate as legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or kind) happen to be reflected in the parties' common intention."

89. However, in the specific context of determining the extent of the beneficial interest of the parties where legal ownership of the property is held in joint names (as was the case in *Stack v Dowden*), Baroness Hale refers at [58] to the wider concept of "the domestic consumer context". Lord Neuberger goes further, concluding at [107] that:

> "while the domestic context can give rise to very different factual considerations from the commercial context, I am unconvinced that this justifies a different approach in principle to the issue of the ownership of the beneficial interest in property held in joint names. In the absence of statutory provisions to the contrary, the same principles should apply to assess the apportionment of the beneficial interest as between legal co-owners, whether in a sexual, platonic, familial, amicable or commercial relationship."

90. Whilst expressing no view on whether it should extend to a commercial context, I have no doubt that the search for the possible existence of a common intention constructive trust is the right way of determining in this case whether Thain had a beneficial interest in the properties and, if so, the extent of that interest. I note in passing that this is consistent with the decision of the Court of Appeal in *Gallarotti v*

Sebastianelli [2012] EWCA Civ.865 where the common intention constructive trust principle was applied to a property held in the sole name of one of two close friends who both occupied the property.

91. Thain's case is that, at the time the properties were purchased, there was an express agreement that Thain and Mark would have an equal beneficial interest. Any contributions or subsequent conduct is relied upon only as supporting evidence of the existence of this agreement. Mr Bennion-Pedley confirmed that he does not ask me to infer the existence of a common intention from these other factors. In the circumstances, I do not need to consider the questions at 85.3 and 85.6 in the list suggested by Lewin on Trusts set out at paragraph 85 above.

Was there an agreement between Mark and Thain in relation to the ownership of the properties?

92. Although the issue is whether Thain had a beneficial interest in Margravine Gardens, the question as to whether he had a beneficial interest in Comeragh Road is clearly relevant to the existence of any agreement in relation to the beneficial ownership of Margravine Gardens.

93. Looking first at Comeragh Road, Thain's evidence is that Mark told Thain that, although the property would have to be in Mark's name alone (because the money was coming from Mark's father and Mark's father would insist on Mark being the sole owner) it would be "our house". He says that Mark reassured him that when Mark's father died, he would put the property into both of their names.

94. Thain's mother supports this in her witness statement, recording that Mark told her that "it's going to be our home" and that it was only going to be in his name because his father insisted.

95. Mr Bennion-Pedley also referred to Mr Christoforidies' evidence that, in the context of a conversation at a party about doing some work to the house, Mark said something along the lines of "well this is your house too".

96. Jonathan Clein records in his evidence that Thain told him that he had contributed to the running of the flat, with the understanding that he was entitled to a share of its value.

97. Lance Drakes's evidence is that Thain told him that he had contributed financially to the purchase of both Comeragh Road and Margravine Gardens. Rob Williams also refers in his evidence to Thain telling him that he had borrowed money to put into both properties.

98. As far as supporting evidence is concerned in relation to Comeragh Road, Mr Bennion-Pedley relies principally on the fact that Thain's evidence is that he borrowed £3,000 from a friend, Charles Schmulian which was paid to Mark as a contribution to the purchase price.

99. Thain does however also mention in his witness statement that, when they moved into Comeragh Road, he paid the gas, water and council tax which were in his name and that he also gave Mark £400 per month in cash to put into their joint bank account.

100. Turning to Margravine Gardens, Thain asserts that Mark reassured him that the property belonged to both of them and that when his father died, Mark would put the house in both of their names.

101. Again, this is supported by Thain's mother who recalls Mark reassuring her that the property was as much Thain's as his.

102. In terms of supporting evidence, Thain says in his witness statement that he and Mark agreed that Mark would take out a loan for approximately £17,000 to pay for moving costs and solicitor's fees but which Thain would repay by making payments of £300 a month in cash.

103. Thain also refers to a loan which was taken out in 2008 to carry out some renovations which Thain says he also paid back. In addition, he mentions other, more minor, works which were carried out with the costs split equally between him and Mark.

104. After the move to Margravine Gardens, Thain says that he continued to pay council tax, electricity and water bills. In addition, Mr Cooper states that he paid Mark £400 per month in cash after he moved in on top on the money paid by Thain.

105. In his oral evidence, Thain referred to the loan relating to the purchase of Margravine Gardens as being around £20,000 with the loan for improvements in 2008 being around £17,000. These figures are referred to in draft particulars of claim which were sent to Mark in 2016. The final particulars of claim do not mention a figure for the loan to pay the expenses of the move to Margravine Gardens but do refer to a loan of £17,000 in 2008 relating to improvements.

106. Thain also gave oral evidence about the monthly payments he was making to Mark. He said that he was paying Mark £500 a month, of which £300 related to the repayment of the loan taken out to pay the moving expenses in relation to Margravine Gardens, and £200 was for additional bills. He confirmed that the £400 per month in cash paid by Mr Cooper was on top of the £500 which Thain was paying to Mark. In re-examination, Thain stated that the payments of £500 per month started in 2006. There was no mention of the £400 per month which he had said in his witness statement he had been making to Mark since the purchase of Comeragh Road.

107. On the question as to whether there was any agreement that Thain should have a beneficial interest in either property, Mark's evidence is directly contrary to Thain's. He says he never made any assurances that Thain should have an interest in the property nor that he told Thain that the only reason the property was in his sole name was because his father would insist on it. In his oral evidence Mark recalled a conversation when Thain asked Mark for reassurance that Mark would never throw him out of the property. Mark says that his response was to say that he could not say what would happen in the future but that he had no intention of throwing him out.

108. As far as the various contributions/payments are concerned Mark's evidence was again very different from Thain's.

109. In relation to the £3,000 which Thain says he contributed to the purchase of Comeragh Road, having borrowed that money from Charles Schmulian, Mark says that there was no such contribution. He says there was a loan from Mr Schmulian at the time they lived in Morpeth Terrace (which caused problems with Mark's father as his father was the owner of the property) but not when Comeragh Road was purchased.

110. In relation to the monthly payments, Mark's evidence was that Thain started paying approximately £300-£350 per month when he got a full-time job in 2000 as well as making contributions to the utility bills. He says that this carried on after the move to Margravine Gardens and that the payments had nothing to do with any loan. He confirmed that he did have some personal borrowings at the time Margravine Gardens was purchased but that this had nothing to do with the expenses of moving to Margravine Gardens and that the loan was paid off out of his own funds.

111. Mark also denies the existence of a loan of about £17,000 for renovations in 2008. He says there were two loans of approximately £2,000 and £4,000 (which are referred to in his bank statements) and which, again, he paid off. Although Thain was giving him money, Mark says that this was effectively rent and not a contribution resulting from any agreement that Thain should have a beneficial interest in either of the properties.

112. Mark accepts that Thain started paying £500 per month rather than £300/£350 but says that this increase was as a result of Mr Cooper coming to live in the property and, again, had nothing to do with any loans. Mark denies receiving £400 per month from Mr Cooper in addition to the £500 paid by Thain.

113. As both properties were held in Mark's sole name, the burden is on Thain to displace the presumption that Mark is also the sole beneficial owner (see for example Lord Walker in *Jones v Kernott* [2012] 1 AC at [17]).

114. Based on the evidence available, I have a difficult task. As Lord Walker said in *Jones v Kernott* [2012] 1 AC at [36]):

> "there will continue to be many difficult cases in which the court has to reach a conclusion on sparse and conflicting evidence. It is the court's duty to reach a decision on even the most difficult case."

115. In his skeleton argument, Mark draws attention to the decision of the House of Lords in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107. Lord Bridge stresses the need to distinguish between cases where it is shown that there is an express agreement that a property should be shared beneficially and one where the court can only infer a

common intention from the subsequent conduct of the parties saying at [132E-133A] that:

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.
>
> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

116. That case is one which has some similarities to the present. A husband and wife decided to purchase a property as a home for themselves and their children. The money was to come from the husband's family trust but the trustee would only release the funds if the property was held in the husband's sole name. The wife claimed that, before the purchase took place, she and her husband had agreed that they would own the property jointly.

117. Lord Bridge makes it clear that, in these circumstances, the claimant has a high hurdle to overcome in order to establish that they have a beneficial interest in the property saying at [128C-F] that:

> "Since Mr Rosset was providing the whole purchase price of the property and the whole cost of its renovation, Mrs Rosset would, I think, in any event have encountered formidable difficulty in establishing her claim to joint beneficial ownership. The claim as pleaded and as presented in evidence was, by necessary implication, to an equal share in the equity. But to sustain this it was necessary to show that it was Mr Rosset's intention to make an immediate gift to his wife of half the value of the property acquired for £57,500 and improved at a further cost of sum £15,000. What made it doubly difficult for Mrs Rosset to establish her case was the circumstance which was never in dispute, that Mr Rosset's uncle, who was trustee of his Swiss inheritance, would not release the funds for the purchase of the property except on terms that it was to be acquired in Mr Rosset's sole name. If Mr and Mrs Rosset had ever thought about it, they must have realised that the creation of a trust giving Mrs Rosset a half share, or indeed any other substantial share, in the beneficial ownership of the property would have been nothing less than a subterfuge to circumvent the stipulation which the Swiss trustee insisted on as a condition of releasing the funds to enable the property to be acquired.
>
> In these circumstances, it would have required very cogent evidence to establish that it was the Rossets' common intention to defeat the evident purpose of the Swiss trustee's restriction by

> acquiring the property in Mr Rosset's name alone but to treat it nevertheless as beneficially owned jointly by both spouses."

118. Lord Bridge suggests (see paragraph 115 above) that the finding of an express agreement or arrangement can only be based on evidence of express discussions between the parties. However, where the evidence of the parties is diametrically opposed and the court must favour one party's version of events over the other, I do not understand Lord Bridge to be suggesting that it is impermissible for the court to take into account other evidence, including conflicting evidence as to the subsequent conduct of the parties, in determining which version of events should be accepted.

119. As I have already said, I have approached the evidence of both Thain and Mark with some caution and so have looked at it in the light of the other available evidence. Based on this, I am not satisfied that there was any agreement at the time of the purchase of either property that Thain should have a beneficial interest in the property.

120. I have little doubt that Mark purchased both of the properties with the intention that the properties should be a home both for himself and for Thain. However, that is very different to an agreement that Thain should have a beneficial interest in the properties.

121. In his submissions, Mark referred to the comments of Lord Millett in *Otway v Gibbs* [2000] UK PC 39 where he said at [18]:

> "cohabiting couples, like married couples, speak of 'our home' and 'our money' meaning 'the home where we live' and 'the money we live on' without distinguishing between what belongs to one or the other or both."

122. In the same vein, Mark referred to a similar note of caution sounded by his Honour Judge Norris QC in *Churchill v Roach* [2002] EWHC 3230 (Ch) that:

> "there are clear dangers in treating social chit chat of this sort as equivalent to a declaration concerning the legal consequences of the property ownership as it stood in March 1999 and I do not so treat it."

123. I would certainly put the statement made by Mr Christoforidies where he recalls Mark saying "well this is your house too" (or words along those lines) in this category. Similarly, the comments Mark is said to have made to Thain's mother (which Mark denies) and what Thain's friends remember him saying to them, whilst relevant, provide little assistance in reaching a conclusion as to whether Mark and Thain had reached an express agreement as to the beneficial ownership of the properties.

124. As far as any discussions between Mark and Thain at the time the properties were purchased are concerned, I think it more likely than not that, as accepted by Mark, there was some general discussion as to what security Thain should have. However, contrary to Thain's evidence, I am not persuaded that any assurances which were given amounted to an agreement that Thain should have a beneficial interest in the property.

125. The main reason for this is that Thain's version of the other events which he says supports the existence of such an agreement are both internally inconsistent and inconsistent with what little documentary evidence is available. This has affected the weight I am able to give to Thain's evidence of the agreement which those other factors are said to support, particularly in circumstances where Mark's and Thain's relationship, whilst committed, was not exclusive, and Mark is said to have made a gift to Thain of half of each property against the express wishes of Mark's father, who was providing the purchase price.

126. Taking first the contribution of £3,000 which Thain says he made to the purchase of Comeragh Road, his oral evidence was that he borrowed this money from Mr Schmulian and that it was paid to Mark as a contribution at the time the purchase took place. The question as to whether this contribution was made at the time of the purchase (as opposed to subsequently) was put to Thain twice in cross examination and he confirmed that it was. However, Thain's particulars of claim state that £3,000 was paid in three instalments in May 1999, December 1999 and March 2000 (Comeragh Road having been purchased in March 1999).

127. The documentary evidence contains references to a loan secured against Morpeth Terrace (which, it will be recalled, was owned by Mark's father) and that Mr Schmulian was involved in whatever arrangements had been put in place. Based on

this, I prefer Mark's evidence that, to the extent that there was any loan from Mr Schmulian, it related to Morpeth Terrace and had nothing to do with Comeragh Road.

128. Mark's evidence in relation to the regular payments made by Thain is also more consistent with the documentary evidence available. This includes Mark's bank statements from 2005-2012. These show that, in 2005, Thain was paying Mark approximately £300 per month (although he did not make payments every month). The amounts became much more regular and increased to £500 per month at some time between August 2007-January 2008 (the bank statements for August – December 2007 are missing). It will be recalled that Mr Cooper moved into Margravine Gardens sometime after he was made redundant in November 2007.

129. There is conflicting evidence as to when Mr Cooper moved in to Margravine Gardens. In his defence, Mark states that it was in late 2007. Thain did not take issue with this in his reply which confirms that Mr Cooper was made redundant in November 2007 and moved into Margravine Gardens "at around that time". Mark's witness statement also puts the date as "late 2007". Thain and Mr Cooper both say in their witness statements that Mr Cooper came to Margravine Gardens in February or March 2008.

130. Given that it is common ground that Mr Cooper was made redundant in November 2007, it is in my view more likely that the increase in the payments made by Thain related to Mr Cooper's occupation of the Margravine Gardens. There is no other obvious explanation for the increase in the payments given that Mark's bank statements show that the loans which were taken out by him were in May 2007 and September 2008 and the £500 payments only started at some point between August 2007-January 2008 – i.e. the increase did not coincide with Mark taking out either of the loans.

131. The other piece of evidence available in relation to the payments made by Thain is a joint bank statement which was part of the supporting evidence for Thain's application for leave to remain in the UK. This shows a credit of £300 in August 2001 which, again, is consistent with Mark's evidence.

132. Mark's bank statements also show that, in February 2005 (when the available bank statements begin), he was making monthly repayments in respect of a personal loan of just over £600 per month. Again, this is inconsistent with Thain's evidence that a

loan had been taken out in respect of the moving expenses for Margravine Gardens which was repaid at a rate of approximately £300 per month and which was funded by Thain.

133. Mark's bank statements also confirm the loan of just over £2,000 in May 2007 and a further loan of just over £4,000 in September 2008. It is true that the repayments thereafter totalled just under £300 per month but, on his own evidence, Thain had been making monthly payments to Mark for a long time before that, certainly since 2006 and, based on his witness statement, including whilst they were living at Comeragh Road.

134. Mr Cooper and Thain say that Mr Cooper paid Mark £400 per month in cash. There was no evidence of cash deposits into Mark's bank account which would verify this although, of course, Mark may simply have kept the money and spent it. However, given that it is clear that the amount being paid by Thain increased from approximately £300/£350 per month to £500 per month at around the time Mr Cooper moved in, I find it that it is more likely than not that no such payments were made.

135. I should make it clear that it is not the lack of contribution by Thain which has led me to reject Thain's assertion that there was an express agreement in relation to the beneficial ownership of the properties. No such contribution is needed if there was an express agreement. Instead, it is the discrepancies in Thain's evidence of what he puts forward as support for his case that an express agreement as to the beneficial ownership of the properties was reached which has led me to conclude that I cannot rely on Thain's account as to the sharing of beneficial ownership.

136. One point on which both parties are agreed is that payments were made to Mark in respect of Mr Cooper's occupation of Margravine Gardens. The question which must of course be asked is why, if Thain thought he owned half of the property, he and Mr Cooper should feel the need to make any additional payments in respect of Mr Cooper's occupation. This is not a point which was put to Thain or to Mr Cooper in cross examination and it is not addressed in their evidence. It is however another factor which, to my mind, supports the conclusion that there was no agreement that Thain should have a beneficial interest in the property.

137. I should record one important submission made by Mr Bennion-Pedley. This relates to the suggestion that Mark's reason for not putting the property in joint names was because his father would disapprove. Mr Bennion-Pedley submits that the fact that Mark felt the need to make an excuse for not putting the property in joint names shows that there must have been an intention that Thain should have a beneficial interest in the property (see for example *Eves v Eves* [1975] 1 W.L.R. 1338 and *Grant v Edwards* [1986] Ch. 638).

138. Had Mark made such a statement, this submission may have had some force. However, for the reasons set out above, I am not satisfied that any such statement was made. Even if it was, I am not convinced in this particular case that this shows any intention that Thain should have a beneficial interest. On the basis of Thain's evidence, what Mark said was that he could not put the property in joint names as his father would not accept it but that he would put the property in joint names when his father died. To me, this shows at the most an intention that Thain would be given a beneficial interest after Mark's father's death (if at all) and not any immediate interest. This would be consistent with the settlement agreement which Mark and Thain signed in 2011 under which Thain was to receive funds either when Mark received money from his father which had no strings attached or, when he received his inheritance (i.e. on his father's death).

139. In my view, Mr Bennion-Pedley was right not to invite the court to infer a common intention that Thain should have a beneficial interest in either of the properties as a result of the parties' subsequent conduct. There is no serious basis on which such an intention could be inferred.

Detrimental Reliance

140. Given that I have concluded that there was no common intention that Thain should have a beneficial interest in the property, there is no need to consider whether Thain acted to his detriment in the belief that he was acquiring a beneficial interest in the properties. I will, however, address the point briefly.

141. Mr Bennion-Pedley accepts that detrimental reliance is required and that the detriment must in some way be linked to the common intention (see for example *Lloyds Bank v Rosset* quoted at paragraph 115 above). Any doubt there might be on this point (see

Lewin on Trusts (20th Edition) at 10-069, footnote 318) has been set to rest by the Court of Appeal in *O'Neill v Holland* [2020] EWCA Civ 1583 at [27-35], a decision handed down after the conclusion of the hearing.

142. In terms of detrimental reliance, Mr Bennion-Pedley relies on the financial contributions which Thain says he made. He also relies on Thain's evidence that, had he not believed that he had an interest in the properties, he would have made other arrangements to acquire a property, perhaps through some sort of shared ownership scheme.

143. As far as the financial contributions are concerned, I have found that there was no payment of £3,000 in relation to Comeragh Road and that there was no agreement that Thain would repay any loan which might have been taken out whilst Thain and Mark were living at Margravine Gardens. It is however undisputed that he paid regular monthly amounts to Mark. However, in my view, these payments are insufficient to amount to detrimental reliance for the purposes of establishing a common intention constructive trust.

144. The reason for this is that, based on the evidence, the payments look much more like a contribution to the expenses of running the properties than any sort of capital contribution. This is supported by Thain's own evidence (although not accepted by Mark) that, at regular intervals, there would be a tallying up of expenses compared to the amounts which had actually been paid so that any necessary adjustment could be made.

145. As far as Thain's suggestion that he would have looked for another property is concerned, there is absolutely no evidence of this other than his own assertion. If, as he says, he and Mark were in a committed relationship, it seems unlikely that Thain would have looked for another property to purchase as long as he had a home together with Mark, whether or not he owned part of the property. There is also no evidence that he would, in practice be able to afford to buy a house of his own, even on a shared ownership basis.

146. There is a separate point as to whether abstaining from doing something which a claimant might otherwise have done in the absence of any common intention that they should have a beneficial ownership in a property can constitute detrimental reliance.

Typically, detrimental reliance is shown by doing some positive act rather than refraining from doing something. Mr Bennion-Pedley was not able to point to any authority where detrimental reliance has been found on the basis of refraining from taking action.

147. In principle, it seems to me that a failure to take action could constitute detrimental reliance where there is evidence that the decision not to do something different was caused by the belief that there was a common intention that the claimant should have a beneficial interest in the property. However, I would expect that such cases would be rare as it would be unusual for somebody who thinks that they do have a beneficial interest in the property to turn their mind to what they might have done had they thought that they had no interest in the property.

148. In the circumstances, I do not need to go on to consider what Thain's share in the properties might have been had there been some agreement or common intention that he should have a beneficial interest. His case is that the agreement was that he and Mark would have an equal interest in both the properties. Had I been satisfied that there was an agreement between Mark and Thain that he should have a beneficial interest in the properties, it follows that it is likely that I would also have been satisfied that the agreement was that the properties were intended to be shared equally. This is not one of those cases where it would have been necessary to infer that the shares in which the properties were beneficially owned from contributions to the purchase or from other factors, nor is it one where the alleged common intention did not extend to any understanding as to the shares in which the properties were to be owned, thus requiring the court to determine the shares which it considers the parties must, in the light of their conduct, be taken to have intended.

149. Having concluded that Thain did not have a beneficial interest in Margravine Gardens I turn now to consider the effect of the 2011 Agreement.

The 2011 Agreement

150. I have set out the text of the 2011 Agreement in paragraph 35 above.

151. Despite the points put forward in his particulars of claim, Mark now accepts that the 2011 Agreement is a valid, binding agreement. He accepts that, subject to certain

conditions, it requires him to pay Thain a minimum amount of £250,000. However, he says that the conditions have not been satisfied and so the obligation to make the payment has not yet arisen. In particular, he submits that the conditions are not satisfied by the sale of Margravine Gardens and his receipt of the sale proceeds.

152. In contrast, Mr Bennion-Pedley argues that the condition is satisfied as a result of Mark's receipt of the proceeds of sale of Margravine Gardens.

153. Neither party made any detailed submissions as to the principles which should be applied by the court in interpreting the 2011 Agreement. However, both Mark and Mr Bennion-Pedley (quite rightly) agreed that the court can and should take into account the surrounding circumstances and the facts known by the parties at the time the agreement was entered into. This does not of course include the parties' subjective intentions.

154. Before turning to the terms of the 2011 Agreement, it is worth recalling some of the comments made by Lord Clarke in *Rainy Sky S.A. v Kookmin Bank* [2011] UKSC 50. Although that case concerned a commercial contract, it has been held that the same principles apply to the interpretation of wills (see *Marley v Rawlings* [2014] UKSC.2 at [19-20]) and to family trusts (see *Armstrong v Armstrong* [2019] EWHC 2259 (Ch)). In my view, there is no reason to apply different principles to an agreement made in a domestic rather than a commercial context. Neither party suggested that I should approach the matter any differently.

155. Lord Clarke, in *Rainy Sky*, described at [21] the exercise of construction as:

> "essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard at all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other."

156. However, he noted at [23] that:

> "where the parties have used unambiguous language, the court must apply it."

157. In *Marley v Rawlings* [2014] UKSC 51, Lord Neuberger referred at [19] simply to "common sense" rather than "business common sense". This is, of course, more appropriate in the context of a domestic contract as well.

158. The key part of the 2011 Agreement is the statement in the first paragraph that Mark's obligations are:

> "totally dependent on me receiving unmonitored or controlled funds from my father or receiving my inheritance, whichever is earlier".

159. Mr Bennion-Pedley submits that all that is required in order to satisfy the condition is that Mark should receive money which derives from his father. Clearly the proceeds of Margravine Gardens, he says, fulfils this condition as there is no dispute that Mark's father provided the purchase price for Margravine Gardens (being the proceeds of sale of Comeragh Road (which had in turn been funded by Mark's father) together with a further gift to make up the difference between the purchase price of Margravine Gardens and the sale proceeds of Comeragh Road).

160. Mark, on the other hand, submits that it is clear from the wording of the condition that it will only be satisfied if he receives a gift or inheritance from his father after the date of the 2011 Agreement. As Mark already owned Margravine Gardens at the time the 2011 Agreement was entered into, the receipt of the sale proceeds of that property could not satisfy the condition.

161. In support of this, Mark draws attention to the fact that he had told Thain that Mark's father was planning to make a significant gift to him in 2011 as part of his inheritance tax planning. It was therefore anticipated that Mark would receive funds from his father in the foreseeable future.

162. I agree with Mark's interpretation of the condition. The natural meaning of the words used is that the condition would be satisfied on a future receipt of funds by Mark from

his father. Had it been agreed that the payment should be made if Mark were to receive funds from the sale of Margravine Gardens, I would have expected the agreement to say so specifically.

163. To the extent that there is any ambiguity in the words used, the fact that Mark was expecting to receive significant funds from his father and that he had discussed this with Thain is strong evidence that this is the correct interpretation.

164. It might be said that, from a common sense point of view, it would not make sense for Thain to give up any interest he thought he had in Margravine Gardens in return for a promise to make a payment which was conditional and where he had no certainty as to when the payment might be received and, where the conditions might never be satisfied if they related only to a future gift by Mark's father and were not capable of including the receipt by Mark of the proceeds of sale of Margravine Gardens.

165. However, Mark and Thain did build a fall-back position into the 2011 Agreement. This is the requirement that Mark would sign a will in favour of Thain. The 2011 Agreement is not clear precisely what provision was intended to be contained in the will but it can be inferred that the requirement was that Mark should sign a will including a gift of a minimum of £250,000 to Thain. Mark complied with this by signing a will on 17 October 2011 which contained such a gift.

166. Thain therefore had some certainty that, although he could not require Mark to pay him unless he received funds from his father, he would ultimately receive the amount which Mark had promised to pay.

167. I should note that there was no suggestion from either party that the requirement for Mark to make a will in favour of Thain is in any way conditional on the receipt of funds from his father. I agree with this. The promise to pay a minimum of £250,000 specifically states that this obligation only arises when Mark receives "sufficient funds as stated above". There is no such qualification in the paragraph which requires Mark to make a will in favour of Thain. In addition, from a common sense point of view it would be surprising if the requirement to make the will were conditional on the receipt by Mark of funds from his father given that, if this were the case, Thain would have left himself in a position where he might never receive any funds from Mark.

168. My conclusion in relation to the 2011 Agreement therefore is that Mark's obligation to pay Thain a minimum of £250,000 is conditional on Mark receiving a gift or inheritance from his father after the date of the agreement. The receipt of the proceeds of sale of Margravine Gardens does not therefore satisfy the condition as these funds derived from gifts which were made prior to the date of the 2011 Agreement.

169. Mark does however have an obligation to make a will leaving a minimum of £250,000 to Thain. No doubt, if Mark has not complied with this requirement at the date of his death, Thain may well have a claim against his estate if he has not already been paid during Mark's lifetime.

Was the 2011 Agreement varied?

170. Thain's case is that, whether or not the condition contained in the 2011 Agreement is satisfied by Mark's receipt of the proceeds of sale of Margravine Gardens, Mark subsequently agreed that Thain would be paid once Mark received the proceeds of sale of Margravine Gardens. Mr Bennion-Pedley submits that this constitutes a variation to the 2011 Agreement with the result that, following the sale of Margravine Gardens in 2015, Mark is obliged to pay Thain a minimum of £250,000 under the terms of the 2011 Agreement, as varied.

171. Mr Bennion-Pedley accepts that, even if Thain can establish that Mark agreed to make the payment once he received the proceeds of sale of Margravine Gardens, Thain can only rely on this if that agreement was supported by consideration.

172. Again, the evidence from Thain and the evidence from Mark are directly contrary to each other. Thain says that Mark agreed to pay him on receipt of the proceeds of sale. Mark says that he never made any such promise.

173. It is common ground that Mark and Thain kept in touch with each other after Thain and Mr Cooper moved out of Margravine Gardens.

174. Thain's evidence is that Mark's agreement to pay him once he received the proceeds of sale of Margravine Gardens was made in November 2014. He says that the circumstances in which this came about were that Mark contacted Thain as he was in

financial difficulties. As a result, Thain suggested to Mark that the house should be sold which would enable Mark to pay off his debts, to pay Thain what he owed him and still have enough money left over to purchase a cheaper property. Thain says that they looked together at properties on the internet so that Thain could show Mark what he could purchase in Kennington rather than West London.

175. Thain refers to two or three other occasions between then and May 2015 when he says he and Mark discussed the sale of the property, including a conversation about whether the offer made by the ultimate purchaser should be accepted.

176. Towards the end of May 2015, Thain recounts a visit to Mark where they ended up going to a local pub for a drink and showed each other details of the properties which they both were thinking about purchasing. Thain's evidence is that, at this meeting, Mark again assured Thain that Mark would pay him once he had received the proceeds of sale.

177. Thain refers to a subsequent meeting at a pub in August 2015. The meeting had been arranged as Thain was getting impatient as he had not been paid by Mark, despite the sale completing in May. Thain's evidence is that Mark said that the purchaser had been slow paying him but that he would sort it out.

178. There is some support for Thain's case in the evidence given by Mr Cooper who confirms that he and Thain went to visit a property in Elephant and Castle which Thain was considering buying with the money which Mark had agreed to pay Thain once he had received the sale proceeds.

179. One of Thain's other witnesses, Lance Drake (who was not cross examined) also said in his evidence that Thain had told him in 2014 that the property at Margravine Gardens had been put up for sale and that Thain was proposing to buy a place in Elephant and Castle with the proceeds of sale.

180. One further point which Thain makes in his evidence is that he says he was told by Mark that the proceeds of sale had gone to Mark's father although there was no evidence as to when or in what circumstances that statement was made. It did however lead to Thain writing to Mark's father in the hope that he might be able to assist in Mark making the payment which Thain believed to be due. It is also to some

extent corroborated by the evidence of Mark's brother-in-law, Peter Gillingwater who recalled that, in June 2017 when Thain and Mr Cooper arrived unannounced at Mr Gillingwater's house and Mr Gillingwater had called the police, one of the questions the police asked Mark's father (who was visiting at the time) was whether he had received any of the proceeds of sale of the property.

181. Mark's evidence of the events in November 2014 is rather different. He agrees that he was in financial difficulties but insists that the decision to sell the property was one taken by him and Mr White. Mark says that he then told Thain that he was proposing to sell the property. In support of this, he notes that the property was originally put on the market for £1.4m and not the figure of £1.2m which is referred to in the particulars of claim and in Thain's witness statement. Had Thain been involved in the decision to sell the property, Mark suggests that Thain would have been expected to know the proposed asking price. Mr White supports Mark's version of events in his own evidence saying that the decision to sell the property was taken in September 2014.

182. Mark agrees that he subsequently discussed the sale with Thain and that Thain tried to persuade him to move to South London. He does not however recall Thain showing him details of any property which Thain himself was proposing to purchase. He also denies agreeing or reassuring Thain that he would make any payment to Thain following receipt of the proceeds of sale of Margravine Gardens.

183. Mark recalled meeting Thain at a pub in August 2015. Mark's version of events however is that Thain was putting pressure on Mark to pay him out of the proceeds of sale but denies making any representations that he would pay Thain.

184. Given the stark discrepancies between the account of events given by Thain and by Mark I have, to the extent possible, looked at other evidence in deciding which version of events I should accept. Ultimately, I have come to the conclusion that Mark did not agree to vary the 2011 Agreement and to pay Thain once he had received the proceeds of sale of Margravine Gardens.

185. Mr White's evidence is that he and Mark agreed in September 2014 that Margravine Gardens should be sold. Thain's evidence in his witness statement, on the other hand, is that he was the one who suggested that Margravine Gardens should be sold and that

he did this in November 2014. In cross examination, Thain did however say that it was Mark who first suggested the possibility of a sale of the property.

186. The documentary evidence contains an email from the agent instructed by Mark to sell the property. The email attaches the photos which were taken for marketing purposes and confirms that:

> "All the details should be online by tomorrow on all the property websites and on our own website".

187. The copy of the email in the bundle is undated but the covering description states that the email is dated 16 October 2014. This date has not been challenged by Thain. I accept it. I see no reason why Mark would use an incorrect date for the email in circumstances where Thain may well have asked to verify the date by seeing a full copy of the email exchange.

188. It is therefore apparent that Thain's recollection of events is faulty as the decision to sell the property had been taken by Mark and by Mr White and the property put on the market prior to any discussions which Thain had with Mark in November 2014.

189. As suggested by Mark, this conclusion is fortified by the fact that Thain did not appear to know what the initial asking price for the property was. It is also supported by the fact that Thain gave inconsistent evidence in his witness statement and in his oral evidence as to who first suggested that the property should be sold.

190. Based on this, I find it is more likely that Thain's recollection of other aspects of those discussions, including any promise by Mark to pay him once he received the proceeds of sale is equally likely to be faulty and that Mark's memory of events is more likely to be reliable.

191. In my view, the other events described by Thain, whilst not inconsistent with a promise by Mark to pay him following receipt of the proceeds of sale, do not provide any significant support for the allegation that he did so.

192. Mark accepts that Thain showed Mark properties on the internet, including properties in South London which he might be more able to afford after paying off his debts. He does not accept that Thain showed Mark properties which Thain was thinking of

purchasing. Whilst Mr Cooper confirms visiting a property in Elephant and Castle which Thain was hoping to buy, this is not on its own enough to persuade me that Mark agreed to pay Thain on receipt the proceeds of sale of Margravine Gardens. It is equally consistent with a hope that Thain would be able to pressure Mark into paying him once he had the money to do so.

193. At the meeting which Mark and Thain had at a local pub near Margravine Gardens towards the end of May 2015, Thain says he showed Mark details of a property in Elephant and Castle which Thain was thinking of purchasing. Mark's recollection of this is that Thain may well have shown him a property in Elephant and Castle which he was suggesting that Mark should purchase. Given that Thain himself accepts that he was keen for Mark to consider purchasing a property in South London, Mark's explanation is, in my view, more likely.

194. As far as events after the completion of the sale in May 2015 are concerned, the fact that Thain arranged to meet with Mark and to ask for payment is consistent not only with Thain's case that Mark agreed to pay him once he had received the proceeds of sale of Margravine Gardens but is also consistent with Thain sensing an opportunity to be paid now that Mark had the funds available to do so.

195. It is perhaps telling that the letter which Thain wrote to Mark's father shortly after sending Mark the draft particulars of claim in 2016 refers in terms only to the contributions Thain said he made over the years both in financial terms and in terms of caring for Mark. It makes no mention of any subsequent agreement that Mark would pay Thain once he had received the proceeds of sale of Margravine Gardens. The draft particulars of claim also say nothing about a subsequent agreement that Thain should be paid following receipt of the proceeds of sale of Margravine Gardens. Instead, it relies solely on the argument that the correct interpretation of the 2011 Agreement is that Thain was entitled to be paid out once Mark had received the proceeds of sale of Margravine Gardens as this was money which had indirectly come from Mark's father and therefore satisfied the original condition. The only mention of the purported variation in November 2014 is a statement that Mark told Thain that he was thinking of selling the property (contrary to Thain's evidence in his witness statement that it was Thain who suggested selling the property) and that Mark told Thain that he would honour the agreement.

196. I accept that Mark may have told Thain in August 2015 that there had been a delay in the buyer paying him and that he may also have told Thain at some point that the money had gone to his father. Mr Bennion-Pedley places reliance on these statements as he asks why Mark would make such excuses if he had not agreed to pay Thain once he had received the proceeds of sale. However, in circumstances where Thain was trying to pressure Mark into paying him it is in my view, just as likely that Mark would have made such excuses to avoid a confrontation with Thain as a result of making an outright refusal to pay. It was clear to me from what I observed at the hearing that Thain has a much more forceful personality than Mark and it would be entirely consistent with their personalities for Mark to act in this way. That is however very different from Mark agreeing to pay Thain once he had the proceeds of sale.

197. I do not therefore accept that there was ever any agreement between Mark and Thain that Mark would pay Thain the amount which he had promised to pay under the terms of the 2011 Agreement following receipt by him of the proceeds of sale of Margravine Gardens.

Consideration

198. Given my conclusion that there was no agreement to vary the 2011 Agreement, it is irrelevant whether there was any consideration for such an agreement. I will however comment briefly on Mr Bennion-Pedley's submissions.

199. Mr Bennion-Pedley argued that the consideration given by Thain was not taking any action to enforce his rights prior to the sale of the property. Mr Bennion-Pedley suggested that, had Mark made it clear prior to the sale that he would not pay Thain following receipt of the proceeds of sale, Thain would have brought a claim straight away. The claim would have been either to enforce what he considered to be the terms of the 2011 Agreement or to assert a proprietary interest in the property on the same basis as he has claimed a beneficial interest in these proceedings but also based on the fact that any disclaimer of that interest as part of the 2011 Agreement was either conditional on being paid the minimum sum of £250,000 (which had not happened) or, alternatively, on the basis that the 2011 Agreement became ineffective as a result of the conditions not being satisfied within a reasonable period of time.

200. I will not reach any conclusion on these points as it is not necessary for me to do so. However, I would note that, on the face of it, Thain's disclaimer (through his solicitors) of any interest in the property is unconditional. Although his solicitors were aware of the 2011 Agreement, there is no reference to it in the exchange of correspondence between the solicitors which confirms the position. The reason for this is that Mark did not want his solicitors to know the details of the agreement as they were being paid by his father and he was worried that his father would disapprove of the agreement.

201. As stated above, the letter from Mark's solicitor to Thain's solicitor asks for confirmation that Thain agrees that he has no interest in the property and no intention to make a claim in respect of the property. The response from Thain's solicitor is simply to confirm that their client's instructions accord with that letter. My tentative conclusion therefore is that Thain's disclaimer of any interest in the property is unconditional and is made in consideration for Mark's conditional promise to pay him a sum of money and an unconditional promise to make a will in his favour.

202. As to the question whether the 2011 Agreement might have come to an end as a result of the conditions not being satisfied within a reasonable period of time, Mr Bennion-Pedley's submissions were based primarily on the comments made by Mr Justice Christopher Clarke in *Beazley Underwriting Limited v The Travellers Companies Incorporated* [2011] EWHC 1520 (COMM) where the Judge said at [185] that:

> "If the correct analysis is that there is a conditional contract, there could be expected to be some limit to the time within which the subjectivities are to be satisfied. The usual implication when a period of time is unspecified is that the thing must be done within a reasonable time."

203. In fact, in that case, the Judge decided that there was no conditional contract. However, even if there were, the conditions were such that they were a prerequisite to any binding contract coming into existence at all. That is rather different to the present case where the conditions must be met before Mark's payment obligation arises but the lack of fulfilment of the conditions does not prevent other obligations taking effect immediately, such as Mark's obligation to make a will in favour of

Thain and (at least on my tentative analysis) Thain disclaiming any interest he may have in the property.

204. In any event, as Mark submits, there is in effect a time limit for the compliance with the condition which is the date of Mark's father's death given that the condition is either that Mark's father makes a gift or that Mark receives his inheritance.

205. I do however accept Mr Bennion-Pedley's submission that giving up even a doubtful claim is good consideration (see Chitty 33 Edition 2019 at 4-052) and so it is logically possible that refraining from making a doubtful claim could constitute consideration.

206. It is therefore likely that, had I found that there had been an agreement to vary the 2011 Agreement, this would have been supported by consideration and would therefore have been binding.

Proprietary estoppel

207. Thain's case is that, assuming he is entitled to be paid at least £250,000 under the terms of the 2011 Agreement (either as it originally stood or, as varied), he has an equity in relation to the proceeds of sale of Margravine Gardens entitling him to follow/trace the proceeds into the property owned by Mr White.

208. As Lord Walker confirmed in *Thorner v Major* [2009] UKHL 18 at [29], a successful claim based on proprietary estoppel requires three main elements:

> "a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance"

209. Thain has failed in his claim that he had a beneficial interest in Margravine Gardens or, alternatively, that he is due a sum of money under the terms of the 2011 Agreement either as it originally stood or as varied. I do not therefore have to consider whether, on the basis of proprietary estoppel, Thain had some sort of equity in the proceeds of sale of Margravine Gardens which would entitle him to follow/trace the relevant part of the proceeds into the property held in Mr White's name and which was funded by Mark out of the proceeds of sale of Margravine Gardens.

210. However, having concluded that Mark did not make any representation to Thain that he would pay him out of the proceeds of sale of Margravine Gardens, it is clear that a remedy based on proprietary estoppel would not succeed.

211. Even if Thain had been successful in his contractual claim, it is not at all clear to me that Thain would be in a position to establish that he had an equitable interest in the proceeds of sale of Margravine Gardens based on proprietary estoppel when, what he actually had, was a contractual right to be paid a sum of at least £250,000. The terms of the 2011 Agreement were simply to pay Thain a sum of money. Even on Thain's case, any agreement to pay Thain once Mark had received the proceeds of sale of Margravine Gardens was simply a variation to the conditions contained in the 2011 Agreement. Those conditions dictate the timing of any payment. They do not impose an obligation to pay Thain out of the proceeds of sale of Margravine Gardens as opposed to any other funds which Mark might have available to him. However, as I have said, I do not need to come to a conclusion on this point.

Decision

212. There was no common intention that Thain should have a beneficial interest either in Comeragh Road or Margravine Gardens and so Thain has never had a beneficial interest in either of those properties.

213. The 2011 Agreement is valid and binding. It requires Mark to make a payment of at least £250,000 to Thain but only if he receives a gift from his father after the date of the Agreement which he is free to deal with as he wishes or, alternatively, when he receives any inheritance from his father.

214. The terms of the 2011 Agreement also require Mark to have in place a will leaving a gift of at least £250,000 to Thain irrespective of whether he has received any further funds from his father.

215. There was no amendment to the 2011 Agreement to the effect that Mark would make the payment of at least £250,000 to Thain on receipt of the proceeds of sale of Margravine Gardens and so the receipt of those sale proceeds by Mark did not therefore trigger his obligation under the 2011 Agreement to make any payment.

216. As a result of this, Thain has no claim against the property owned by Mr White.

217. Thain's claims against both defendants are therefore dismissed in their entirety.