Neutral Citation Number: [2023] EWHC 59 (Ch)

Appeal No. CH-2022-000075 and Claim No. PT 2022-000752

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD) and PROPERTY, TRUSTS AND PROBATE LIST

ON APPEAL FROM HHJ GERALD
COUNTY COURT AT CENTRAL LONDON

Rolls Building
Fetter Lane
London, EC4A 1NL

20 January 2023

Before :

MRS JUSTICE BACON

- -

Between :

(1) VAQAR MALIK	
(2) FAHIM MALIK	**Appellants/Pt 20 Defendants**
(3) RAHIM MALIK	
- and -	
IFTIKHAR AHMAD MALIK	**Respondent/Pt 20 Claimant**

And Between :

IFTIKHAR AHMAD MALIK	**Claimant**
- and -	
(1) VAQAR MALIK	**Defendants**
(2) SAIRA VAQAR MALIK	

- -
- -

Stephen Jourdan KC (instructed by **Spencer West LLP**) for
Vaqar, Fahim and Rahim Malik
Thomas Munby KC and **James Kinman** (instructed by **Stephenson Harwood LLP**) for
Iftikhar Ahmad Malik

Hearing dates: 7–8 December 2022

- -

Approved Judgment

This judgment was handed down remotely at 2pm on 8 November 2022 by circulation to the parties or their representatives by email and by release to the National Archives.

Mrs Justice Bacon:

Introduction

1. This is an appeal from the order of HHJ Gerald in the Central London County Court, dated 14 March 2022, following a trial in a very long-running family dispute concerning the ownership of a leasehold flat in Knightsbridge. The trial was of a Part 20 claim, the Part 20 claimant being the present respondent Iftikhar Malik. The Part 20 defendants, and the present appellants, are Iftikhar's younger brother Vaqar Malik and two of Vaqar's sons, Fahim and Rahim.

2. Fahim and Rahim were made bankrupt on 14 November 2022, and the Official Receiver (who acts as trustee in each bankruptcy) has confirmed that it does not wish to be represented at or take any active part in the hearing of the appeal. It is common ground, however, that Fahim and Rahim do not have any interest separate from that of their father. It was therefore agreed that the bankruptcy of the two sons would not affect the hearing of the appeal. Given the commonality of interest between Vaqar and his sons, during the hearing counsel generally referred to the parties simply as Iftikhar and Vaqar, and I will generally do the same in this judgment, save where the context requires specific reference to Vaqar's sons.

3. In short summary, in his Part 20 claim Iftikhar sought possession of the flat from Vaqar (and Fahim and Rahim), together with mesne profits. Vaqar counterclaimed that Iftikhar held the flat on trust for him absolutely, alternatively that he had acquired title by adverse possession. The outcome of the dispute was and remains one of considerable financial significance. The flat was bought in 1978 for £70,250. By 2019 it was thought to be worth £2.5m.

4. The trial before HHJ Gerald took place in January 2020 and March 2022, in circumstances which I will describe in more detail further on. Judgment was handed down on 14 March 2022 in favour of Iftikhar. The adverse possession counterclaim was dismissed on the grounds of abuse of process, and also that it failed in any event for lack of necessary intent.

5. Vaqar says that both of the judge's findings on the adverse possession issue were wrong. Iftikhar contends that the judge's findings were correct. In addition, he relies on further grounds set out in a respondent's notice. He also, as a belt and braces approach, applies to lift the stay of earlier proceedings between the parties regarding the entitlement to the flat, those proceedings having been commenced in 1987, but stayed for various reasons thereafter.

6. Vaqar and his sons are represented in this appeal by Mr Jourdan KC, and Iftikhar is represented by Mr Munby KC and Mr Kinman.

Factual background

7. The background to these proceedings is set out in the judgment of HHJ Gerald. In short summary, the dispute concerns the ownership of a two-bedroom flat at 7 South Lodge, 245 Knightsbridge. The flat was purchased by Iftikhar in 1978 on a 150-year lease, having been chosen by Iftikhar in 1977 on a trip to London. In 1984 the lease was extended to 999 years.

8. By the time of completion of the purchase, Iftikhar was living in Pakistan and Vaqar was living in London. Vaqar assisted with completion of the purchase, and he went on to live at the flat from 1979–1981, and again for some months in 1982 before returning to Pakistan. For the next five years the brothers and other family members used the flat when visiting London.

9. In 1987, following a major breakdown in family relations, Vaqar moved from Pakistan to London and took up residence in the flat, together with his then-wife Saira and their two older sons; and he refused to allow Iftikhar and other family members into the flat. Since then, it is common ground that Vaqar and his family have been in sole occupation. Vaqar says he remains there now with his two youngest sons Fahim and Rahim, who were born in 1995.

The 1987 proceedings

10. In 1987, following Vaqar's occupation of the flat, Iftikhar issued High Court proceedings against Vaqar and Saira seeking possession. Vaqar in turn issued High Court proceedings against his father, mother and three brothers claiming that there was a family partnership which owned the flat, and that he was entitled to occupy it on that basis.

11. The complex history of the proceedings which ensued, and the parallel proceedings issued between the parties in Pakistan, is described by Mr John Jarvis QC (sitting as a deputy High Court judge) in his judgment of 21 February 2012, *Malik v Malik* [2012] EWHC 711 (Ch), at the conclusion of a hearing which I will describe below. I will not repeat that history here, as most of it is not relevant to this appeal. What follows is a short summary of the relevant events and procedural steps in the English proceedings.

12. Iftikhar's High Court action commenced on 3 July 1987. Vaqar's action commenced less than a month later, on 28 July 1987. At that stage, the central dispute between the parties was whether the flat was beneficially owned by Iftikhar (Iftikhar's case) or whether it was a family partnership asset, which had been or should be appropriated to Vaqar (Vaqar's case).

13. Iftikhar's action was stayed in December 1987 by an order of Master Munrow, requiring Iftikhar to pay £25,000 into court as security for costs, failing which he was not to take any further steps in the proceedings. Iftikhar did not at that time pay that sum into court. Both actions were then stayed automatically as of 25 April 2000, pursuant to §19 of PD 51A of what was then the new CPR. In the meantime, there were attempts within the family to resolve the dispute.

14. As part of those family discussions, there was an agreement between the brothers and their father, Bilal, that the father would attempt to resolve the dispute between the brothers regarding the flat. There is some debate, not definitively resolved in the judgment of HHJ Gerald, as to whether this formed part of (or was related to) a written agreement in 1992 between all of the siblings and their mother regarding the distribution by Bilal of various unidentified family assets, or whether there was an entirely separate agreement that was reached later in 1992 or 1993 between Iftikhar, Vaqar and Bilal alone. HHJ Gerald refers to the agreement regarding the resolution of the flat dispute as the "1992 Agreement", irrespective of when precisely it was reached, and for consistency with his judgment I will do the same.

15. Unfortunately the family attempts to mediate a resolution were unsuccessful. The terms of the 1992 Agreement are, however, of some importance to this appeal and I will return to this later.

16. In April 2010 Vaqar was made bankrupt on his own petition, and in December 2010 Mr Papanicola was appointed as Vaqar's trustee in bankruptcy. Any interest that Vaqar held in the flat then vested in the trustee.

17. In 2011 Iftikhar paid into court (out of time) £25,000 pursuant to the order of Master Munrow, and applied to lift the stays of the English proceedings, seeking judgment in his favour that he was the legal and beneficial owner of the flat. That application was opposed by the trustee on the grounds that Bilal had in fact resolved the dispute and had done so in favour of Vaqar, and that it was agreed between the parties that the English proceedings would be withdrawn or discontinued. The trustee also said that the case turned on very old facts in relation to which there was a risk that a fair trial would not be possible. In addition, the trustee said that if fresh proceedings were commenced he would be pleading a defence of adverse possession.

18. That led to the hearing in February 2012 before Mr Jarvis to which I have referred above. During that hearing there were several exchanges between the judge and Vaqar (referring to both his position and that of his then-wife Saira) as to the extent to which the adverse possession argument was pursued.

19. At the conclusion of the hearing, on 21 February 2012, the judge delivered a long and detailed *ex tempore* judgment refusing Iftikhar's application. As an initial matter, the judge took the view that he could not reject Vaqar's evidence as to the existence of an agreement to withdraw or discontinue the proceedings, and that was a matter to be taken into account when considering whether to lift the stay (§95). He went on to consider various factors relevant to his decision. In particular, in relation to the consequences of refusing to lift the stay, he commented that:

> "119. … In considering those consequences, I ask myself the question identified earlier, if I refuse to lift this stay what will happen to the claimant's claim? The claimant, if it wishes to seek possession, will be able to issue fresh proceedings and there is no doubt that the primary issue that concerns the claimant is to get possession of the flat. …
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> 120. … [Iftikhar's] sole interest is possession of the flat, mesne profits for the last six years and interest. There is no reason why that cannot be dealt with in the new proceedings. In fact, there is much to be said for starting again. The proceedings are so stale that it seems to me that, where no defence has been served, it is perfectly in order for new proceedings to start again. Present proceedings would have to be amended in any event. It does not seem to me therefore, that there is anything … that can point to saying that the administration of justice favours the lifting of the stay. Rather, it seems to me that it favours the issuing of new proceedings."

20. The judge returned to this point several paragraphs later:

> "130. (i) The effect which the grant of relief would have had on each party. To some extent, I have already considered this. So far as Iftikhar is

> concerned, I have indicated that he can bring a new claim. Initially, the position was that it was contended on behalf of Iftikhar that he would be substantially prejudiced because his claim had been met with the defence of adverse possession. It was confirmed to me by Saira and, indeed, by Vaqar on Thursday and repeated to me again in court today, that there was no claim for adverse possession and so I discount that as a prejudice. It seems to me that it is, as I have indicated, far cleaner for a new action to be started."

21. After noting the submissions of the trustee and Saira to the effect that the action was far too old, should not be resuscitated, and that a fair trial after a delay of 25 years would be very difficult, the judge's overall conclusion was as follows:

> "133. … I have to stand back then and ask myself the question whether this is a case where it could be proportionate bearing in mind all the circumstances and the factors that I have mentioned to lift this stay. As this case has progressed, I have become more and more convinced it would be wrong to lift the stay. A case that is so old as this where there is such a dispute as to the facts, where oral evidence will have to be tested, seems to me to be a paradigm case where it would have been struck out under the old jurisdiction. … I am very far from convinced that this is the kind of case which the court should allow to be resuscitated.
>
> 134. It seems to me to be fundamentally unjust to allow a stale case such as this to be brought back before the court. I, therefore, have no hesitation in refusing relief from sanctions both in relation to the automatic stay and the stays under the order of Master Munrow."

22. In exchanges between the judge and counsel (Ms Tipples for Iftikhar, and Ms Mather for the trustee in bankruptcy) following the delivery of the judgment, the judge made clear that while he had dismissed the application to lift the stays, he had not dismissed either of the two actions. Ms Tipples and Ms Mather both agreed with that position.

The present proceedings

The 2017 claim and Part 20 claim

23. In April 2013 Vaqar was discharged from bankruptcy and any interest in the flat then re-vested in him. Vaqar and Saira divorced in around 2016 and Saira has had no involvement in any of the proceedings since then.

24. In 2017 the freeholder of the flat, South Lodge Flats, brought County Court proceedings against both Iftikhar and Vaqar, for breach of a covenant to allow access to the flat following a leak from the flat into the premises below. Vaqar filed a defence in which (by contrast with his position in the 1987 actions) he no longer claimed that the flat was owned by a family partnership; rather he asserted that the flat was held by Iftikhar on trust for him absolutely. That triggered the Part 20 claim by Iftikhar against Vaqar, seeking possession of the flat.

25. In 2018 Vaqar and his sons applied to strike out and/or summarily dismiss the Part 20 claim as an abuse of process, and on the basis of a counterclaim contending adverse

possession. The matter came before HHJ Gerald, who on 13 February 2019 dismissed the application and ordered costs to be paid by Vaqar on an indemnity basis.

26. The dismissal of Vaqar's application for summary dismissal was then appealed. Falk J granted permission to appeal but dismissed the appeal: *Malik v Malik* [2019] EWHC 1843 (Ch). A further application for permission to appeal to the Court of Appeal was dismissed by Lewison LJ in September 2019. That then laid the foundation for the trial which commenced before HHJ Gerald in January 2020.

27. The trial was adjourned mid-way to allow Vaqar an opportunity to make a disclosure application, and to file further evidence and/or make an application to amend in light of documents disclosed during trial. It was relisted to conclude in June 2020. By that time, however, the Covid pandemic had commenced, as a result of which Vaqar and his sons were notified that the resumed trial would take place remotely. They failed to attend and HHJ Gerald struck out their defence and counterclaim and entered judgment for Iftikhar.

28. Vaqar and his sons then appealed that decision on the basis that the stay on residential possession actions imposed by PD 51Z, which came into force as a result of the pandemic, applied to the present proceedings, such that the trial should not have resumed while the stay was in place. Meade J granted the appeal in May 2021 and the trial was then relisted to resume in March 2022.

29. Iftikhar was represented by counsel throughout the trial. At the start of the trial Vaqar was representing himself but his sons were represented by Mr Pettican of counsel. By the resumption of the trial in 2022 Mr Pettican was representing both Vaqar and his sons.

The judgment of HHJ Gerald

30. Following the conclusion of the trial, HHJ Gerald found in favour of Iftikhar and dismissed Vaqar's counterclaim. The judge noted the caution that had to be placed on memories of events some 44 years previously when the flat had been purchased. He nevertheless reached a fairly clear view of the credibility of the two main witnesses, Iftikhar and Vaqar:

    i) Iftikhar, he considered, was an open, frank and generally credible witness, although there were some lacunae and inconsistencies in his evidence and on some points the judge preferred the evidence of Vaqar (§26).

    ii) Vaqar, by contrast, was described as "deeply manipulative and willing to say or do anything to hold on to property, the flat, which he knew and knows perfectly well was not and is not his". Having said that, the judge fairly noted that there were some aspects of his evidence which the judge had found to be more credible than Iftikhar's (§25).

31. The judge went on to reach five main conclusions:

    i) Vaqar had failed to adduce credible evidence to rebut the presumption that Iftikhar, the registered owner of the flat, was also the absolute beneficial owner. Put another way, there was no credible evidence that Iftikhar held the flat on trust for his brother (§§70 and 72).

ii) It was an abuse of process for Vaqar to claim adverse possession, having forsworn the point at the hearing before Mr Jarvis in 2012 (§100).

iii) In any event Vaqar had failed to establish title by adverse possession, since by asking Iftikhar to pay the service charges for the flat Vaqar had demonstrated that he did not have the necessary intention to possess (§115).

iv) It could not, however, be said that the 1992 Agreement prevented Vaqar from having the necessary intent to possess, since there was no dispute that Iftikhar had not consented to Vaqar's occupation; Bilal could not be regarded as having given Vaqar a licence to possess; and the judge did not accept that Vaqar thought that he was occupying as Bilal's licensee (§§121–2).

v) Accordingly, Vaqar was ordered to pay mesne profits for his unlawful occupation of the flat for the 6 years prior to issue of the Pt 20 claim (§123).

Grounds of appeal

32. In his order dated 14 March 2022, HHJ Gerald refused Vaqar and his sons permission to appeal. Permission to appeal was also refused on the papers by Meade J on 26 May 2022, but granted by him on 22 July 2022 following an oral renewal hearing at which counsel for both parties made submissions.

33. There is no appeal against the first of the judge's conclusions. The position is therefore that Iftikhar is and always was, subject to the adverse possession issue, the legal and beneficial owner of the flat. Vaqar and his sons do, however, maintain their adverse possession case, in relation to which they appeal the judge's second conclusion (that it was an abuse of process to claim adverse possession) and third conclusion (that in any event Vaqar did not have the necessary intent to establish adverse possession). If the appeal is successful then the final conclusion on mesne profits will also necessarily fall to be set aside.

34. Following the grant of permission, Iftikhar filed a respondent's notice seeking to uphold the order on three further grounds, challenging the fourth of the judge's conclusions listed at §31 above, as follows:

i) From the time of the 1992 Agreement to some point between 2007/2010 Vaqar was permitted to occupy the flat by Iftikhar as part of the agreement that Bilal would attempt to resolve the dispute between his sons, and accordingly Vaqar cannot establish adverse possession for the requisite period of 12 years.

ii) In the alternative Vaqar occupied the flat during that time on the basis of permission given to him by Bilal.

iii) Vaqar did not have the intent necessary to acquire title by way of adverse possession, since his intention was to occupy the flat on the basis of permission given to him under the 1992 Agreement, not to occupy on his own behalf.

35. In addition, on 8 September 2022 Iftikhar filed an application – which is to be heard alongside the appeal – that the court should lift the stay of his 1987 action, give summary judgment in those proceedings, and require Vaqar to give vacant possession of the flat

together with mesne profits, on the basis that it has been finally determined in the present proceedings that Iftikhar is the true owner of the flat.

The issues

36. The appeal and Iftikhar's application therefore raise, between them, the following issues:

    i) Whether it is an abuse of process for Vaqar to claim adverse possession in these proceedings.

    ii) Whether any intention to possess by Vaqar fails on the basis of the service charges paid by Iftikhar.

    iii) Whether an adverse possession claim fails on the grounds set out in the respondent's notice, namely that Vaqar occupied pursuant to a licence granted by either Iftikhar or Bilal under the 1992 Agreement, from 1992/93 until sometime between 2007/10, or at least believed that he was occupying pursuant to such a licence.

    iv) Whether the stay of Iftikhar's 1987 action should now be lifted by the court.

37. Mr Munby confirmed at the hearing that the application to lift the stay was only pursued if Vaqar's appeal was allowed and all of the respondent's notice points failed, the point being that only in that event would the need to revive the 1987 proceedings arise. I will therefore consider the issues in the order set out in the foregoing paragraph.

Abuse of process

Submissions

38. The appeal of the judge's conclusions on abuse of process rested on a series of arguments advanced by Mr Jourdan: that Vaqar had not made any clear statement to Mr Jarvis, at the 2012 hearing, that there would be no reliance on an adverse possession defence; that in any event whatever Vaqar said on this point was not material to the deputy judge's conclusion in the 2012 judgment, which would have been the same regardless of Vaqar's statements; that HHJ Gerald based his decision on a highly critical assessment of Vaqar's character, which was irrelevant; that since the trustee in bankruptcy would have been able to claim title by adverse possession, Vaqar should be in the same position following his discharge from bankruptcy; that the proper way of addressing any unfairness to Iftikhar was by making a fresh application to lift the stay; that the judge failed to take account of the serious consequences of his decision on the abuse point; and that the judge's decision was overall one that was not open to him on the facts.

39. Mr Munby submitted that the judge's conclusion on abuse of process was an evaluative decision weighing up the facts, in relation to which an appellate court should be slow to interfere. In any event he submitted that the judge's decision was correct and should be upheld, on the basis that Vaqar not only made his position clear at the 2012 hearing (when looked at in the round), but had intended to induce Mr Jarvis to reach the conclusion that he did at that hearing. He disputed all of the criticisms made by Mr Jourdan.

The law

40. By the end of the hearing it was common ground that when considering whether the adverse possession claim is an abuse of process, the principle to be applied is essentially that set out by the Court of Appeal in *LA Micro Group (UK) v LA Micro Group* [2021] EWCA Civ 1429, [2022] 1 WLR 336, referred to there as a form of estoppel arising from the conduct of a party in litigation.

41. The principle is that where a party's stance in earlier proceedings was a reason for the judgment or order obtained by that party in those proceedings, and it would in all the circumstances be unjust to allow the party to resile from that position, the court will hold the party to that position (§22). That must be approached by means of a "broad, merits-based assessment". It is material to that assessment to consider whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings (§26).

42. The Court of Appeal cited with approval the similar doctrine recognised by the law of the United States, as set out in *New Hampshire v Maine* (2001) 532 US 742, commenting that the purpose of the rule was said to be "to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment" (§§23–4).

43. While described in *LA Micro Group* as a species of estoppel, Mann J used the label of abuse of process in *Eight Representative v MGN* [2016] EWHC 855, §34. Nothing, in my view, turns on the precise label used. The basic principle is that where a party to litigation has obtained a judgment or order on the basis of a particular position taken in the litigation, the court has the power to prevent that party to litigation from resiling from that position where that would cause injustice to the other party to proceedings and undermine the integrity of the judicial process.

44. Mr Jourdan submitted that to engage this principle, by analogy with the requirements for a promissory estoppel, there must be a clear and unequivocal representation of the relevant party's position, which a reasonable person would understand was intended to be relied on by the court, and which was indeed relied on by the court. Mr Munby disputed any analogy with promissory estoppel, on the basis that the court in *LA Micro* had emphasised that the principle was a broader one. He did not, however, ultimately disagree that to establish an abuse of process on this ground it must be shown that there has been a clear statement of position, viewed objectively, and that the court did rely on that position.

45. Mr Munby said that in order to establish how, objectively, a representation of a position taken in litigation should be and was understood by the court, it may be relevant to look at evidence of the subjective intent of the person making the representation. It is, however, difficult to see how subjective intent could be relevant to this point. If the evidence shows that, objectively understood, a representation by a litigant was to be interpreted in a particular way, then the fact that the person making the representation also subjectively intended that it should be interpreted in that way adds nothing to the analysis. If, by contrast, the evidence shows that the statements made by the litigant were ambiguous and could reasonably be interpreted in several ways, it is difficult to see how those statements could form the basis of an abuse of process or estoppel argument, whatever the intent of the person making those statements.

46. Intention might, nevertheless, arguably be relevant in a different way: if viewed objectively the statements made by the litigant represented a particular position, but the evidence shows that the litigant in making those statements was confused and did not intend to convey the meaning that was in fact conveyed, that might well be a relevant factor to take into account in the "broad, merits-based assessment" of whether it is unjust to allow the litigant to resile from the position that has inadvertently and unintentionally been conveyed. Likewise, if a claim is made that the litigant was indeed confused, it is obviously relevant to consider any evidence showing that, on the contrary, the litigant was well aware of and intended the impression given by the representations in question.

The conclusions in the judgment of HHJ Gerald

47. The judge started his discussion of the abuse of process point by examining Vaqar's evidence as a whole as to the basis on which he was occupying the flat from 1987 onwards. He made a number of highly critical observations about Vaqar's evidence, on the material before him (which included Vaqar's oral evidence at the trial), finding that Vaqar was "adept at saying one thing but meaning another, or obfuscating sufficiently to satisfy the questioner but avoiding giving simple, straightforward answers", that he had made a "knowingly disingenuous" statement to his trustee in bankruptcy regarding his interest in the flat, that he had demonstrated his "ability to manipulate and control scenarios to advance his own agenda and case" and that the evidence as to what occurred at the 2012 hearing revealed a "masterpiece of dissembling, and manipulation".

48. Specifically as to what occurred at the 2012 hearing, the judge characterised Vaqar's statements to Mr Jarvis as constituting assurances that he would not be claiming adverse possession in any new action if the 1987 claims were struck out (§80). He said that Vaqar had told Mr Jarvis at the 2012 hearing that the adverse possession proceedings had been a mistake, specifically in order to hinder Iftikhar's efforts to get the stays lifted; and that he knew precisely what he was saying and what its effect might be (§§94–5).

49. The judge concluded that Vaqar's disavowal of an intention to bring any claim for adverse possession "brought about or strongly influenced" the decision by Mr Jarvis not to lift the stay of Iftikhar's actions. In that context Vaqar's adverse possession claim in these proceedings was an abuse of process (§100).

Preliminary comments on the scope of the appeal

50. In so far as a finding of abuse of process rests on balancing numerous different factors, then it is established that an appellate court will be slow to interfere. It will generally only do so where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle, or come to a conclusion that was impermissible or not open to them on the evidence: *Aldi v WSP Group* [2007] EWCA Civ 1260, [2008] 1 WLR 748, §16. An appellate court will also not interfere with a trial judge's conclusions on primary facts unless it is satisfied that the trial judge was "plainly wrong": *Volpi v Volpi* [2022] EWCA Civ 464, §2.

51. In the present case, the judge's decision on abuse of process was not on its face based on a balancing exercise. It did, however, include findings of facts based on the material before the judge, including oral evidence of the witnesses at the trial. To that extent, the court in this appeal should be slow to interfere, and Mr Jourdan rightly did not take issue with the judge's findings as to the credibility and character of Vaqar, or his related

findings as to Vaqar's understanding of what had been said at the 2012 hearing. Rather, Mr Jourdan's submissions on those points were confined to a challenge to the relevance of those findings to the assessment of abuse of process, which I will address in due course.

52. As to the judge's characterisation of what was said by Vaqar at the 2012 hearing, and the judge's interpretation of the 2012 judgment, those are not matters of primary fact but are matters which an appellate court is as well-equipped as the trial judge to evaluate. The relevant material is the 2012 judgment itself, and the relevant parts of the transcript, which are before this court. This court is in as good a position as the trial judge to reach a conclusion as to the objective interpretation of what was said at the 2012 hearing. In so far as the transcript of that hearing is incomplete (which is the case for one particular exchange on the last day of the trial) it is not said, and nor does the judgment of HHJ Gerald suggest, that there was any evidence at the trial which purported to fill those gaps.

53. The abuse of process appeal does not, therefore, in my view stray impermissibly into a challenge to the primary facts found by the judge, or any balancing exercise conducted by him. It is in essence a challenge to the judge's characterisation and interpretation of the material relating to the 2012 hearing, as well as to the relevance of the judge's assessment of Vaqar's character.

Materiality of Vaqar's statements at the 2012 hearing

54. It is convenient to start with Mr Jourdan's arguments on the materiality of the discussion of the adverse possession point at the 2012 hearing to the decision of Mr Jarvis not to lift the stay. Those arguments in effect take issue with the conclusion of HHJ Gerald that Vaqar's statements during the hearing had "brought about or strongly influenced" the decision of Mr Jarvis.

55. Mr Jourdan's argument was, first, that the correct test was whether "but for" the relevant statement the result would have been different, and that in the present case the result would have been the same irrespective of the debate as to the adverse possession point; and secondly, that even on a lower threshold test of material influence, Mr Jarvis was not materially influenced by Vaqar's statements at the hearing regarding the adverse possession point.

56. As set out above, it follows from *LA Micro* that an estoppel or abuse of process may arise where the stance taken by the relevant party was "a reason" for the judgment obtained by that party, or where the earlier decision was obtained "on the footing of, or because of" the position taken by the party in the earlier proceedings. Contrary to Mr Jourdan's submissions, that does not suggest that the relevant representation must have been the decisive factor in the earlier decision, such that "but for" the statement the result would have been different. In some cases, it may of course be possible to say that the relevant representation was decisive. In other cases, however, where the decision is a balancing exercise reached on the basis of an assessment of a number of different factors, it may be impossible to isolate any one of those factors as playing a decisive role. In such cases what is required, in my judgment, is that the statement was a material factor in the decision.

57. In that regard the conclusions in the judgment of HHJ Gerald are unimpeachable. It is evident from §§119–20 and 130 of the 2012 judgment that the questions of whether

Iftikhar would be able to bring a new claim, and whether such a claim would be defeated by the defence of adverse possession, were important factors in the judge's decision not to lift the stay.

58. It is also apparent from the 2012 judgment that the judge understood that Vaqar and Saira were not and would not be advancing a claim for adverse possession. That was the basis on which, in §130 of the 2012 judgment, he dismissed Iftikhar's submission that if he brought a new claim he would be substantially prejudiced because it would be met with the defence of adverse possession. The judge's understanding of Vaqar's position on this point was therefore undoubtedly a material reason for his decision.

59. I do not, therefore, agree with Mr Jourdan's submission that irrespective of the adverse possession point the *only* correct decision at the 2012 hearing was to maintain the stay. While the judge certainly regarded the claim as being "stale", his conclusion that it should not be resuscitated went hand in hand with his conclusion that the correct course was that Iftikhar should issue new proceedings, and that Iftikhar would not be substantially prejudiced in doing so.

60. As a fallback submission in this regard, Mr Jourdan disputed Mr Jarvis' understanding of what Vaqar had said. That falls to be considered as part of the challenge to the clarity of Vaqar's statements at the 2012 hearing, to which I now turn.

Clarity of Vaqar's statements at the 2012 hearing

61. HHJ Gerald's characterisation of Vaqar as having disavowed an intention to bring a claim for adverse possession was based on what the judge described as the "critical exchange" between Vaqar and Mr Jarvis at the 2012 hearing:

> "MR MALIK: I think we made a mistake making this adverse possession application. We should not have listened to our solicitors and barristers. … The reality is you cannot change facts. This is family property. It is brought with family funds. Everyone has agreed the whole thing belongs to the father because has been distributed.
>
> THE DEPUTY JUDGE: Just so I understand the position because one of the elements is obviously a concern to this difficulty that you would want to assert a claim, or the trustee would but it would depend on what you say this claim, that you are saying there is not an adverse possession claim.
>
> MR MALIK: I want to be truthful and straightforward with you. How can you make an adverse possession claim on a property that you partly own?
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> THE DEPUTY JUDGE: You cannot.
>
> MR MALIK: Exactly. I mean, the property is partly owned by me. It is partly owned by the partnership. We have all decided everything belongs to the father so that he can settle it. I am saying that we have given up our rights in favour of the father. …"

62. Pausing there, what Vaqar was saying was that he could not make an adverse possession claim in relation to a property that he partly owned. He was not saying that such a claim

would not be brought even if the courts were to find that the property was in fact owned by Iftikhar.

63. A few pages further on in the transcript, there was the following discussion as to the position of Saira (not referred to in the judgment of HHJ Gerald):

> "MR MALIK: … what Saira would submit is that it would be then therefore more fair and equitable if a fresh claim was filed.
>
> THE DEPUTY JUDGE: Why?
>
> MR MALIK: Because she is not certain, and we do not have at the moment access to legal advice. She is not certain as to what her then defences could be. Her defence at that time when these actions were filed is there, but now the situation has changed.
>
> …
>
> THE DEPUTY JUDGE: Why is she going to be in a better position to deal with a new claim? That is what I do not understand.
>
> MR MALIK: Well, she would be in a better position to deal with a new claim because if it is still claimed that Iftikhar is the owner and that he bought the funds from his personal, you know, then she would obviously, I suppose, have rights of adverse possession.
>
> THE DEPUTY JUDGE: But what will be claimed is we know what your brother Iftikhar's case is. He says he is the owner; he is a registered owner and he is entitled to possession. … It will then be up to your wife to plead her defence to it … She has not pleaded defence yet. So it will be exactly the same as it would be to the present action.
>
> MR MALIK: Yes; but there would be a slight difference, would there not? That difference would be (and I am not suggesting that she is) that because she was not a partner in the business, then it may well be possible that she then has a defence regarding adverse [possession], for the simple reason that … she has been in occupation for that many years and Iftikhar has done nothing about the claim that he filed earlier on. …
>
> …
>
> THE DEPUTY JUDGE: You cannot claim adverse possession when you have that sort of promise. You do not get title from that; you have been given a right to live there on certain terms.
>
> MR MALIK: Yes, but that would only apply if the file were to concede – and there is no bar in English law which says that the father had the authority to decide because --
>
> THE DEPUTY JUDGE: Her evidence is that Iftikhar agreed as well.

> MR MALIK: Yes. But then Ms Tipples says that even if they all did agree this is property law and this is not enlightening(?) and, therefore, it should not apply."

64. That exchange is revealing. It showed that Vaqar intended that at the very least his wife Saira *would* advance a defence of adverse possession, and he was candid that this was an advantage to them of Iftikhar having to start new proceedings. While Mr Jarvis suggested in response that a claim of adverse possession might not be possible if there was a licence to occupy, Vaqar pointed out that this would require that the licence was given by someone with authority to do so.

65. In Ms Tipples' closing submissions for Iftikhar, she raised the point that her understanding of what was being said by Vaqar on behalf of Saira was that she wanted to keep all of her options open including the defence of adverse possession. The judge interjected that he had understood Vaqar to accept that his claim was not one of adverse possession but was rather one of title to the property "either because it was a partnership asset or because it … remained the father's property which he had said that on his death would vest in Vaqar … He had a right to occupy". The judge then asked Vaqar to confirm whether his recollection was correct.

66. The transcript records Vaqar's response and the judge's reaction to that as follows:

> "MR MALIK: My Lord (inaudible) is entirely correct. What I did say was that I did not want Saira to -- because we are not legal people, we don't understand the implications of everything, I did not want her to lose any (inaudible), and therefore is the extent of my argument. But I did say that (inaudible) how can he make an adverse possession hearing.
>
> JUDGE JARVIS: That's what I thought you said.
>
> MR MALIK: (inaudible) be possible.
>
> JUDGE JARVIS: Thank you. Well so if it wasn't clear before I think it's clear now."

67. Reading the judge's response together with the comments at §130 of his judgment, the judge appears to have understood Vaqar to have confirmed in this exchange that an adverse possession defence was not being pursued by either him or Saira in the proceedings before him, and would not be advanced by them in any new proceedings. Some caution must be taken in reconsidering that conclusion, given the inaudible passages in this exchange. The audible passages of the transcript can and should, however, be considered alongside the earlier parts of the transcript cited above.

68. As regards Saira, Vaqar confirmed that he "did not want her to lose any (inaudible)" – the inaudible word presumably being "rights" or something similar. That was consistent with his comments in the earlier lengthy discussion as to her position. As to Vaqar's own position, his comments – so far as they appear on the transcript – were rather ambiguous. His endorsement of the judge's comments ("My Lord … is entirely correct") and his subsequent comment "But I did say that … how can he make an adverse possession hearing" suggested agreement with the judge's immediately preceding summary in the

exchange with Ms Tipples, namely that Vaqar was claiming title to the property rather than relying on a claim or defence of adverse possession. The judge did not, however, ask Vaqar what his position would or might be if in future proceedings the court were to find (contrary to Vaqar's primary case claiming title to the property) that Iftikhar was in fact the true owner of the flat, and Vaqar did not make any specific representation as to what his position would be in that event.

69. Mr Munby said that if §130 of the judgment was inaccurate, it should have been corrected by the parties present after the judgment had been delivered. I do not think that is realistic. The judgment was a long *ex tempore* judgment, and the relevant passage discussing what had been said on the subject of adverse possession was a single sentence among 134 paragraphs. It is entirely unrealistic to expect any of the parties to have focused on the precise wording of that sentence, delivered orally, particularly Vaqar and Saira who were litigants in person.

70. Mr Munby also relied on the conclusions of HHJ Gerald that Vaqar was a "clever and sophisticated person" who knew and understood that the adverse possession claim was a factor being taken into account by the judge, and that if the stay was lifted that would be damaging and possibly fatal to a claim to adverse possession. He said that those conclusions as to Vaqar's understanding and intentions could and should be taken into account in assessing the objective interpretation of what was said at the trial, particularly if the transcript was incomplete.

71. For the reasons given at §§45–46 above, HHJ Gerald was entitled to consider the evidence of Vaqar's subjective intentions in order to reject Vaqar's claim that he had not understood the relevance of the discussion with Mr Jarvis on the adverse possession point. The question of whether Vaqar was confused in his exchange with Mr Jarvis was also a matter which HHJ Gerald was entitled to take into account as part of his assessment of whether it would be an abuse of process for Vaqar to resile from the position expressed at the February 2012 hearing.

72. I do not, however, consider that evidence of Vaqar's subjective intentions can be used to reinterpret what was said at the 2012 hearing. The clarity of Vaqar's statements at that hearing is a matter to be assessed objectively by reference to the material before the court at that hearing, and what is recorded on the transcript as having been said by the parties. The majority was clearly recorded by the transcriber, and its effect was, in my judgment, as set out above. As already noted, it is not suggested that there was at the trial before HHJ Gerald any evidence from the parties which shed light on what was said in the inaudible passages of the transcript.

73. In my judgment, the transcript does not disclose any clear representation by Vaqar that neither he nor Saira would in future proceedings advance any defence of adverse possession. HHJ Gerald was therefore wrong to find that Vaqar had disavowed an intention to claim adverse possession in any new proceedings, so as to make it an abuse of process for the point to be advanced in the present proceedings.

Other arguments on abuse of process

74. I do not, therefore, need to reach a conclusion on Mr Jourdan's other objections to the finding of abuse of process, and will set out only some brief observations on the arguments before me on those points.

75. As regards the trustee's ability to claim title by adverse possession, had fresh proceedings been commenced before Vaqar had been discharged from bankruptcy, that is in my view irrelevant to an abuse of process claim based on the conduct of Vaqar. A litigant whose bankruptcy has been discharged, and whose prior conduct gives rise to an abuse of process in the proceedings which they are (following discharge) conducting on their own behalf, cannot avoid that consequence by saying that the claim would not have been an abuse if it had been pursued by their trustee in bankruptcy.

76. Mr Jourdan's suggestion that Iftikhar could and should have cured any unfairness by making an application to lift the stay is also not very persuasive, in circumstances where that very application by Iftikhar is now opposed by Vaqar, and would no doubt have been even more robustly opposed had such an application been made while the 2017 proceedings were still pending in the County Court.

77. I also do not consider it realistically arguable that HHJ Gerald failed to take account of the consequences of his decision on the abuse point. The adverse possession argument was (as the judge recorded at §9 of the judgment) advanced by Vaqar in the alternative to Vaqar's primary case that Iftikhar held the flat on trust for him from the date of completion of the purchase. Quite obviously if Vaqar's claim to adverse possession succeeded, it would defeat Iftikhar's claim to possession; equally obviously, if the adverse possession claim failed then (on the judge's first conclusion as to the beneficial ownership of the flat) Iftikhar's claim to possession would succeed and Vaqar would have to leave the flat. It is fanciful to suggest that the judge ignored those consequences.

78. As to Mr Jourdan's final argument that the judge's decision was overall not open to him on the facts, I have found that the judge's decision was wrong, but on the narrow basis set out above.

Conclusion

79. I allow the appeal on the abuse of process point. It is therefore necessary to consider the further ground of appeal and respondent's notice points relating to the question of whether, as a matter of substance, a defence of adverse possession can be maintained by Vaqar in the present case.

Intention to possess

Submissions

80. The appeal against this aspect of the judge's conclusions rested on the proposition that Iftikhar's payment of the service charges for the flat did not show that Vaqar had no intention to possess, since payment of service charges is an incident of ownership, not possession. The fact that the owner of leasehold property pays the service charges is not, Mr Jourdan said, inconsistent with a third party's intention to possess that property.

81. Mr Munby said that the judge's conclusion should be upheld as being a straightforward application of settled law to uncontroversial facts. While accepting that the payment of service charges is not, strictly speaking, required by someone in mere possession of property, he submitted that in practice one would expect the occupier to do so, such that a request from Vaqar to Iftikhar to pay those charges demonstrated equivocal intention to possess.

The law

82. The Limitation Act 1980 provides in s. 15(1) that no action may be brought to recover land more than 12 years after the right of action accrued. The effect of Part I of Schedule I to the Act, §§1 and 8(1), is that a right of action will accrue when the person entitled to the land has been dispossessed by a squatter in adverse possession of the land. The effect of s. 75 of the Land Registration Act 1925 was that on the expiry of the limitation period the registered owner was deemed to hold the land on trust for the squatter. Schedule 12 to the Land Registration Act 2002, §18 now provides that where a registered estate was held on trust for a person immediately before the 2002 Act came into force, that person is entitled to be registered as proprietor.

83. It is commonly recognised, however, that the term "adverse possession" is something of a misnomer. In the leading case of *Pye (Oxford) v Graham* [2003] 1 AC 419, in which the House of Lords approved the approach taken by Slade J in *Powell v McFarlane* (1977) 38 P&CR 452, Lord Browne-Wilkinson confirmed that to establish "adverse possession" it is not necessary for the squatter to act "adversely" to the interests of the paper owner of the land. Rather, all that is needed is that the squatter has dispossessed the paper owner by taking ordinary possession of the land for the requisite period without the consent of the owner: *Pye* §36.

84. In order to establish "possession", there are two requirements: (1) a sufficient degree of physical custody and control, i.e. factual possession; and (2) an intention to exercise custody and control on one's own behalf and for one's own benefit, i.e. an intention to possess: *Pye* §40.

85. The intention to possess is to be distinguished from an intention to own or to acquire ownership. What is required is an "intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow": *Pye* §43, citing *Powell*, pp 471–2.

86. A squatter who makes full use of the land, in the way in which an owner would, will not normally have to adduce additional evidence to establish an intention to possess. But where the actions of the occupier in relation to the land are equivocal and open to more than one interpretation, those actions will not be sufficient to establish an intention to possess. What is required, in such a case, is evidence that the squatter has made it "plain to the world at large" by their actions or words that they have intended to exclude the owner as best they can: *Pye* §§76–7 (per Lord Hutton).

The facts

87. There is no dispute as to the facts. As to factual possession, it is common ground that Vaqar was in physical possession of the flat from 1987, having changed the locks and denied entry to Iftikhar, his parents and his siblings. Vaqar has remained in physical possession of the flat since then, to the present day where he says that he resides in the flat together with Fahim and Rahim. It is also agreed that utility bills and council tax charges have been met by Vaqar since 1987. (A suggestion by the judge that some of these were reimbursed by Iftikhar was agreed to be incorrect. Likewise the parties agreed that the judge's reference to "rent" being paid by Iftikhar was also incorrect, as the lease stipulated only a peppercorn rent.)

88. By contrast, demands for service charges sent to the flat by the managing agents and addressed to Iftihkar were not paid by Vaqar. Instead his solicitors forwarded the relevant invoices to Iftikhar's solicitors, requesting their payment by Iftikhar. As set out in the correspondence cited by HHJ Gerald at §§109–111 of his judgment, Iftikhar agreed to pay the service charges, with his solicitors stating that "As our client is the owner of the flat it is clearly correct that he should discharge this account".

The conclusions in the judgment of HHJ Gerald

89. The judge took the view that payment of service charges on leasehold premises is an "incident of possession", without which possession cannot be maintained. Accordingly, by requesting that Iftikhar discharge those obligations, Vaqar was treating him as being in control such that Vaqar did not have the necessary intention to possess (§§114–9).

90. Mr Munby suggested that the judge's findings on this point should be interpreted in the context of the judge's earlier findings as to Vaqar's shifting reasons for claiming ownership of the flat, which in his submission indicated a lack of unequivocal intention to possess on his own behalf.

91. The judge did not, however, find a lack of intent to possess manifested by Vaqar's varying claims regarding the flat's ownership. The sole and decisive basis for rejecting an intention to possess was the payment by Iftikhar (at Vaqar's request) of the service charges for the flat. Indeed the judge stated in terms at §114 that if Vaqar had paid the service charges as and when demanded, he would have had a strong claim that he was possessing the land with the necessary intent. It follows that Vaqar's stated position as to the basis on which he was occupying the flat is not relevant to this ground of appeal.

92. Mr Munby also argued that the judge's conclusions should be interpreted as reflecting the point that the payment of a service charge, if not an obligation or incident of possession, is a normal expectation of someone in possession, such that a request to the paper owner to pay that charge is equivocal conduct of the sort referred to by Lord Hutton at §§76–7 of *Pye*.

93. I do not consider that the judge's conclusions rested on this analysis. While the judge certainly took the view that a trespasser who calls upon the paper owner to pay the service charge cannot be described as exhibiting a clear intention to possess, he reached that conclusion on the express footing that control or possession of leasehold premises carries with it incidents of a different order and nature from freehold premises, namely the acceptance of the responsibility to pay the service charge (§§117–9 of the judgment).

94. It is therefore, in my judgment, necessary to consider first the approach adopted by the judge as summarised in the foregoing paragraph. I will then turn to Mr Munby's alternative analysis, in the event that Mr Munby's analysis can be regarded as at least part of the basis for the judge's conclusions.

Whether payment of the service charge is an incident of possession of leasehold property

95. It was common ground before me that the obligation to pay the service charge for leasehold premises is an incident of ownership of the lease: it is an obligation that falls exclusively on the leaseholder or assignee of the lease. Mere control or possession of

leasehold premises, without ownership, does not carry with it any obligation to pay the service charge.

96. As *Pye* confirmed, an intention to possess does not require an intention to own. All that is required is an intention to exercise custody and control on one's own behalf and for one's own benefit. If payment of the service charge is not a necessary incident of possession, then an intention to possess likewise cannot require the payment of the service charge.

97. The facts of the present case support that analysis. While Iftikhar paid the service charges, it is common ground that Vaqar was in factual possession of the flat, and that Iftikhar was excluded by him. That factual possession was (quite evidently) not in any way affected by the payment by Iftikhar of the service charges. That being the case, it is difficult to see why Vaqar's intention to be and remain in factual possession should have been affected by the question of who paid those charges.

98. Mr Munby sought to draw an analogy with the case of *Pavledes v Ryesbridge* (1989) 58 P&CR 459, in which adverse possession was rejected where Mr Pavledes had asked the freehold owner of land to repair fencing which kept trespassers off the site. Knox J commented at p 480 that:

> "so far as the necessary mental element is concerned, in my judgment, Mr Pavledes cannot be heard to claim that he was in adverse possession as against the GLC in respect of periods when from time to time he actually called on the GLC to do its duty as the person entitled to possession to keep out trespassers. … Possession is indivisible, we are told. It seems to me that Mr Pavledes cannot validly claim himself to be in adverse possession as against persons whom he actively requested to shoulder the responsibilities that possession has."

99. That case reflects the principle that possession requires the possessor to exercise physical custody and control over the property, by excluding "the world at large", including the owner. A request to the owner to exclude trespassers is therefore inconsistent with an intention on the part of the squatter to do so. That is, however, very different from the present case, where the request was to defray an obligation of ownership which had nothing to do with the exercise of physical custody and control over the property.

100. Mr Munby also relied on the citations of *Pavledes* in the Northern Irish case of *St Patrick's Archdiocesan Trust v Ward* [2018] NICh 5, and the Hong Kong case of *Hollywood Shopping Centre v Owners of Wing Wah Building* [2010] HKCFI 694. *St Patrick's Archdiocesan Trust* concerned a complaint by the squatter to the owner about trees on the disputed property overhanging the squatter's adjoining property. The court also found that the claimed acts of possession were in any event equivocal. In *Hollywood Shopping Centre* the squatters had agreed to contribute to the costs of complying with an order to investigate and report on the structural integrity of the disputed premises, and there was also evidence that the squatter only used part of those premises.

101. In both cases, the point made by the courts was that the conduct of the squatters indicated that they did not regard themselves as being in control (or in the *Hollywood* case, wholly in control) of the disputed premises. The cases turned, however, on the specific facts and

evidence before the court, and neither case concerned the payment by the owners of service charges. I do not consider that either of those cases assists Mr Munby.

102. I therefore respectfully disagree with the judge's conclusion that possession of leasehold premises carries with it acceptance of the responsibility to pay the service charge, such that Vaqar's request to Iftikhar to pay the service charges demonstrated a lack of intent to possess the flat.

Whether the request to pay the service charge demonstrated equivocal conduct

103. I turn therefore to Mr Munby's alternative analysis, which was that (i) as a matter of practical reality the service charges will have to be paid by someone to maintain title under the lease; (ii) a squatter will therefore have an interest in ensuring that the charges are paid; and therefore (iii) a request by the squatter that the owner pay the service charge amounts to equivocal conduct.

104. There is no dispute about the first two of those propositions. Contrary to Mr Munby's submissions, however, it does not follow that a request by the squatter to the paper owner to pay a service charge will amount to equivocal conduct, such as to require positive evidence of intention to possess to be adduced in order to found a claim for adverse possession. If (as I have found, and as was common ground) the payment of a service charge is not an incident of possession, and the defraying of that charge by the paper owner is therefore entirely consistent with possession by the squatter, then there is nothing equivocal in the request by the squatter that the paper owner should pay the charge.

105. It is certainly the case that if a squatter were to ask the paper owner to assume responsibilities suggesting that the squatter was *not* in control of the premises to the exclusion of the paper owner and third parties, that might well be said to be manifesting an equivocal intent to possess – essentially the reasoning in *Pavledes* and the subsequent cases cited above. But that is not the case here: it is common ground that at all times since 1987 Vaqar and his immediate family have been in full control of the flat, to the exclusion of all others including Iftikhar. There is nothing at all equivocal about that conduct.

Conclusion

106. I therefore allow the appeal in respect of the judge's substantive conclusion as to Vaqar's intention to possess, in circumstances where he had requested that Iftikhar pay the service charge.

The Respondent's notice points

Submissions

107. In light of the conclusions that I have reached above, it is necessary to consider the points raised in Iftikhar's respondent's notice. The first two of those are that it follows from the judge's conclusions that either or both of Iftikhar and Bilal agreed to Vaqar's occupation of the flat as part of the 1992 Agreement. That agreement continued in force until some point between 2007 and 2010. On that basis, Iftikhar says that there was no 12-year period of continuous possession by Vaqar "without the consent of the owner", and the judge should so have found. The third respondent's notice point is that Vaqar at least

believed that he was occupying as a licensee, such that he lacked the necessary intention to possess the flat on his own behalf.

108. Mr Jourdan's response to this was that the claims that Iftikhar or Bilal consented to Vaqar's occupation of the flat are directly contrary to Iftikhar's pleaded case for the trial and cannot be raised now for the first time on appeal; that HHJ Gerald did not find that there was any such consent by Iftikhar or Bilal; and that the argument that Vaqar intended to occupy as a licensee was wrong both factually and legally.

Appeal on points not pleaded: the law

109. No authority has been cited to me for Mr Jourdan's proposition that a party is not allowed to raise on appeal a factual contention that contradicts that party's pleaded case. Nor do I accept that proposition as a matter of principle. As Briggs LJ observed in *Sibir Energy v Slocom* [2014] EWCA Civ 831, §70, it is commonplace in civil litigation for the conclusions of a trial judge to find that the truth lies somewhere between the rival evidential cases advanced by the opposing parties; the judge is not constrained to opt for one or the other of the extremes contended for by the parties. Where that occurs, it would be very odd if the parties to an appeal were bound to maintain their original factual positions that had been rejected by the judge.

110. Different considerations arise, however, where the appeal puts in issue a point that was not raised at all as a dispute before the first instance court. It is well-established that an appellate court will be cautious about allowing a new point to be raised for the first time before it: *Singh v Dass* [2019] EWCA Civ 360, §§15–18, and *Sivier v Riley* [2021] EWCA Civ 713, §18. In particular, an appellate court will not generally permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b) had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial: §17 of *Singh v Dass*, citing *Mullarkey v Broad* [2009] EWCA Civ 2, §§30 and 49.

111. At §30 of *Mullarkey v Broad* the principle was expressed as being that "if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards." The court noted at §49 that the party seeking to advance a different case on appeal "bears a heavy burden as regards showing that the case could not have been conducted differently, in any material respect, as regards the evidence."

112. Even where the new point is a pure point of law, the appellate court will only allow it to be raised if the other party has had adequate time to deal with it, has not acted to its detriment on the faith of the earlier omission to raise it, and can be adequately protected in costs: §18 of *Singh v Dass*, citing *R (Humphreys) v Parking and Traffic Appeals Service* [2017] EWCA Civ 24, §29.

The conclusions in the judgment of HHJ Gerald

113. It is common ground that Iftikhar did not, at the trial, either plead or raise the point that he consented to Vaqar's occupation of the flat at any time. On the contrary, in his Part 20 particulars of claim he alleged that Vaqar had occupied the flat "without [his] consent or licence". That position was repeated in Iftikhar's reply and defence to counterclaim.

Vaqar's defence and counterclaim agreed, saying that Iftikhar "has never consented to [Vaqar's] possession of the Flat".

114. The pleadings did, however, raise the issue of whether Vaqar thought that he was occupying as Bilal's licensee. Iftikhar in his Part 20 particulars of claim, repeated in his reply and defence to counterclaim, stated that that Vaqar had purported to occupy the flat as the licensee of Bilal, the Malik family, or a partnership constituting the Malik family (i.e. essentially recording the position that Vaqar had advanced in the 1987 actions). On that basis Iftikhar denied that Vaqar was entitled to raise a defence of adverse possession. Vaqar denied that he occupied as licensee on any basis, asserting that the flat was purchased for use as his home from the outset, and was held on trust for him by Iftikhar.

115. It appears from the judgment that, by the time of the trial, this issue had crystallised to an argument that Vaqar thought that he was occupying the flat as Bilal's licensee pursuant to the 1992 Agreement.

116. That agreement was the subject of witness evidence from Iftikhar and Vaqar, both of whom were cross-examined at the trial. In addition, the judge had before him a 2011 witness statement from Bilal, which also addressed the issue. The judge approached that evidence with caution, given that Bilal had died in 2014 and the circumstances in which his 2011 witness statement had been given were not clear, but he said that this did not mean that he should give the statement no weight at all (§27).

117. The judge's findings as to the effect of the 1992 Agreement were first set out in a section of the judgment on the abuse of process point. As part of the discussion of that point, the judge said that it was necessary to consider Vaqar's evidence as a whole (§80), and proceeded to set out and discuss Vaqar's evidence on, among other things, what was agreed in or around 1992. On that point the judge found that:

> "85. What is important is what was agreed between Vaqar, Iftikhar and father. In my judgment, it was simply agreed that father was given authority to distribute, or determine or resolve, the dispute as to ownership (and therefore occupation) of the flat, but was *not* actually treated as being the owner, and that if no accepted determination or distribution or resolution was made then both sons could resume their dispute. That broadly, is what Iftikhar says and is consistent with what father says. That in my judgment was the thrust of what Vaqar said in cross-examination: 'upon the undertaking of the father, that he would distribute the assets … his agreement signed and that it would give him authority to distribute and on that basis, I say that he is the owner'. A further aspect of the agreement was that until resolution, Vaqar could remain in occupation of the flat.
>
> 86. That makes practical sense and is consistent with what one would expect at the time. If for some reason father did not distribute or resolve the flat dispute, or his resolution was not accepted by either or both brothers, then it would be self-evident that either brother could return, and maintain, their then positions, Vaqar that it be or had been allocated as part of the partnership assets to him with a right to live (not that he had been the absolute owner from purchase); Iftikhar that he was the absolute owner. Commercially, and practically, it would make no sense for either brother to have relinquished their claims and vest all in father. Consistent (I was told) with Pakistani

> patriarchal culture and the way in which this family operated, this agreement was intended to enable peaceful resolution within the family by father but if, for whatever reasons, father did not decide or one or other of the brothers did not accept his decision, none would be prejudiced. However, until resolution, or resurrection, Vaqar could remain in occupation, otherwise the dispute would have in effect been resolved. There was never any agreement between family members or Iftikhar that father was the owner of the flat.
>
> 87. In making this finding, I have not overlooked that Vaqar has in various witness statements and other documents stated that the 1992 Agreement was to the effect that father was the absolute owner. When cross-examined about this at length, his answers were confused, contradictory and obfuscatory, unwilling to come down clearly on one side. Neither have I overlooked that Iftikhar did not seek to challenge this point as it was the foundation for his argument that Vaqar was in occupation as licensee of his father so could not have been in possession on his own behalf but vicariously on that of his father's. However, for reasons stated, I am unable to accept that it was agreed, and that Vaqar ever did believe, that it had been agreed that father would be the absolute owner for the simple reason, already stated, that it would make no sense at all. I refer to this issue further below."

118. The judge therefore apparently concluded, in these passages, that the 1992 Agreement between Vaqar, Iftikhar and Bilal included an agreement that Vaqar could remain in the flat until Bilal had resolved the dispute, or (if not resolved) until the litigation was resurrected. The judge's conclusions on abuse of process did not, however, turn on that specific finding.

119. By contrast the judge did address the question of any consent to occupy the flat in considering Iftikhar's argument that Vaqar had purported to occupy the flat as a licensee. The judge's conclusions on abuse of process and the payment of the service charge meant that this further argument did not, strictly speaking, need to be determined, but the judge nevertheless addressed it at §§121–2 as follows:

> "<u>Occupation as licensee of father under 1992 Agreement</u>
>
> 121. The central question here is whether the 1992 Agreement prevented Vaqar from having the necessary intent to occupy or possess on his own behalf. There is no dispute that Iftikhar, the paper owner, had not consented to Vaqar's occupation. As Falk J put it in *Malik v Malik* … the question here is 'whether Vaqar in fact had the necessary intention to exclude others, or whether he did not because he was not intending to exclude his father, being the relevant third party. In other words, he was occupying on his father's behalf', vicariously …
>
> 122. For reasons already stated, I am unable to accept the 1992 Agreement was to the effect that all agreed that father was the absolute owner of the flat, from which it follows that I am unable to accept that Vaqar at any time thought he was occupying as father's licensee, or vicariously on his behalf (which would be somewhat unreal, given that father has at no time accepted that he had any domain over the flat: merely that he was trying to resolve a

> family dispute as best he could). Further, rhetorically, how could someone (father) who has been physically excluded from the flat since 26.06.87 license another (the excluder) to possess on his behalf? The circularity of that position makes it unsustainable. …"

120. The judge's findings at §§85–6 regarding an agreement that Vaqar could remain in the flat are not easy to reconcile with his statements at §§121–2 that Iftikhar had not consented to Vaqar's occupation, that Bilal accepted that he had no domain over the flat, and that Vaqar could not therefore plausibly have thought that he was occupying as Bilal's licensee. I will return to this point below.

Vaqar's occupation as licensee of Iftikhar

121. For the reasons given above, I do not accept that Iftikhar is precluded from raising a respondent's notice point claiming on appeal that he consented to Vaqar's occupation of the flat pursuant to the 1992 Agreement, simply because that was not his pleaded case at the trial. The problem with raising this point now is, however, not merely that it is inconsistent with Iftikhar's pleaded case at trial, but that the question of Iftikhar's consent was – as the judge noted at §121 – simply not in dispute at all at the trial, where it was common ground that Iftikhar had *not* consented to Vaqar's occupation. The question is therefore whether, in this appeal, Iftikhar can for the first time put the point in dispute, by contending that he did in fact so consent. That requires, in particular, consideration of whether the evidence at the trial would or might have been different if the point now taken had been pleaded by Iftikhar.

122. It is apparent from the findings in the judgment set out above that the judge did have before him both Iftikhar and Vaqar's accounts of the 1992 Agreement. But while the judge found that the 1992 Agreement included as a "further aspect" that Vaqar could remain in occupation until resolution of the dispute (§85), he appears to have reached that conclusion on the basis that this made practical sense, since the dispute would otherwise have been resolved (§86). He did not suggest that either Iftikhar or Vaqar had said that there was any such agreement.

123. Had Iftikhar pleaded and pursued a case (even in the alternative) that he consented to Vaqar's occupation, he would have had to address that in his evidence. In turn, Vaqar would have had to respond to that point. As Mr Jourdan submitted, the cross-examination of both parties would have then necessarily focused on that issue. As it was, however, because it was common ground that Iftikhar never consented to Vaqar's occupation, that did not happen. I cannot with any confidence assume that, if the evidence had focussed on the point, the judge's findings would have been the same as set out at §§85–6.

124. If the point had been pleaded, therefore, it would have both necessitated new evidence and would, inevitably, have resulted in a different approach to the evidence being taken at trial, in particular in the cross-examination of Iftikhar and Vaqar. In those circumstances I do not consider that Iftikhar can now raise for the first time in this appeal the proposition that he consented to Vaqar's occupation.

125. In any event, while this respondent's notice point rests on the findings regarding the content of the 1992 Agreement in §§85–6 of the judgment of HHJ Gerald, those findings are made in passing in a section of the judgment which addressed abuse of process, rather than the consent issue, and where the conclusion on abuse did not turn on the judge's

findings regarding consent to occupy. By contrast, in the later section of the judgment at §§121–2 concerning the question of a purported licence to occupy, where the issue of consent to occupy was part of the judge's direct reasoning on this question, the judge recorded that there was no dispute that Iftikhar had *not* consented to Vaqar's occupation.

126. Even if, therefore, it were open to Iftikhar now to advance a new case on consent, it is not one that finds clear factual support in the judgment.

Vaqar's occupation as licensee of Bilal

127. The same problems arise in relation to the claim that Vaqar occupied the flat as the licensee of Bilal. Iftikhar's pleaded position at the trial was not that Bilal *had in fact* given Vaqar permission to do so, but that Vaqar was *purporting* to occupy the flat as the licensee of Bilal, the Malik family or a partnership constituting the Malik family. As in relation to the issue of consent by Iftikhar, I am not satisfied that the evidence would have been the same if the question of whether Bilal had in fact consented to Vaqar's occupation had been put squarely in issue by Iftikhar.

128. Furthermore, as a matter of fact HHJ Gerald did not find that Bilal consented to Vaqar's occupation of the flat. Mr Munby relied again on §§85–6 of the judgment, saying that if Iftikhar did not consent to Vaqar's occupation, then Bilal must have done so. As noted above, however, that section of the judgment was concerned with the abuse of process issue. In the later section of the judgment which squarely addressed Vaqar's occupation as Bilal's licensee, the judge recorded his earlier findings that Bilal was not the owner of the flat; noted that Bilal had "at no time accepted that he had any domain over the flat" but was merely doing his best to resolve the dispute; and said that it was therefore unreal to say that Vaqar thought that he was occupying as Bilal's licensee (§122). Mr Munby did not challenge those factual findings as being not open to the judge on the evidence before him.

129. Again, therefore, even if it was open to Iftikhar now to raise the point on appeal, the contention that Vaqar occupied as Bilal's licensee is not supported by the facts as found by the judge. I do not, therefore, need to address the question canvassed by counsel of the effect of consent given by Bilal if he was not the owner of the flat. On the judge's findings, no such consent was given.

Vaqar's intention to occupy as licensee

130. By contrast with the first two respondent's notice points, the third point as to Vaqar's purported occupation as licensee is consistent with the case run by Iftikhar at the trial. Again, however, the point fails on the facts as found by the judge: the conclusion at §122 was that the judge was "unable to accept that Vaqar at any time thought he was occupying as father's licensee, or vicariously on his behalf", not least given his finding that Bilal had not accepted any domain over the flat.

131. That is consistent with the judge's findings earlier in the judgment that when Vaqar told his trustee in bankruptcy that he had no interest in the flat as it was beneficially owned by Bilal, that was "disingenuous, and knowingly disingenuous", as Vaqar's position remained as stated and pleaded in the 1987 actions, namely that he in fact had a beneficial interest in the flat (§89). Again, Mr Munby did not challenge those findings as being not open to the judge on the evidence before him.

132. I therefore reject the third respondent's notice point without needing to decide the question of the legal consequences of a wrongful belief by the squatter that they are occupying as licensee (on which I was referred to various conflicting case-law). In the present case, as HHJ Gerald found, Vaqar held no such belief.

Conclusion

133. I therefore reject the respondent's notice points for the reasons set out above.

Application to lift the stay

134. In light of my conclusions on the grounds of appeal and the respondent's notice points, it is necessary to address Iftikhar's application to lift the stay of his 1987 action. The point of this application is that no adverse possession defence can arise in relation to the 1987 proceedings. As I have explained above, the fact that an adverse possession defence might arise in new proceedings whereas it could not run under the 1987 actions was one of Vaqar's explicit reasons for contending at the 2012 hearing that the 1987 actions should remain stayed.

Submissions

135. Mr Munby accepted that the court's discretion as to whether to lift the stay should be exercised on the same basis as an application for relief from sanctions, engaging the three-stage analysis set out in *Denton v TH White* [2014] EWCA Civ 906, [2014] 1 WLR 3296. By analogy with that analysis, it is necessary to consider, first, the seriousness and significance of the delay in applying to lift the stay; secondly, the reasons for that delay; and thirdly whether it is appropriate to lift the stay taking account of all the circumstances of that case.

136. In that regard, Mr Munby accepted that the delay was both serious and significant, but said that there were good reasons for all or most of the delay, as set out in Iftikhar's evidence as well as the detailed chronology of the proceedings in the 2012 judgment. Taking into account all the circumstances of the case, Mr Munby pointed out that the key new factor is that it has now been determined that the flat is, and always was, Iftikhar's. A refusal to lift the stay would therefore deprive Iftikhar of an extremely valuable asset which (it follows from HHJ Gerald's judgment) was wrongfully taken from him, and hand it to Vaqar who was at least as blameworthy as Iftikhar for the delay in resolution of this dispute.

137. Mr Jourdan confirmed that Vaqar does not advance any substantive defence to Iftikhar's action if the stay is lifted. The consequence of lifting the stay will therefore be that Iftikhar's possession claim will succeed. Mr Jourdan contended, however, that the stay should not be lifted for two reasons. The first was the long delay in making this application. The second was that the application could not be determined without hearing evidence about exactly what was agreed under the 1992 Agreement in relation to the existing legal proceedings, on which the evidence before Mr Jarvis in 2012 was conflicting. As explained in the 2012 judgment, Vaqar's evidence was that it was agreed that the dispute would be settled within the family and that the English legal proceedings would be discontinued, whereas Iftikhar had said that the existing proceedings would be stayed pending resolution by Bilal. Mr Jarvis took that dispute (which he did not resolve)

into account as a factor in deciding whether to lift the stay. If Vaqar's position was correct, however, Mr Jourdan said that the lifting of the stay would breach the agreement.

The evidence before the court

138. Iftikhar's application was supported by a witness statement dated 5 September 2022. In that witness statement Iftikhar referred to and adopted his witness statements for the proceedings before Mr Jarvis, to explain the long delay in applying to lift the stay which had led to the 2012 hearing. Iftikhar also referred to and adopted a witness statement filed by him in January 2019 for the purposes of the strike out and summary judgment applications before HHJ Gerald, setting out the reasons why he did not immediately bring fresh possession proceedings following the 2012 judgment dismissing his application to lift the stay in his 1987 action.

139. On 6 October 2022 Deputy Master Linwood approved a consent order providing for Vaqar to serve any evidence in response to Iftikhar's application by 9 November 2022. No evidence was served by Vaqar.

140. That creates a fundamental difficulty with Mr Jourdan's submissions, which is that they are entirely unsupported by any evidence on the part of Vaqar. There is not, therefore, any evidence from Vaqar as to whether his position continues to be that the lifting of the stay would be in breach of the 1992 Agreement. Nor does he address Iftikhar's evidence as to the reasons for the various delays in the proceedings and Vaqar's joint responsibility for those delays; nor does he explain how, if at all, he has been prejudiced by those delays. As Iftikhar has pointed out in his witness statement in support of his application, if anything the delays in the proceedings have resulted in a substantial benefit to Vaqar, in that he has been able to occupy an extremely valuable Knightsbridge property rent-free for over three decades, in circumstances where – it has now been established – he had no right to do so.

141. Mr Jourdan said that Vaqar could simply rely on his 2011 witness statement for the purposes of the 2012 hearing before Mr Jarvis. That witness statement was, however, made for the purposes of a different application more than a decade ago. I do not have any evidence from Vaqar adopting his 2011 witness statement as still being applicable and relevant now, in circumstances where the situation has fundamentally changed since the 2012 hearing: most importantly, a trial has now taken place in which Vaqar's various accounts advanced over the years as to the basis of his entitlement to remain in the flat have been robustly rejected by the judge; and (presumably because of that) Vaqar no longer advances any substantive defence to Iftikhar's 1987 action.

142. It is also notable that while Vaqar said in 2011 that the 1992 Agreement included an agreement to discontinue the English litigation, he did not apparently pursue that contention in his defence and counterclaim to the Part 20 claim in the 2017 proceedings, or in his application to strike out that claim, or in his submissions at the trial. If that argument had been raised, the judge would have had to address it; but there is no trace of the point either in the judgment on the strike out application, or in the final judgment following the trial. Quite the contrary, HHJ Gerald found that the agreement was that if no resolution was reached then both sons could resume their dispute (§85 of the judgment, cited above), and that at some point between 2007 and 2010 "both sons regarded themselves as released from whatever obligations they felt towards father and free to litigate and resume where they left off back in 1987/8" (§88).

143. It cannot, therefore, simply be asserted that Vaqar's evidence for Iftikhar's 2011 application to lift the stay is and remains Vaqar's evidence for a fresh application made now in 2022, on different grounds. Moreover, Vaqar's 2011 evidence self-evidently could not have addressed any issue of delay or prejudice caused by the passage of time since the 2012 hearing.

144. It follows that I cannot accept Mr Jourdan's submission that the lifting of the stay would breach the 1992 Agreement. If Vaqar wished to rely on that submission, notwithstanding the findings of HHJ Gerald, he would have had to adduce evidence as to the effect of that agreement. Likewise, any submissions as to the reasons for and effect of the delay in proceedings should have been supported by evidence. Vaqar was given ample opportunity to serve evidence in response to Iftikhar's application, but chose not to do so.

Application of the *Denton* test

145. On the basis of Iftikhar's evidence before me, Mr Munby's submissions as to the three stages of the *Denton* analysis are in my judgment well-founded. While there is no doubt that there has been an unusually lengthy delay in applying to lift the stay of the 1987 proceedings, the blame for that delay is not to be ascribed solely or even predominantly to Iftikhar, but lies at least equally with Vaqar. Vaqar's proceedings were issued very shortly after Iftikhar's in 1987, and the progress of the two sets of proceedings then took the course which I have summarised at §§10–22 above. As HHJ Gerald recorded at §16 of his 2019 judgment dismissing Vaqar's strike out application, Vaqar's counsel in that application had accepted that:

> "it is very difficult to say that one brother has been more at fault than the other brother in terms of the prosecution of their respective actions, both brought as they were in the same month in 1987. For whatever reasons, they allowed their dispute to go to sleep such that they were stayed automatically in April 2000 and when there was an attempt by [Iftikhar] to revive the matters and have their underlying disputes resolved, that was vigorously opposed by [Vaqar] and since then both brothers have again allowed the dispute to become dormant".

146. Specifically as regards the delay in progressing the dispute following the 2012 hearing, Iftikhar's evidence sets out detailed reasons for that, which include in particular the fact that during 2012–14 he was engaged in without prejudice settlement negotiations with Vaqar's trustee in bankruptcy, and the fact that he was responsible for distributing Bilal's estate after Bilal's death in 2014. It appears that it was only in 2018 that even part of Bilal's estate was able to be distributed in accordance with Sharia law, a substantial part still remaining pending distribution, and Iftikhar says that the delay in distributing the estate was in part due to Vaqar refusing to cooperate with the administration of the estate. As set out above, I do not have any evidence from Vaqar to gainsay the points made by Iftikhar.

147. It is also necessary to take into account the fact that, since 2017, the parties have been engaged in the new proceedings, which it was obviously hoped would resolve the dispute between them. It is entirely reasonable that, while those proceedings were underway, Iftikhar did not seek to lift the stay of the 1987 proceedings.

148. As for the other circumstances to be taken into account, Mr Munby is in my judgment correct to say that the position has changed since the dismissal of Iftikhar's application to lift the stay at the 2012 hearing, given that it has now been determined that the flat belonged to Iftikhar from the outset. While Mr Jarvis appears to have thought that, if Iftikhar's ownership was established in future proceedings on that basis, it would not be met by a defence of adverse possession, that defence has in fact been advanced in the 2017 proceedings. That defence only arises, however, in relation to the 2017 proceedings; it does not arise in relation to the 1987 proceedings, which were commenced promptly after Vaqar took possession of the flat.

149. Unless the stay is lifted, therefore, Iftikhar will be deprived of a very valuable property which Vaqar wrongfully possessed and occupied from 1987 onwards, and which Vaqar and his family have enjoyed rent-free since then.

150. In all the circumstances of the case, it is in my judgment appropriate to lift the stay of Iftikhar's 1987 proceedings, and to give judgment for Iftikhar in those proceedings.

CONCLUSION

151. In conclusion, for the reasons given above I will allow the appeal and dismiss the points raised in the respondent's notice. Iftikhar's application to lift the stay of the 1987 proceedings is, however, granted, and I will give judgment for Iftikhar in those proceedings.