



Neutral Citation Number: [2024] EWHC 2748 (Ch)

Case No: CH-2024-000022

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY APPEALS (ChD)**  
**ON APPEAL FROM THE ORDER OF MASTER MARSH (sitting in retirement)**  
**DATED 8 JANUARY 2024**  
**(Case Ref PT-2021-001064)**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 31/10/2024

**Before :**

**THE HONOURABLE MR JUSTICE TROWER**

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**Between :**

**(1) DOUGLAS STUART PONSFORD**  
**(2) MOVE ON NOW LIMITED**

**Claimant**

**- and -**

**(1) MESUD HABIB SALI**  
**(2) GIZEM YOSKAN**

**Respondent**

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**FRANCIS TREGEAR KC (instructed by Ali Legal Limited) for the Appellants**  
**The First Respondent in person**  
**The Second Respondent did not appear**

Hearing date: 22 October 2024  
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**Approved Judgment**

This judgment was handed down remotely at 10.30am on 31 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE TROWER

## **MR JUSTICE TROWER:**

### **Introduction**

1. This is an appeal brought by permission of Adam Johnson J granted on 24 May 2024 against a decision of Master Marsh (sitting in retirement) made on 13 December 2023. By that order the Master made a declaration relating to the property known as 2 Walsingham Road, Orpington, Kent BR5 3BW (“2 Walsingham Road”). The Master also determined five specific issues and made three orders ancillary to the declaration in relation to possession and management of 2 Walsingham Road and the payment of rent. As well as their appeal against the declaration, the Appellants appeal against the Master’s answers to three of the five issues and all of the ancillary orders.
2. At the hearing of the appeal, the Appellants were represented by Mr Francis Tregear KC, who had not appeared below and was not instructed until shortly before the oral renewal of his client’s application for permission to appeal. The First Respondent (“Mr Sali”) represented himself and also spoke for his wife, the Second Respondent, who was in the court building with their children but did not attend the hearing. Mr Sali had not filed a skeleton argument in opposition to the appeal. In broad terms he was content to rely on the Master’s judgment. He addressed me on the general merits of the dispute and emphasised a number of matters which were important background, but did not always focus on the issues which this court is required to determine. Nonetheless, his submissions were helpful and, amongst other matters gave me a clear sense of how strongly he feels about the way he says that he has been treated by the First Appellant (“Mr Ponsford”). It is clear from paragraph 68 of the Master’s judgment that a sense of grievance is felt on both sides.
3. The Master’s order was made after a six-day trial of certain issues which had arisen in the course of taking an account relating to a former partnership between Mr Ponsford and Mr Sali called ‘Move on Now’. The partnership used an assisted sale agreement (“ASA”) system to acquire property. The way in which the Master said that the ASA operated was that the registered proprietor of a property agreed to sell their interest for a guaranteed price. The seller then received an immediate cash payment equivalent to the current equity. The purchaser was granted a power of attorney and took over responsibility for payment of the mortgage with the permission of the lender and was protected by a restriction on the title. The effect of the arrangement was that the registered proprietor received the value of the equity and a guaranteed price as well as having the responsibility of paying the mortgage removed.
4. The Master held that the partnership traded successfully and happily for some years from October 2010 and held a portfolio of about 15 properties. There was no written partnership agreement but the Master said it was common ground that the partners shared in capital and profits equally. Mr Sali managed the properties and organised the repairs, rentals and sales.

### **The Proceedings**

5. The relationship between the partners broke down in 2021. It is Mr Ponsford’s case that relations between them soured when he discovered that Mr Sali had stolen

substantial amounts of money from the business. Mr Sali disputed this and said that the final straw was Mr Ponsford's conduct at a meeting between them on 29 April 2021 (the "April 2021 Meeting"). Proceedings were issued by Mr Ponsford at the end of 2021, a freezing order was made against Mr Sali (and continued by order of Meade J dated 6 January 2022) and Mr Ponsford was appointed receiver and manager of the partnership property. It was always the Appellants' case that this included 2 Walsingham Road.

6. On 30 March 2022, at a summary judgment hearing at which both the Appellants and the Respondents were represented by counsel, Deputy Master Hansen made a consent order (the "Consent Order") which recited that the parties had agreed that the partnership was dissolved on 1 December 2021 and made provision for the taking of accounts and for the making of inquiries in relation to the dealings and transactions in respect of the business and assets of the partnership. It was directed that the account was to be filed by Mr Ponsford by 31 May 2022 and Mr Sali was to have until 15 July 2022 to file his notice of objections.
7. The Consent Order also made provision for the sale of the property and assets belonging to the partnership, which appeared to include (by an express reference back to the freezing order made by Meade J on 6 January 2022), the property which is the subject of this appeal, viz., 2 Walsingham Road. Although the accounts and inquiries were yet to be carried out and worked through, the Consent Order granted the Appellants almost all of the relief they had sought in their claim form and particulars of claim.
8. At the time the Consent Order was made, no defence had been served by the Respondents and indeed much of the relief sought in the particulars of claim was reflected in the Consent Order as having been agreed. However, on 24 June 2022, the Respondents, still then represented by solicitors, served a defence which accepted the need for the sale of the partnership property that had already been ordered by Deputy Master Hansen, but which also pleaded a positive case in relation to 2 Walsingham Road.
9. The defence did not make a specific allegation that 2 Walsingham Road was not partnership property, and the manner in which it was set out in the Appendix treated it as if it was. However, the defence also alleged that there were arrangements which were inconsistent with it being partnership property. Although not characterised as such, this amounted to a pleading that Mr Ponsford held 2 Walsingham Road on bare trust for Mr Sali. Thus, it was pleaded that, at all material times, Mr Ponsford and Mr Sali had agreed, understood and treated 2 Walsingham Road as beneficially owned by Mr Sali.
10. Mr Sali said in his defence that Mr Ponsford was only on the title as he was the party able to obtain a mortgage, but that all payments for 2 Walsingham Road had been made by him. It was then pleaded that Mr Sali's beneficial ownership was reflected in a deed of trust signed by both Mr Ponsford and Mr Sali whereby Mr Ponsford agreed that upon sale any proceeds would be held by him on trust for Mr Sali. This deed of trust was at the core of the appeal and I shall call it the 2021 Declaration. It is the only document which has ever been identified by anyone as being capable of fulfilling the requirements of section 53(1)(b) of the Law of Property Act 1925 in relation to the trust alleged by Mr Sali. Section 53(1)(b) provides that:

“a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will”

11. The defence also contained an allegation that, in recognition of the fact that 2 Walsingham Road was the home of Mr Sali, on or about 29 April 2021, Mr Sali asked Mr Ponsford to sign a TR1 Transfer, so as to transfer the legal title to Walsingham Road to Mr Sali in order to reflect his beneficial interest in the Property. It was alleged that, although Mr Ponsford initially agreed to sign a TR1 Transfer, there was an altercation at the April 2021 Meeting which was said by Mr Sali to have been both the cause of the dissolution and the date from which the partnership was treated by the parties as having been dissolved. Despite this last plea, I understand it to be common ground that the partnership was in fact dissolved on 1 December 2021, a fact which is reflected on the face of the Consent Order.
12. At a hearing held on 30 September 2022, the Respondents’ defence was struck out by Deputy Master Lampert. As well as striking out the defence to the claim, she also gave directions for Mr Sali to file a notice of objections (to be verified by a witness statement) in answer to Mr Ponsford’s accounts and inquiries. The order required the notice to be served by 11 November 2022, effectively further extending the timetable set by the Consent Order. It follows that, from the time of Deputy Master Lampert’s order, there was no positive case before the court making the allegations in relation to the 2021 Declaration, the TR1 Transfer and the beneficial interest in 2 Walsingham Road summarised above. The court was then to proceed to take an account of (amongst other things) the property belonging to the partnership at the date of dissolution, taking into account the objections filed by Mr Sali.
13. The grounds on which the defence had been struck out are not clear from the order which was made, although it recites CPR 3.4(2)(c) (failure to comply with a rule, PD or court order). Mr Tregear had no instructions and I was not shown the materials in support of the strike out application. But the lateness of the defence, the absence of any reference to an application for relief from sanctions, the fact that it had been filed after the Consent Order had been made granting most of the relief sought in the particulars of claim and the ambiguities as to the pleadings in relation to partnership property are all grounds that might have persuaded Deputy Master Lampert to make the order that she did. However, the fact that she gave directions for Mr Sali to file a notice of objections verified by a witness statement indicated that she contemplated that he would be able to make his case on elements of the account during the course of that process. I was not told whether Mr Sali filed a notice of objections in accordance with the directions of Deputy Master Lampert, nor was I told whether if he did they related in any way to 2 Walsingham Road.

### The Preliminary Issues

14. The taking of the account was then listed for hearing before the Master on 28 July 2023. At that hearing the Master formed the view (I was told of his own initiative) that there were a number of substantial issues of fact to which the parties had not paid proper regard and which could not be resolved without cross-examination. He therefore adjourned the hearing of the account, made orders to remove certain restrictions placed

on titles by Mr Sali to enable sales to proceed and confirmed that a number of the paragraphs in the Consent Order remained in force. In light of the issues he then ordered to be tried, I do not think he appreciated that (on the true construction of the Consent Order) an order for the sale of 2 Walsingham Road was amongst the orders he was confirming in force.

15. There were five issues of fact identified by the Master to be determined at the adjourned account:
  - i) the validity and scope of the 2021 Declaration;
  - ii) the legal and beneficial ownership of 2 Walsingham Road, and whether it is a partnership asset;
  - iii) whether a 20% interest rate had been agreed between Mr Ponsford and Mr Sali; and
  - iv) two further issues which are not the subject of this appeal relating to the status of another property as a partnership asset and the appropriate rate and amount of remuneration for Mr Ponsford's role as receiver.
16. It is not apparent from the Master's July order whether he anticipated at that stage that they would be the only issues to be determined at the adjourned hearing. However, by the time he delivered judgment it was clear that he recognised that, even after determining the issues of fact he had now tried, it would not yet be possible for a final account to be prepared. At the hearing in July, the Master also gave directions for further evidence and the contents of a trial bundle which did not include Mr Sali's defence; this was not surprising as it had been struck out. He also made an order for Mr Ponsford to disclose completion statements relating to partnership properties which had been sold since October 2021 (i.e. shortly before the agreed date of dissolution), which presumably went to the further issues unrelated to this appeal. No order was made for disclosure by either party of documents relevant to the first two issues concerned with the beneficial ownership of 2 Walsingham Road.
17. In his judgment, the Master explained that the first and second issues arose despite Mr Sali's defence having been struck out:

“because it is essential for the taking of the account to establish the extent of the partnership assets and it would have been wrong to prevent Mr Sali from seeking to establish whether 2 Walsingham Road is a partnership asset or is beneficially owned by him. On his case the property has always been held outside the partnership. It is by far the most valuable single asset claimed to be partnership property.”
18. In his skeleton argument, Mr Tregear submitted that, as a result of the striking out of Mr Sali's defence 10 months earlier, there was no basis on which Mr Sali could pursue any case that 2 Walsingham Road belonged to him and was not partnership property. He submitted that this fact undermined the Master's criticism of the parties for not being ready to deal with the beneficial ownership of 2 Walsingham Road because it had not been an issue on the pleadings since September 2022.

19. In his oral argument, Mr Tregear put the position rather higher. He cited *Integral Petroleum Sa v Petrogat FZE* [2023] EWHC 44 (Comm) at [44] to [49] and *Thevarajah v Riordan & Other* [2015] EWCA Civ 41 at [33] in support of the submission that, because an order striking out the defence had been made, it was not open to the Master to take the approach that he did. It was submitted that for that reason alone he should not have ordered the trial of the issues, and more particularly issues 1 and 2. He said it was not open to the court to permit the issue of the beneficial interest in 2 Walsingham Road to be (as Mr Tregear put it) litigated again.
20. I do not agree with this submission. Unlike the situation in *Integral* and *Thevarajah*, the order made by Deputy Master Lampert struck out the defence but did not debar Mr Sali from defending the claim. It also gave directions for service of notice of objections to particular items on the account. Furthermore, the defence was a defence to the claim made by the particulars of claim seeking dissolution and an order for inquiries and an account, which had already been resolved by the Consent Order. It was not a defence or answer to particular items on the account itself, which the Deputy Master must have contemplated could continue to be litigated through the normal process of a notice of objections. For these two reasons, it seems to me that the principles to be applied to what has occurred are very different from the debarring order cases to which Mr Tregear drew my attention.
21. In short, I do not consider that there is anything to prevent Mr Sali from challenging the case made by Mr Ponsford on every element of the account, which (pursuant to paragraph 3 of the Consent Order) Mr Ponsford had the burden of filing, preparing and serving. It is still necessary for Mr Ponsford to establish a case that property within the account is indeed partnership property and (in the absence of a debarring order) it is still open to Mr Sali to challenge Mr Ponsford's case to that effect.
22. However Mr Tregear also had a more nuanced submission. He said it was extraordinary that on his own initiative, the Master proceeded to order the trial of separate issues in the partnership account of the very issue that had been struck out and said that the decision to do so was misguided in any event. He said that it was always obvious that the questions relating to 2 Walsingham Road would be intimately intermingled with the account more generally, not least because there was always a real possibility that the use of monies and opportunities to which the partnership was entitled were used in the acquisition and development of that property. He also submitted that, applying the normal principles for the trial of preliminary issues, this order should not have been made.
23. In support of this last submission, Mr Tregear referred to *Steele v Steele* [2021] CP Rep 1096, in which Neuberger J identified ten factors which a judge should take into account when deciding whether or not to order (or once ordered, determine) a preliminary issue or issues. Mr Tregear went through each of them and explained why none of the factors supported the Master's decision:
  - i) Would determination of the issue dispose of the case or at least one aspect of the case? He said that determination would not dispose of possible claims in relation to 2 Walsingham Road and achieved nothing in respect of the account itself.

- ii) Would the determination of the issue significantly cut down the costs and time of trial preparation? He said that it would not do so and did not do so. He pointed out that the case had already been on foot for nearly two years and the preliminary issue would deal with a matter that could have been dealt with on the full account, which has now been further delayed.
- iii) How much effort would be involved in preparing for the issue? He said that consideration should have been given to the cost of specific directions needed to deal with the issue, but that did not occur particularly in relation to the necessity for disclosure.
- iv) If there was a question of law, to what extent could it be determined on agreed facts? He said that there was no focus on the facts which would have assisted the court, and in particular on the documents showing what on Mr Ponsford's case was the important movement of funds, i.e., the source of the monies used by Mr Sali to maintain and develop 2 Walsingham Road.
- v) If the facts are not agreed, to what extent might it be thought to impinge on the value of the issue? He said that the Master went wrong on this point because he failed to give proper directions to ensure that the issue was properly determined. He seems to have thought that a preliminary issue was suitable because of, rather than despite the fact that cross examination would be necessary.
- vi) Would the determination of the issue prevent the parties or the court from achieving a just result? He said that this has not been achieved in the present case because Mr Sali has obtained a significant and premature financial advantage in respect of an asset which, on Mr Ponsford's case should be available to meet any proprietary claims in the overall account.
- vii) Will the determination of the preliminary issue increase costs and delay the trial? He said that in this case the answer is clearly yes because the costs will have increased enormously and the determination of the account has been greatly delayed.
- viii) To what extent might the determination of the issue be irrelevant? He said that there are strong grounds for considering that the account will have to consider the partnership's claims on 2 Walsingham Road irrespective of the answers to the issues.
- ix) Is there a risk that the determination of the issue might lead to an amendment to the pleadings to avoid its effect? He said that this indeed might occur so as to enable an equitable proprietary claim to be made by Mr Ponsford to 2 Walsingham Road or part of it.
- x) Taking into account all of these considerations was it just to order a preliminary issue? In this case he said that the answer was in the negative. The substance of his submission was similar to that determined by Neuberger J to be the case in *Steele v Steele*: to do so would make things worse rather than better, while if more careful thought had been given to the benefits and disadvantages, no preliminary issue would have been agreed or ordered.

24. As Mr Ponsford did not appeal against the Master's decision to order the trial of these issues, it might be thought that he would have some difficulty in contending that the mere fact that the court went ahead to determine them is itself a ground for setting aside the Master's order. However, although not advanced as a specific ground of appeal, Mr Tregear submitted that the Master's judgment simply cannot stand because it is the product of a fundamental error in his approach to the case which has led to an unjust result. In that regard he relied not just on the fact that the issues were ordered to be tried, but also on the absence of focussed directions for pleadings, evidence and disclosure, and on the manner in which the trial was conducted, with both parties' cases being permitted to develop in a random and chaotic manner as the trial proceeded.
25. Mr Tregear said in his written argument that the reason for this was that the Master's order did not give any consideration to the wider taking of the account, and that this was a major error. The most substantial problem was that the court did not then have proper regard to the misappropriations alleged by Mr Ponsford as pleaded in the particulars of claim and said to have been substantiated by a forensic accountant's report, which was referred to in the Master's judgment but not taken into account at the trial. It was at the heart of Mr Tregear's complaint that it should have been, both as relevant evidence on the source of the monies to purchase, maintain and develop 2 Walsingham Road, which he said came from the partnership, and also as to the order which it was appropriate for the Master to make at the end of the trial in any event.
26. In the result, Mr Tregear submitted that the procedure adopted by the Master was unjust because the effect is that Mr Sali has the immediate benefit of a judgment in which Mr Ponsford has been ordered (a) to transfer 2 Walsingham Road (said to be worth £1 million) to Mr Sali, (b) to pay all rent received in respect of the property since December 2023 while (c) remaining liable for the outstanding mortgage of £200,000 (including an obligation to service the interest) in circumstances in which (d) Mr Ponsford's claims for misappropriation against Mr Sali, which still arises in the context of the taking of the account, remain undetermined.
27. I agree with Mr Tregear that the course which these proceedings have taken means that the taking of the account has to some extent been distorted by a focus on an issue which has not been fully pleaded, and has been removed from its proper context in the taking of the account as whole. This is exacerbated by the fact that, although not asked to do so, the Master did not give directions for disclosure on an issue which as the Master himself recognised in his judgment, was not reflected in a statement by Mr Sali of exactly how he put his case. I shall revert to the principal practical impact of this distortion a little later in this judgment.

### The Master's Judgment

28. By the order he made at the conclusion of the trial, the Master declared that 2 Walsingham Road is held by Mr Ponsford for Mr Sali beneficially. He also determined the first and second issues by holding that the 2021 Declaration is valid and that 2 Walsingham Road is held on trust by Mr Ponsford for Mr Sali. The remaining issues are not relevant to the appeal, but by paragraph 4 of his order the Master made a number of ancillary orders in relation to 2 Walsingham Road: that the Appellants are to give



full possession and management to Mr Sali immediately and that the Appellants are to pay Mr Sali forthwith rent received from 1 December 2023.

29. On 30 January 2024, Richards J stayed the Master's order pending determination of this appeal. I should add that, although the Appellants' notice sought to set aside the Master's determination of the third (interest rate) issue, none of the grounds of appeal referred to it and no submissions were advanced in Mr Ponsford's skeleton or oral argument as to why the Master was wrong. I therefore say no more about it.
30. Although Mr Sali's claim in relation to 2 Walsingham Road was not pleaded, the Master explained that he took it to be based on an express trust. He said that Mr Sali did not advance any arguments for a common intention constructive or resulting trust although he said that it might have been open to him to do so. I cannot be sure why the Master made this passing comment, but he may have been referring to the principles explained by Patten LJ in *de Bruyne v de Bruyne* [2010] EWCA Civ 519 at [51] in the following terms:

“There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect.... The most obvious examples are secret trusts and mutual wills ... in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to inter vivos transactions as it does to wills.”
31. If that were to have been the case, it would have had an obvious impact on one of the arguments which arises on this appeal (section 53(1)(b) has no application to a constructive trust: see section 53(2)). But if such an argument had been run, it would have had to be properly pleaded and evidenced and the focus of the hearing before the Master would have been rather different. In particular it would have been more obviously open to Mr Ponsford to counter the allegation of unconscionable or inequitable conduct made against him with his own allegations of unconscionable or inequitable conduct against Mr Sali arising out of what he alleges to have been the misuse of partnership monies on the maintenance and development of 2 Walsingham Road.
32. As the Master explained, and despite the absence of disclosure, the parties concentrated on matters of fact. He explained that, from Mr Ponsford's perspective, the focus had been on the validity and effect of the 2021 Declaration, while Mr Sali focused on what he says he agreed with Mr Ponsford about 2 Walsingham Road rather than how a valid trust of land came into being. The appeal is based on the Master's findings as to what occurred at the April 2021 Meeting and the true construction of the 2021 Declaration. However, his findings as to what occurred between 2010 and 2021 are an important part of the background, not least because they relate to the trust which the Master held

to have been manifested and evidenced by the 2021 Declaration. I shall therefore summarise those findings.

The period 2010 to 2021

33. In October 2010, Mr Sali entered into an ASA with Mrs Linda Daniel, the registered proprietor of 2 Walsingham Road. He became her attorney under the ASA and in that capacity was able to deal with the property. This was about the time the partnership commenced. In evidence which the Master said was undisputed, Mr Sali said that 2 Walsingham Road had initially been introduced in 2010 as a property that might be suitable for an ASA, but that Mr Ponsford had thought that the risks were too great given the level of mortgage arrears, the condition of the property and its occupation by an unsatisfactory tenant. He explained that Mr Sali's evidence was that he dealt with Mrs Daniel, that he paid the mortgage arrears, that he obtained vacant possession on her behalf against a difficult tenant, that he carried out repairs to satisfy an improvement notice and that all this was done at his expense. He said that he and his family then moved into 2 Walsingham Road in 2011 (where they remained until the end of 2021).
34. In 2013, i.e., two years after Mr Sali had moved in, 2 Walsingham Road was purchased from Mrs Daniel in the name of Mr Ponsford for £250,000. The purchase was made with the assistance of a £200,000 mortgage on which Mr Ponsford was and remains liable. Mr Sali acted as attorney for Mrs Daniel as vendor. Mr Ponsford was registered as the proprietor on 2 August 2013. The registered title bears a restriction relating to the ASA, but the title contains no note of a trust in favour of Mr Sali. None of this was disputed.
35. The parties were not ad idem as to the next stage of what occurred. The Master described Mr Sali's evidence as follows:

“After completion [Mr Sali] says he repaid Mr Ponsford the amount of the deposit, stamp duty and expenses. The title ended up with Mr Ponsford because only he could borrow sufficient to buy the property. The intention was that Mr Ponsford held the property in trust for Mr Sali. This was the clear understanding between them. The only evidence of payment on completion is a completion statement from Mr Sali's solicitors showing that approx. £48,000 was transferred to him. He says he topped up the amount so that Mr Ponsford was fully covered for his expenditure with a small commission in addition.”
36. The Master also described how up until 2021, the monthly mortgage payments were paid from the partnership account to the mortgagee (Aldermore Bank), with Mr Sali contributing 50%, such contributions being paid by Mr Sali direct to Mr Ponsford. Mr Sali said not just that the mortgage and insurance were both paid out of the partnership account but also that he had carried out further works at his own cost, spending a total of between £100,000 and £200,000 which extended the property and created two dwellings.
37. The Master also described how Mr Sali said that he received the income from 2 Walsingham Road, because he received the rent without accounting for it to the partnership. He said that there was no objection by Mr Ponsford to his family's

occupation of the property or the receipt by him of the income it generated. He also said that Mr Ponsford visited 2 Walsingham Road on many occasions and was aware both of the occupation by Mr Sali and his family and of the works.

38. Mr Ponsford's evidence was that 2 Walsingham Road became a partnership asset in 2013 and that the only agreement with Mr Sali was for him to live there as a short term measure or temporary arrangement. The Master recorded that Mr Ponsford had accepted that Mr Sali paid half the monthly mortgage costs, but that he did not explain why Mr Sali would have done this if 2 Walsingham Road were partnership property. The Master did not mention the converse of this, on which Mr Tregear placed considerable reliance on appeal, namely the acceptance in Mr Sali's evidence that 50% of the monthly mortgage costs were not paid by him but came from the partnership.
39. On the basis of this evidence the Master made a finding that, upon transfer of 2 Walsingham Road to Mr Ponsford in 2013, Mr Ponsford intended that he would hold the property on trust for Mr Sali. He held that the intended trust was likely to have been of the property, not the proceeds of sale, although he said that the practical difference between the two would have been minimal. The essence of the Master's decision on this part of the case was that the intended trust was a bare trust for Mr Sali. He summarised his finding in paragraph 82 of his judgment:

“Unlike other properties that fell within the partnership, [2 Walsingham Road] fell outside and was subject to a trust in favour of Mr Sali. It was always Mr Sali's property.”
40. In reaching this conclusion, the Master pointed out that there is no requirement for a declaration of trust respecting any land to be in writing and signed. The formality required is written evidence of the declaration of trust. He also held that a trust of land, such as the one for which Mr Sali contends in the present case, may be declared many years before it is manifested and proved in writing. He said that a lengthy gap between the declaration and the proof in writing does not matter and that an ineffective or unenforceable putative trust may become effective retrospectively if and when section 53(1)(b) is complied with.
41. In light of the arguments made on this appeal, there are a number of aspects to this conclusion which merit further examination. The first is that it is clear from paragraphs 54(5) and 78 of the Master's judgment that he accepted that Mr Sali had repaid the £50,000 deposit to Mr Ponsford in 2013 (together with stamp duty and expenses). It is also clear from his judgment that this was a material factor in the Master's conclusion that, subject to section 53(1)(b), 2 Walsingham Road was held by Mr Ponsford for Mr Sali from the time he completed his purchase from Mrs Daniel. This factual finding was contested by Mr Ponsford and, as Mr Tregear pointed out, was unsupported by any documentary evidence.
42. The second aspect related to the monthly mortgage payments. Mr Tregear submitted that the Master's finding as cited above overlooked the crucial fact that Mr Sali had therefore only paid 50% of the mortgage cost, which was wholly inconsistent with him being the beneficial owner. I do not think that Mr Tregear is correct on this point. The evidence is not very clear but I think that this part of the Master's judgment was referring to evidence that the monthly mortgage payments were agreed to be made out of the partnership account, but that 50% was then to be reimbursed by Mr Sali to Mr

Ponsford personally. The effect of this would be that, although the partnership paid the monthly mortgage costs, Mr Sali would have reimbursed Mr Ponsford personally to the extent that his partnership interest was depleted by the payment. This is what Mr Sali said in paragraphs 13 and 16 of his witness statement, but it is also the way it was expressed by Mr Ponsford in paragraph 32 of his first witness statement.

43. In a later witness statement filed a month or so before the hearing, Mr Ponsford reiterated his evidence but explained that Mr Sali had not adhered to the agreement. The Master seems to have lost sight of this aspect of the evidence when, in paragraph 55 of his judgment, he said that Mr Ponsford accepted that Mr Sali paid half the mortgage costs monthly up until 2021.
44. Furthermore, I think that the Master went wrong when he went on to say that Mr Ponsford did not explain why Mr Sali paid 50% of the mortgage costs up to 2021, a factor which the Master considered counted against Mr Ponsford's case because, if 2 Walsingham Road was partnership property, there was no reason for Mr Sali to make the payment. It was Mr Ponsford's case that the payment was made to reflect Mr Sali's occupation of what he regarded as a partnership asset. In any event, the use of the partnership account in this way is more consistent with 2 Walsingham Road continuing to be a partnership asset, entirely without prejudice to the way in which Mr Ponsford and Mr Sali may have agreed that the proceeds should be distributed if and when it was to be sold. This was the kind of issue which was capable of being determined on the taking of full partnership account.
45. The third aspect related to Mr Sali's evidence that he spent a total of between £100,00 and £200,000 on further works to 2 Walsingham Road, that Mr Sali said that he received the income from 2 Walsingham Road and that there was no objection by Mr Ponsford to the occupation of 2 Walsingham Road by Mr Sali and his family or the receipt by him of the income it generated. As to further works, this is a reference to a paragraph in Mr Sali's witness statement (expressed in the third person) that:

“The Defendant now Thinking that he had the piece of mind and a secure Family Home from 2013 to 2021 started Developing the Property from scratch spending hundreds of thousands of pounds from his funds. (Exhibit 4 and 6). On or around 2015 the Defendant Applied and obtained a planning permission to develop his family home using the land to the side of the property into 2 large family homes with a loft and 2 large extensions doubling the square footage of the old property and modernising the whole asset with the latest Home Features.”

46. Mr Tregear pointed out that the evidence as to the amount spent and its source was unsubstantiated by any documentation. The Master said that the lack of documentation was explicable because Mr Ponsford's lawyers did not press for disclosure after the court had ordered the trial of the issues which came on for hearing in October 2023. I agree with Mr Tregear that, as Mr Ponsford had undertaken the liability for mortgage payments and had paid the deposit in excess of the mortgage monies for the original purchase, it is surprising that Mr Sali had no written evidence to substantiate his case on where the money had come from. But as the Master said it is a matter for the parties to identify the disclosure they think is required from the other side and then persuade the court to make an order to that effect. The fact that was not done in this case is not a criticism that can be laid at the door of the court.

47. Nonetheless it seems to me that this also highlights one of the more fundamental problems which Mr Tregear says arises out of the fact that the trial of issues 1 and 2 was being conducted in isolation from the taking of the account. It was already an issue in the taking of the account that Mr Sali had been responsible for misappropriations of partnership monies. There was no documentation before the Master to establish that the expenditure on 2 Walsingham Road came from Mr Sali's own resources rather than those of the partnership. It was Mr Ponsford's case that the source of this expenditure may well have been the partnership, or money due and owing to the partnership, a matter which was to be resolved on the broader taking of an account. Mr Tregear submitted that this illustrated not just that the trial of this particular preliminary issue had taken the court down a blind alley. It also risked the court reaching an unjust result because it sought to determine complex intertwined issues in a partnership dispute out of their proper context. The same point can be made about the source of the mortgage payments.

#### The April 2021 Meeting and the 2021 Declaration

48. In reaching his conclusion that an express trust of 2 Walsingham Road had arisen, the Master expressed himself satisfied that Mr Ponsford's intention to declare a trust in favour of Mr Sali was capable of being derived and inferred from his words and actions. But he also recognised that, unless the terms of section 53(1)(b) were satisfied, no trust of the real estate could have come into being. In the event he determined that the 2021 Declaration was sufficient for this purpose. The Appellants' appeal concentrates on this finding rather than the anterior question of Mr Ponsford's intent, although they relied on what they said was the unsatisfactory nature of the Master's findings in relation to what occurred in and after 2013 as background to why the 2021 Declaration did not fulfil the requirements of the statute
49. The Master held that the 2021 Declaration was signed by Mr Ponsford and Mr Sali in April 2021. There was no challenge to that finding, although the document itself is dated 2018, and appears to derive from slightly different earlier drafts of other declarations of trust which were used during the course of the partnership's business. The document has four recitals. The first three record that Mr Ponsford is the registered proprietor, the registered title number and that the property is subject to a mortgage. The fourth provides: "The parties hereto have agreed that their respective shares in the Property shall be as hereinafter mentioned". Its operative terms provide as follows:
- “1. Douglas Stuart Ponsford will hold the said Property with full title guarantee subject to the Mortgage on trust to sell the same with power to postpone the sale and TO HOLD the gross proceeds of sale (after deducting thereout the balance of any money due under the Mortgage and the legal costs and disbursements in respect of any such sale) and the net income until sale in trust in the proportions hereinafter mentioned
  2. The entire proceeds of sale are to go to MESUD HABIB SALI
  3. IT IS HEREBY AGREED AND DECLARED between the parties hereto that no sale of the property shall be effected without the prior written Consent of all parties”.

50. The 2021 Declaration concludes with signature clauses for Mr Ponsford, Mr Sali and Mrs Ponsford. Mr Ponsford has signed the 2021 Declaration as a deed, but his signature was not witnessed. Mr Sali has also signed the 2021 Declaration as a deed, but his signature was witnessed by Mr Ponsford's brother. Although there is a signature clause for Mrs Ponsford, she did not in the event sign.
51. As the Master recognised, the language of the 2021 Declaration provided for a trust for sale with the proceeds to go to Mr Sali. There was a power to postpone and a declaration that no sale could take place without the consent of both Mr Ponsford and Mr Sali. Therefore, although the terms of the 2021 Declaration created a trust of land within the meaning of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"), it did not declare a bare trust of the type which Mr Sali had pleaded in his defence. The Master held (paragraphs 43 to 45 of his judgment), and no argument to the contrary was mounted, that it was a trust to which section 53(1)(b) applied.
52. Initially Mr Ponsford challenged the effectiveness of the 2021 Declaration on the grounds that it was not a deed complying with the requirements of section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. This argument was not pursued at trial, because it was accepted that the absence of a witness to Mr Ponsford's signature did not prevent the document from either creating a trust or being evidence of a trust for section 53(1)(b) purposes, unless the court were to conclude that it was never intended to be relied upon.
53. The Master said that he was not addressed about clause 3 which requires the consent of all parties to a sale and he therefore said nothing further about it apart from a comment that, if applicable, it would have taken effect subject to the provisions of TOLATA. As will appear, I think that a lack of focus on clause 3 may have been one of the reason why the Master fell into error when considering the application of section 53(1)(b).
54. The Master then went on to hold in paragraph 42 of his judgment that a trust relating to 2 Walsingham Road could have come into being in one of two ways. The first was that it was agreed between the parties that 2 Walsingham Road would be purchased in Mr Ponsford's name but held for Mr Sali on trust with the intention that a subsequent deed of trust be executed. The issue in those circumstances would be whether the 2021 Declaration complied with section 53(1)(b) in a manner which manifested and proved the trust created in 2013. The Master said that the issue for the court in those circumstances would be whether there was what he described as a sufficient match between the trust that was created in 2013 with the manifestation and proof which was contained in the 2021 Declaration. In the event, he found for Mr Sali on this way of putting his case.
55. The second alternative was that the 2021 Declaration itself created a trust for sale in respect of 2 Walsingham Road on the basis that it both declared the trust and evidenced it. He said that in that context the subject matter of the trust was the proceeds of sale of 2 Walsingham Road. In the event, and in the light of his conclusions on the first alternative, he said that it was unnecessary to make any findings on the second alternative (see paragraph 94 of his judgment).
56. Against that background, the Master said that by the end of the trial, the core issue was not whether there was an absence of form in the 2021 Declaration, or whether it sufficed to comply with section 53(1)(b), but whether, when the document was handed over, its

delivery was conditional on Mr Sali agreeing to the terms of other documents settling issues between him and Mr Ponsford, including a document acknowledging his debt to the partnership. However, it also remained the case that there was a legal question as to whether the 2021 Declaration evidencing a trust for sale was capable of amounting in law to manifestation and proof of the bare trust said by Mr Sali to have been declared in 2013 in a manner which was sufficient to ensure that section 53(1)(b) was complied with.

57. As to the first of these points, the Master examined the evidence in relation to the April 2021 Meeting and what happened when the 2021 Declaration came into the hands of Mr Sali. The evidence was that a number of declarations of trust had been produced for partnership properties and were executed in 2018, but that the 2021 Declaration for 2 Walsingham Road was in a different form and was not executed at that stage. Mr Sali said that when Mr Ponsford gave instructions for it to be produced in 2018 he clearly had in mind that 2 Walsingham Road would be Mr Sali's, even though nothing was done with the draft for several years.
58. The Master then held that, by the time of the April 2021 Meeting, the amicable relationship between Mr Ponsford and Mr Sali was breaking down and Mr Sali owed a large sum to the partnership. The 2021 Declaration was signed and handed over, although the Master said that there was no evidence about a request for it and he was not in a position to make any findings as to how or when that occurred. Indeed the Master described how Mr Sali's evidence made no mention of the 2021 Declaration. Based on Mr Sali's evidence, which he accepted, the Master said that Mr Sali's focus was on his desire to have the title to 2 Walsingham Road transferred to him, to which end he produced two TR1 transfer forms one with a purchase price of £200,000 and the other with a purchase price of £250,000. Mr Sali also accepted that Mr Ponsford had been advised by his accountants that he should not transfer the property at £200,000 when the market value was higher.
59. In his evidence, Mr Sali accepted that he became angry when Mr Ponsford refused to transfer 2 Walsingham Road to him by executing a TR1 transfer form, and he then ripped up some of the documents he had already signed. The Master did not describe all of those other documents, but the evidence disclosed that they included a signed declaration that Mr Ponsford was owed £84,000 by Mr Sali, an unsigned CGT calculation and the two completed but unsigned TR1 forms for 2 Walsingham Road. He did not rip up the 2021 Declaration which remained intact. The Master held that it was not in dispute (a) that the 2021 Declaration was signed by Mr Ponsford and (b) that the original was handed to Mr Sali who left the meeting with it. The Master said that this was seemingly without objection and that Mr Ponsford never asked him to return it.
60. The Master was critical of the manner in which Mr Ponsford's evidence as to the April 2021 Meeting emerged during the course of the proceedings. This was understandable because, although there was a description of the other documents which were discussed at the meeting, there was no mention of the 2021 Declaration in his first witness statement in support of his application for a freezing order. When this was rectified in later evidence, Mr Ponsford expressed himself very concisely as follows:

“In the meeting, I handed the [2021 Declaration] to [Mr Sali] in exchange of singing (sic) the agreements and promise that monies covering my loans to [the

partnership] would be repaid from the sale of properties that were currently under offer or would be marketed for sale.”

61. The Master characterised Mr Ponsford’s core point as being that the 2021 Declaration was handed over in exchange for Mr Sali signing the other documents. The Master’s summary of Mr Ponsford’s evidence was that he agreed to give Mr Sali the 2021 Declaration if he would sign the documents demonstrating his liability, but then reneged on the deal by tearing them up. The Master explained that Mr Ponsford denied that he was holding 2 Walsingham Road on trust.
62. In his description of the differences in the cases advanced by Mr Ponsford and Mr Sali in relation to the April 2021 Meeting, the Master explained that the evidence as to what occurred was limited. The court was not told by either party how the meeting came about, how long the meeting lasted, how it started or when the 2021 Declaration was handed over. He also said that no indication was given of the words used when it was handed over. He then concluded this part of his analysis by holding that, subject to one point, from the moment of signature of the 2021 Declaration by Mr Ponsford, the requirements of section 53(1)(b) were satisfied.
63. The Master then went on to describe two separate aspects of a single composite point. The first was whether the 2021 Declaration was properly to be construed as a sufficient manifestation and proof of a trust of the land itself for the purposes of section 53(1)(b). The second was whether, even if it had that effect, the 2021 Declaration was handed to Mr Sali on a conditional basis, with the consequence that objectively speaking it was not intended to have legal effect for the purposes of section 53(1)(b) until satisfaction of a pre-condition which was never in the event satisfied.
64. As to the first aspect, the Master recognised that a difficulty arose for Mr Sali because the 2021 Declaration was drafted as a trust of the proceeds of sale of 2 Walsingham Road. The question which then arose was whether this was sufficient for the purposes of manifesting and proving a trust of the land itself in circumstances in which the 2021 Declaration referred to the property and described the parties to the trust as Mr Ponsford holding the property on trust and Mr Sali being the beneficiary of the trust. The Master made the following finding:

“The essence of section 53(1)(b) is to ensure that there is sufficient evidence in writing of the existence of a trust that relates to land. The writing need not be precise or legalistic. On the facts of this case the writing must be evidence of the pre-existing trust which validates retrospectively a declaration of trust. The parties and the subject matter of the trust are essential items. I consider that the declaration is sufficient manifestation and proof of the intention to create a trust relating to 2 Walsingham Road. The declaration clearly identifies the property, the parties and the creation of a trust. There is clearly a difference between the property and the proceeds of sale but for the purposes of section 53(1)(b) the declaration suffices to evidence a trust of the land that was ‘declared’ in 2013.”
65. As to the second aspect of the section 53(1)(b) point, the Master accepted that Mr Sali had described the April 2021 Meeting as leading to a number of agreements “to solve the issues”, but said that the description of the meeting by Mr Ponsford’s then counsel as a settlement meeting was to place too much of a legal gloss on it. He found that there were by then disagreements and the partners wished to wind up the partnership and



move on, but that they had different objectives. The Master described Mr Ponsford's objective as being to obtain an acknowledgment of sums due to the partnership from Mr Sali, while Mr Sali wanted a transfer of 2 Walsingham Road into his name at its 2013 value, an objective said to go well beyond obtaining confirmation of a trust.

66. In making his assessment of what occurred at the April 2021 Meeting, the Master held that he was unable to accept Mr Ponsford's evidence that he only handed over the 2021 Declaration on a conditional basis and that basis was not fulfilled. He said that Mr Ponsford's evidence on this issue was unreliable and that the paragraph in which he made the assertion of conditionality did not have the appearance of being his own evidence, but rather a rationalisation of the legal case he wanted to put forward. He held that the negotiations which he accepted happened at the April 2021 Meeting were not about the trust. In his view, the 2021 Declaration was simply designed to reflect what the current position was in the light of the historic dealings between the parties. He said that this was evident because, if the TR1 had been signed, the 2021 Declaration would have been otiose. He said that it followed from this that the 2021 Declaration can only have been intended to reflect what the current position was in April 2021. It was not part of the negotiations and therefore was not a matter which required to be resolved before it became effective.
67. In reaching that conclusion, the Master expressed the view that, under the 2021 Declaration, Mr Sali would have been able to call for a sale of 2 Walsingham Road but not a transfer of the title. I found that conclusion puzzling, not least because the need for the consent of both parties was set out in clause 3 of the 2021 Declaration. I also think that it is likely to have had the effect of causing the Master to treat the trust contemplated by the 2021 Declaration as if it was substantially the same as a bare trust; treatment which had an impact on the approach he took both to the application of section 53(1)(b) and to the question of whether the April meeting was indeed a settlement meeting.

### Grounds of Appeal

68. There are four Grounds of Appeal:
- i) The Master erred by not accepting that the purpose of the April 2021 Meeting was to reach a settlement and that the signing of the 2021 Declaration by Mr Ponsford was conditional upon Mr Sali signing the other documentation which he signed but later tore up.
  - ii) The Master failed to make any findings as to the effect of Mr Sali's conduct at the April 2021 Meeting; which had the effect of causing the 2021 Declaration to fail.
  - iii) The Master erred in holding that Mr Ponsford made a valid declaration of trust in respect of 2 Walsingham Road. On the true construction of the 2021 Declaration, applying the natural and ordinary meaning of the words used in it, no immediate trust of land arose.

- iv) The Master erred in finding that a declaration of trust made in 2013 was “manifested and proved” by some writing signed by Mr Ponsford sufficient to satisfy section 53(1)(b) of the Law of Property Act 1925.
69. It is clear that all four grounds are concerned with the 2021 Declaration and not (anyway directly) with the Master’s finding in paragraphs 81 and 82 of his judgment that, unlike other properties that fell within the partnership, 21 Walsingham Road fell outside and, subject of course to section 53(1)(b), was held on a bare trust in favour of Mr Sali as beneficiary. However, Mr Tregear submitted that deficiencies in the approach the Master took to deciding what occurred in the circumstances surrounding what he called the “supposed 2013 trust” infected his analysis of what happened in 2021 and the inferences which it was appropriate for him to draw.

### Grounds One and Two

70. The first and second grounds of appeal raise questions of fact. Their essence is whether the Master was wrong to reject Mr Ponsford’s case that the April Declaration was only handed to Mr Sali on a conditional basis and so was not objectively intended to have any effect until the conditions were satisfied, which never occurred because it was part of a package of documents which were rejected by Mr Sali when he tore them up.
71. These grounds of appeal face the obvious difficulty that an appeal court will not interfere with a trial judge’s findings of fact unless it is satisfied that he was plainly wrong. As Lord Reed said in *Henderson v Foxworth Investments Limited* [2014] UKSC 31 at [62]:
- “The adverb “plainly” does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.”
72. Lord Reed then went on to make clear at [67] what this means in practice:
- “It follows that in the absence of some other identifiable error, such as ... a material error of law or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by the trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.”
73. What these passages make very clear is that an appellate court cannot set aside findings of primary fact made by a lower court just because it is satisfied that it would have reached a different conclusion. Furthermore, it is well established that an appellate court will always assume that the trial judge has taken all of the relevant evidence into consideration even where he does not refer to it in his judgment (e.g., *Volpi v Volpi* [2022] EWCA Civ 464 at [2]). However, it may interfere if and to the extent that the court below misunderstood or demonstrably failed to consider relevant evidence.

74. Mr Tregear accepted that, applying those principles, this court has to accord appropriate respect to the fact that the Master heard the evidence live at the trial. Nonetheless, he contended that the Master lost sight of the fact that it was part of both parties' cases that the April 2021 Meeting was intended to solve many if not all of the issues which had arisen in relation to the partnership dispute. It was the unchallenged evidence of Mr Ponsford that he and Mr Sali had agreed to meet in April 2021 in an attempt to resolve the outstanding issues between them. Indeed, Mr Sali's own evidence described the April 2021 Meeting as intended to solve the issues of which the status of 2 Walsingham Road was plainly one, a fact of which Mr Sali must have been well aware because he wanted Mr Ponsford to sign the TR1. Most significantly, those issues included many of the matters which would have arisen on the taking of the account, because of the claims which Mr Ponsford thought he had against Mr Sali arising out of the misappropriations for which he thought that Mr Sali was responsible. This is well illustrated by the fact that one of the documents which Mr Sali tore up was a draft of a signed document in which he was asked to acknowledge his debt to the partnership.
75. Furthermore, Mr Tregear submitted that, whatever the Master may have found at the trial, the facts which surrounded what he called the supposed 2013 trust were all contra-indicative of any trust having been created at that stage. In particular he relied on the facts that (a) all of the purchase monies were advanced by Mr Ponsford from his own monies or by way of mortgage, the repayment of which was Mr Ponsford's personal liability, (b) the mortgage was paid through the partnership account and (c) there was no documentary support for Mr Sali's bare assertion that he contributed towards the mortgage through reimbursements paid to Mr Ponsford direct.
76. I agree with Mr Tregear that each of these considerations points against the existence of a trust of the character found by the Master to have come into existence in 2013 (subject to later manifestation and proof) and points towards an intention that 2 Walsingham Road was to be treated as partnership property. However, there were also pointers going the other way and, if these were to have been the only criticisms of the Master's decision I do not think that it would have been open to an appeal court to take a contrary view. The question for the Master involved an evaluative exercise which he was much better placed to carry out than this court can ever be. I also do not think that Mr Tregear's attack on the Master's decision to order the trial of preliminary issues affects this point.
77. Nonetheless I accept Mr Tregear's further submission that the Master had made his own task more difficult by trying this issue divorced from its proper context as part of the taking of the partnership account. Had he not done so, he would have been more focused on the importance to Mr Ponsford of the broader question of what had happened generally to the partnership's assets, rather than the narrower question of how 2 Walsingham Road was to be dealt with as part of a resolution of the whole dispute. In my view this led to a misapprehension by the Master of some of the evidence, which itself served to undermine his conclusion (at the heart of the first two grounds of appeal) that the April 2021 Meeting was not a settlement meeting and that Mr Ponsford was wrong to contend that the 2021 Declaration was not intended to have legal effect independently of approval of the other documents which Mr Sali then tore up.
78. The principal reason for this is that the Master's conclusion cuts across Mr Sali's own evidence, which the Master must have lost sight of. Mr Sali himself characterised the April 2021 Meeting as one "to resolve the transfer of 2 Walsingham Road in order to

effectively and efficiently dissolve the partnership assets enabling both partners to have a reasonable and profitable split". This is a very clear acknowledgment by Mr Sali that the status of 2 Walsingham Road was intimately interlinked with the division of the partnership assets. True it is that Mr Sali's witness statement described how he wanted to achieve a transfer of 2 Walsingham Road, but the whole tenor of this part of his witness statement recognised that the transfer was one interconnected part of a more complex whole.

79. I also had difficulty with the Master's conclusion (in paragraph 87 of his judgment) that, because the parties had different objectives, that somehow meant that the April 2021 Meeting was not a settlement meeting or that production of the 2021 Declaration was not part of the negotiation. Assuming, as the Master found to be the case, that Mr Sali wanted a transfer of 2 Walsingham Road (which is why the TR1s were amongst the other documents brought to the meeting) and Mr Ponsford wanted an acknowledgment from Mr Sali that he owed money to the partnership, that does not detract from the fact that Mr Ponsford had also prepared the 2021 Declaration to be part of the settlement, confirming what Mr Sali was then prepared to acknowledge as a reflection of the parties' respective interests. As Mr Tregear submitted, the clear inference of what occurred is that both parties had decided that the document which they each produced was the key to settling their differences.
80. Of course, the 2021 Declaration might have been otiose if a TR1 transferring 21 Walsingham Road had been signed by Mr Ponsford and delivered unconditionally to Mr Sali, but that is no reason to conclude that looked at objectively, the 2021 Declaration was not part of the negotiation. To do so is to look at matters simply through the spectacles of Mr Sali, rather than by seeking to ascertain the objective purpose of the April 2021 Meeting, because it gives no weight to the totality of what Mr Ponsford wanted to achieve.
81. This is also consistent with the fact that what was put forward by Mr Ponsford in the form of the 2021 Declaration was something new and different from that which the Master had concluded was the form of the 2013 trust. I will come back to this in the context of the argument based on section 53(1)(b), but the Master had concluded that what was agreed in 2013 was that Mr Ponsford would hold 2 Walsingham Road on bare trust for Mr Sali. As he put it paragraph 82 of his judgment, it was always Mr Sali's property. This is not the form of the 2021 Declaration, which contemplated a trust for sale in respect of which Mr Ponsford had to consent to a sale, not surprisingly as he remained liable on the mortgage which was paid through the partnership account. This too was something which I think that the Master lost sight of, because he said that the 2021 Declaration simply reflected historic dealings between the parties and was intended to reflect what the current position was. I agree with Mr Tregear's submission that the lack of correspondence between what the Master called the supposed 2013 trust and the 2021 Declaration of Trust is itself inimical to the Master's conclusion.
82. A further relevance of the disparity between what the Master held to have been intended in 2013 and the terms of the 2021 Declaration is also demonstrated by what he said about sale of 2 Walsingham Road. He held that under the 2021 Declaration "Mr Sali would have been able to call for sale of 2 Walsingham Road". I do not think that this conclusion can stand, because clause 3 of the 2021 Declaration was explicit that a sale could only be effected with the consent of all parties. It seems to me that what appears to have been the Master's misdescription of this aspect of the 2021 Declaration

significantly undermined both his conclusion that the April 2021 Meeting was not intended to settle matters generally (including the status of 2 Walsingham Road) and his finding that Mr Ponsford did not hand the 2021 Declaration to Mr Sali on a conditional basis which was not in the event fulfilled.

83. In those circumstances, I do not think it was open to the Master to conclude that the description of the April 2021 Meeting as a settlement meeting was to put too much of a legal gloss on it. In my view the only proper conclusion on the evidence was that 2 Walsingham Road was (as Mr Tregear put it in submissions) a bargaining chip in the negotiation. As this was its purpose, and as there was no evidence of any contra-indication by words said, the handing of the 2021 Declaration to Mr Sali was not intended, objectively speaking, to have any legal effect distinct from the effectiveness of the other documents, which Mr Sali then prevented from having any legal effect by tearing them up.
84. For these reasons, and notwithstanding the limited circumstances in which an appeal court is entitled to set aside a decision made by a trial judge on the facts, the first and second grounds of appeal succeed.

#### Grounds Three and Four

85. The essence of these two grounds is that the bare trust found by the Master to have been created in 2013 was a different trust from that which was capable of being manifested and proved by the 2021 Declaration. The question raised is (a) whether the Master was wrong to embark on the exercise of analysing whether there was what he called a “sufficient match” between the trust which was created in 2013 and the 2021 Declaration (see paragraph 42(1) of his judgment) and, (b) having done so, whether he was wrong to conclude that there was (see paragraph 86 of his judgment).
86. I have already set out the terms of section 53(1)(b). It is the successor to section 7 of the Statute of Frauds, which as Turner LJ explained in *Smith v Matthews* (1861) 3 De G.F.&J. 139 at 149: “enacted that all declarations or creations of trust or confidences of any lands ... shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect”. Turner LJ then cited with approval the following passage from the judgment of Arden MR (referred to by Turner LJ as Lord Alvanley) in *Forster v Hale* (1798) 3 Ves. Jr, 696 at 707:
- “The question, therefore, is, whether sufficient appears to prove that Burdon did admit and acknowledge himself a trustee; and whether the terms and conditions, upon which he was a trustee, sufficiently appear ... Therefore, unquestionably, it is not necessarily to be created by writing, but it must be evidenced by writing; and then the statute is complied with; and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit it must be proved in toto, not only that there was a trust, but what it was.”
87. Turner LJ then continued as follows:

“In each of those cases, the purpose and objects of the trusts appeared by the writings which were relied on, and so far from being disposed to dissent from what Lord Alvanley said, I entirely agree in it, and think that he has put a most reasonable, sound and just construction upon the section. I take it therefore, that when this Court is called upon to establish or act upon a trust of lands by declaration or creation, it must not only be manifested and proved by writing, signed by the party by law enabled to declare the trust, that there is a trust, but it must also be manifested and proved by writing, signed as required what that trust is. The question we have to consider is, whether there is any such manifestation and proof.”

88. It was confirmed by Morgan J in *Ong v Ping* [2015] EWHC 1742 (Ch), approved by the Court of Appeal at [2017] EWCA Civ 2069, that the principles explained in *Smith v Matthews* still hold good under the current reenactment of section 7 in section 53(1)(b). As Morgan J explained in *Ong* at [65], having discussed *Smith & Matthews*, *Forster v Hale* and the relevant passage from Lewin on Trusts (19<sup>th</sup> edn at paras 3-012 and 3-013):

“These cases ... establish that the signed writing must not only manifest the fact of the trust but also its terms ... the terms of the trust may be collected from a document which is not signed by the settlor, provided that the document can be clearly connected with, and is referred to in, the document that is signed”

89. In the Court of Appeal in *Ong v Ping* at [60], Sir Colin Rimer also considered the burden of proof. He said that it was for the person relying on an oral declaration of trust to show that it was manifested and proved by writing signed by the person able to declare it. The Master held in paragraph [49] of his judgment that, because the 2021 Declaration speaks for itself, Mr Sali needed only to prove the existence of the 2021 Declaration as having been signed by Mr Sali (which was admitted), at which stage the burden shifted to Mr Ponsford to show that it did not operate to satisfy the requirements of section 53(1)(b). In his initial skeleton argument in support of the application for permission to appeal, Mr Maguire who was then acting for Mr Ponsford said that this was wrong.
90. I did not understand Mr Tregear to pursue this point on the appeal, but in any event it does to seem to me to take matters very much further forward. To speak of a burden shifting to Mr Ponsford because the 2021 Declaration speaks for itself rather begs the question. Once Mr Sali had put in evidence some writing signed by Mr Ponsford (which he did in the form of the 2021 Declaration), it was simply a question of construction of the 2021 Declaration as to whether that writing satisfied the requirements of the statute.
91. In his analysis of this point, the Master did not consider the relevant principles by explicit reference to the authorities. He accepted that the parties and the subject matter of the trust were what he called “essential items” and made clear that he considered that what mattered was that there was a sufficient manifestation and proof of the intention to create a trust relating to 2 Walsingham Road. He recognised that there was a distinction between the property with which any bare trust was concerned and the proceeds of sale with which the 2021 Declaration was concerned. But he then said that in practical terms the difference between the two were minimal and that the 2021 Declaration was sufficient to manifest and prove a bare trust of the land that was declared in 2013.

92. In my view, the Master was wrong on this point. His conclusion (see paragraph 64 above) concentrated only on intention to create a trust “relating to” 2 Walsingham Road and did not focus sufficiently on what the trust actually was or its essential terms. To pick up the language of Lord Alvanley in *Forster v Hale*: do the terms and conditions, upon which he was a trustee, sufficiently appear? This is very important to the outcome of the appeal because there are two linked aspects of the 2021 Declaration, which give rise to a material difference between it and the bare trust for the benefit of Mr Sali which the Master held was intended by Mr Ponsford in 2013. The first is that the trust provided for by the 2021 Declaration was a trust to sell 2 Walsingham Road with power to postpone, with Mr Sali’s rights being to the entire proceeds of sale if or when a sale takes place, not to the property itself. Thus, he had no right to a conveyance of the property to himself (or at his direction) as would have been the case if it were a bare trust. The second is that clause 3 of the 2021 Declaration explicitly declared that no sale of 2 Walsingham Road is to be effected without the prior written consent of all parties. This too is inconsistent with the bare trust found by the Master to have been intended in 2013, which by its essential nature did not require the consent of Mr Ponsford to a sale on the instructions of Mr Sali.
93. Unsurprisingly, the Master was conscious of this distinction and he referred to clause 3 of the 2021 Declaration as taking effect subject to the provisions of TOLATA. However, he also said (in paragraph 89 of his judgment) that, under the 2021 Declaration Mr Sali would have been able to call for the sale of 21 Walsingham Road, but not the transfer of the title. I had difficulty with this sentence because, short of the court’s intervention under TOLATA, that was not the case in respect of the 2021 Declaration. Labels can sometimes confuse, but this seemed to be a reflection of the Master’s conclusion that there was no real difference between the bare trust he had held was intended in 2013 and the trust for sale manifest in the terms of the 2021 Declaration.
94. I do not think it could be said that the 2021 Declaration was a sufficient manifestation of the terms of the trust the Master held to have been intended in 2013. I think that, having concentrated on the general intention to create a trust which related to 2 Walsingham Road (anyway in broad terms) and the parties to the trust, he lost sight of the fact that the writing which was relied on did not manifest and prove the actual subject matter of what he had held to be the trust established in 2013 or the terms on which and circumstances in which Mr Sali’s rights to that subject matter would arise. In short, the Master seemed to have considered that a relationship between the subject matter of the trust which he had held to have been intended in 2013 and the subject matter of the 2021 Declaration was sufficient to ensure compliance with section 53(1)(b). In my view, and applying the authorities I have referred to above, he was wrong to reach that conclusion.
95. There will be many cases in which the formalities for which section 53(1)(b) provides can be overcome because the person in the position of Mr Sali is able to establish the existence of a constructive or resulting trust, thereby disapplying the requirements of section 53(1)(b) by the exclusionary language of section 53(2). However, I think that the distinctions between a bare trust and the trust for sale in the present case were distinctions of substance and, as the Master made clear at paragraph 31 of his judgment, a constructive trust was not part of Mr Sali’s case. Were such an argument to have been run, it would inevitably have opened up the ability of Mr Ponsford to develop his case that contributions to the acquisition and improvement of 2 Walsingham Road ultimately

derived from the partnership's assets in any event. This is the argument which is at the root of his complaint that the Master should never have tried issues 1 and 2 divorced from their proper context of the taking of the partnership account in the first place.

96. In these circumstances I have reached the view that the Master was wrong to conclude that the 2021 Declaration was a signed manifestation and proof of any trust intended to have been established in 2013 sufficient to satisfy the requirements of section 53(1)(b). It is therefore unenforceable by Mr Sali against Mr Ponsford.

### Disposition

97. The appeal will therefore be allowed on all four grounds. If the appeal had only been allowed on the third and fourth grounds, it would have remained open to Mr Sali to argue that, because the Master determined that it was unnecessary to make a finding on the alternative basis that the 2021 Declaration itself created a trust of the proceeds of sale (see paragraph 55 above), this court should now do so, or he should at least be given the opportunity to make out an argument to that effect. However, there was no Respondent's notice and, in light of the conclusions I have reached on the first and second grounds of appeal, I do not think it is arguable that the handing over of the 2021 Declaration on a conditional basis had that effect.
98. Nobody contends that either of the Appellants are the beneficial owners of 2 Walsingham Road in their own right and the consequence of the appeal being allowed is therefore that it is partnership property, as was originally accepted to be the case in the Consent Order. The declaration made by the Master will therefore be set aside. It also follows that paragraphs 2(i) and 4 of the Master's order must be set aside as well.
99. In allowing the appeal, the court is not determining the issue of how any expenditure which may have been incurred by Mr Sali on 2 Walsingham Road is to be treated in the taking of the account. That is a matter which is still to be resolved. I consider that the appropriate way to proceed is for a hearing to be fixed before a master at the earliest opportunity to enable the court to give directions as to how matters are to be taken forward to that end.