Case No: A3/2011/1085

Neutral Citation Number: **[2011] EWCA Civ 1619**
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
Mr Justice Morgan
HC10C01748

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2011

Before :

LORD JUSTICE ARDEN
LORD JUSTICE ETHERTON
and
LORD JUSTICE MCFARLANE

- -

Between :

CROSSCO NO.4 UNLIMITED & ORS	**Appellant**
- and -	
JOLAN LIMITED & ORS	**Respondent**

- -
- -

Mr Michael Driscoll QC and Ciaran Keller (instructed by **Pinsent Masons LLP**) for the **Appellant**
Mr Romie Tager QC and Mr Justin Kitson (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing dates : 1st November 2011

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Judgment

Lord Justice Etherton :

Introduction

1. This is an appeal from an order of Mr Justice Morgan dated 31 March 2011 which, among other things, ordered that a lease of 19/31 Piccadilly, Manchester ("the Building"), of which the second appellant is the tenant and the second respondent is the landlord, be terminated in accordance with section 64 of the Landlord and Tenant Act 1954 ("the 1954 Act") without the grant of a new tenancy.

2. As the Judge wryly remarked in [11] of his judgment it is a remarkable fact that a 15 minute discussion on 18 February 2009, followed by a modest number of communications passing between the parties from 18 February 2009 to 10 March 2009, has resulted in a trial of 35 days. I would add to that statement of wonder that those matters have also led to a judgment of the Judge running to 107 pages and 429 paragraphs, 178 pages of written submissions and 5 bundles of authorities on the present appeal, and an appeal hearing lasting two and a half days even though the appeal has been restricted to only some of the matters in dispute before the Judge.

3. In the event, I consider that the outcome of this appeal turns essentially on findings of fact made by the Judge. Although the appeal raises an interesting question about the jurisprudential basis of what has become known as "the *Pallant v Morgan* equity", considered by the Court of Appeal in *Banner Homes Group Ltd v Luff Developments Ltd* [2000] Ch 372, the factual framework, and particularly the Judge's factual findings, inevitably lead to the failure of the appeal whichever way that type of constructive trust is characterised.

The context

4. The Judge's description of the facts covers many pages. The following account is confined to what is essential for the purpose of understanding what is in issue on this appeal and my reasons for concluding that it should be dismissed.

5. There were two sets of proceedings concerning the Building before the Judge.

6. By a lease dated 27 November 2007 ("the Lease") the Building was demised to the second appellant, Piccadilly, an unlimited company, for a term of 15 years commencing on 27 November 2007 and expiring on 26 November 2022. Clause 9 of the Lease contains a landlord's break clause operable on three months' notice. Between 31 October 2007 and 9 April 2009 the landlord of the Building was Crossco No 4 Unlimited ("Crossco"), the first appellant. On that day it was transferred to Jolan Piccadilly Ltd ("Jolan"), the second respondent.

7. Piccadilly trades from the ground floor of the Building, operating an amusement arcade there. The upper floors are vacant and in a poor state of repair. The Lease is within the security of tenure provisions of the 1954 Act.

8. Jolan wishes to carry out an extensive conversion and development of the Building. It wishes to convert the ground floor and basement into three retail or restaurant units and to convert the upper parts (adding a further floor in the process) into a 157 bedroom Travelodge hotel. Jolan has obtained planning permission for that

development. It has pre-let the ground floor and basement units to Waitrose Ltd, Nando's Chickenland Ltd and Ask Ltd.

9. Jolan has served a notice on Piccadilly to operate the break clause in the Lease and has also served a notice on Piccadilly pursuant to section 25 of the 1954 Act. Jolan opposes the grant of a new tenancy to Piccadilly on the ground that it intends to redevelop the Building. It relies on the ground of opposition in section 30(1)(f) of the 1954 Act. The first set of proceedings before the Judge ("the 1954 Act proceedings") were brought by Jolan to obtain the termination of the Lease pursuant to section 29 of the 1954 Act. In those proceedings Piccadilly contends that Jolan has not proved the necessary intention to develop for the purposes of section 30(1)(f). That was rejected by the Judge.

10. In the second set of proceedings ("the main proceedings") Piccadilly claims that Jolan is not entitled to operate the break clause in the Lease insofar as it would bring to an end the right of Piccadilly to trade from the ground floor of the Building until the end of the full term of the Lease. It is this claim, and the Judge's dismissal of it, which has been the focus of the appeal.

11. That claim arises in the context of a division between two sides of the Noble family of the interests in a substantial commercial organisation ("the Group"). The division has been referred to as the demerger. A very broad and general summary is as follows. Philip Noble, the third appellant, and Michael Noble were brothers who had substantial interests in companies and partnerships which operated various leisure and entertainment business, including adult gaming centres, family entertainment centres, bingo premises, betting premises, bars, nightclubs, restaurants and a bowling alley. They were interested in those businesses partly directly and partly indirectly through family trusts, and their interests were equal in extent. In addition they were equal partners in a number of partnerships that owned a large number of properties, in some of which the leisure businesses were carried on. In the case of the Building, the Group, by different companies, both owned the freehold and carried on the business of an adult gaming centre or amusement arcade on the ground floor. The upper floors had been empty for some time, and the Building had been earmarked within the Group for development.

12. There was a high degree of separation between those in the Group involved in running the leisure businesses and those concerned with the ownership of the properties. Those who were concerned with the running of the leisure group were generally referred to as "the trading group", and those who were concerned with the ownership of the properties were generally referred to as "the property group". At the material times for the purposes of this appeal, the directors and managers of the trading group were different individuals from the directors and managers of the property group. So far as the businesses of the trading group were concerned, the key directors and managers at the material times were Mr Imrie, Mr Biesterfield, Mr Gill, Mr Horrocks, Mr Thompson, Mr Blain and Mr Fox. Mr Biesterfield was a lawyer. The key directors and managers of the property group at the material times were Mr Dalzell, Mr Wooldridge and Mr Wright.

13. Michael Noble died on 19 April 2006. His executors included his wife Gillian Noble, the fourth respondent, and John Barnsley, an accountant, the third respondent. Following Michael Noble's death, the Group was ultimately owned by Philip Noble

and Gill Noble and their respective family trusts and other interests associated with them. It was decided to split the Group equally, that is to say in parts of equal value, between Philip Noble and his respective family trusts and associated interests ("Philip's Side"), on the one hand, and Gill Noble and her respective family trusts and associated interests ("Gill's Side"), on the other hand. Broadly speaking, the general rule was that Philip's Side was to take the trading businesses in the Group and Gill's Side was to take the property interests in the Group. The demerger was completed on 10 March 2009.

14. For the purpose of the demerger the surveyors and valuers Colliers CRE ("Colliers") were instructed to carry out valuations of some of the properties in the Group, and Close Brothers ("Close") were instructed to value the businesses. Close produced a lengthy valuation report dated 21 October 2008. Colliers and Close were instructed on behalf of both sides to the demerger, as were the other professional advisers, the accountants PWC and the solicitors Dickinson Dees.

15. By way of exception to the general rule, prior to 18 February 2009 it was intended that both the freehold of the Building and the business being carried on there, that is to say the Lease, would be owned post-demerger by companies controlled by Philip's Side. On 18 February 2009 that intention changed.

16. On that day there was a meeting at Philip Noble's office in London between Philip Noble, Mr Horrocks and Mr Barnsley. It lasted a couple of hours. A large number of items were discussed. Mr Barnsley raised for the first time, so far as Philip Noble and Mr Horrocks were concerned, the suggestion that the freehold of the Building should be transferred to Gill's Side. That suggestion was discussed for about 15 minutes and proved not to be controversial. It was agreed that the freehold of the Building would be transferred to a company associated with Gill's Side, with a value of £5 million being attributed to it, and that Philip's Side would retain the trading business on the ground floor. Other matters were discussed and considered in relation to the continued occupation of the Building by Philip's Side. I shall refer later to the findings of the Judge about precisely what was discussed and agreed at the meeting.

17. On 19 February 2009 there was a lengthy meeting attended by a large number of professional advisers involved in the demerger.

18. On 20 February 2009 Mr Barnsley sent an e-mail to a large number of persons at PwC and Dickinson Dees and also to Mr Jefferson, Mr Dalzell, Mr Horrocks, Mr Wooldridge and Mr Blain. It was also seen by Philip Noble. The e-mail began as follows:

> "We have now finalised the commercial agreement between each "side". This note sets out these final changes some of which may affect the documents. I appreciate that the timetable is tight but we would prefer to stick to it if at all possible. The markets are so volatile that delay kills deals."

19. Mr Barnsley's e-mail dealt with thirteen topics in separate numbered paragraphs. The second paragraph dealt with the Building, in respect of which he wrote as follows:

> "Gill's side will now get the freehold in Manchester Piccadilly, with an assignment of the lease to the trading side or a new lease on the same terms and with the existing rent but with Gill getting vacant possession of the upper floors. We may have to do the freehold now and follow up later with the lease. I imagine that the property will be ? left in crossco and demerged with Gill's other assets to avoid stamp duty. The value for commercial purposes will be £5m, it may be possible to get a lower value if SDLT is in point."

20. Mr Barnsley said that the freehold might have to be transferred with the varied or new lease to follow.

21. On the same day, the following e-mail was sent by Mr Dalzell to Mr Barnsley and to Mr Horrocks:

> "Following yesterday's demerger meeting I obtained a copy of the lease from Phil Thompson.
>
> On checking the documentation the current area demised to ops is the whole building. If the agreement is that ops will just have the ground floor we will need to have a brief deed of variation to attach a new demise plan limiting rights of occupation to the ground floor. We will also need to vary the rights of repair to make the landlord responsible for the external repairs and include a % recovery clause in based on floor area. If ops to occupy just 1 floor this will probably be circa 20% based on the 5 floors.
>
> If you could please consider these points and if all agree I will ask Dickinson Dees to draft the necessary deed of variation for completion along with the rest of the demerger papers.
>
> Look forward to hearing from you with your instructions."

22. Consideration was given by both sides to moving a substantial staircase at ground floor level giving access to the first floor. That had not been addressed at the meeting on 18 February 2009. If the staircase was to be removed, that would increase the available floor area at ground and first floor levels. There had not been any discussion as to who would bear the cost of removing the staircase and making good.

23. Philip Noble marked a plan of the ground floor, which had originally been drawn in December 1989, to show certain works which were envisaged at that point. He drew a yellow line to indicate the part of the ground floor to be occupied by the arcade business and, thereby, the other part which would be vacated and available to Gill's Side to give access to the upper parts of the building and so as to assist with the development and letting of those parts.

24. By 23 February 2009 it had become clear that both sides, for their different reasons, did not wish to come to an agreement on the extent of the ground floor demise. That was because Gill's Side were not yet at a stage where they could commit themselves

in respect of the area of the ground floor which they would like to see given up to them; and Philip's side were concerned about the effect of altering the ground floor in relation to the premises licences which they had under the Gambling Act 2005. At that time, there were five "split areas" and five licences. Philip's side did not want to jeopardise these licences by agreeing a new ground floor demise with Gill's Side before they had discussed the matter with the local authority. They realised that there would not be adequate time to have such discussions with the local authority before the hoped - for early completion of the demerger.

25. On 23 February 2009 Dickinson Dees advised Mr Horrocks that it was likely that it would be necessary to have a surrender of the Lease and the grant of a new lease, instead of a variation of the Lease.

26. On 7 March 2009 PwC drew up the Noble Organisation Demerger Step Plan, which ran to more than 200 pages. The plan stated that the valuation for the Building was taken at £5 million and that the consideration passing on the transfer of the freehold of the Building would be £1. Two pages of the plan considered the tax consequences of the transfer of the freehold of the Building. When dealing with the VAT consequences, the plan referred to the intending transferee (then Jolan's parent company, the first respondent) continuing to lease part of the Building to a named company in the trading group.

27. On 10 March 2009, when the demerger was completed, Crossco entered into a contract ("the sale contract") to sell the freehold to Jolan's parent company, which was controlled by Gill's Side, subject to the Lease. The future of trading in the Building by Piccadilly was dealt with in a Side Letter ("the First Side Letter"). The First Side Letter, which was from Jolan's parent company, the then intended purchaser from Crossco, was as follows so far as material:

> "We … confirm and agree that we shall agree to a reduction of the extent of the demise created by the Lease in the following manner and subject to the following conditions:
>
> 1. To reduce the extent of the demise created by the Lease to the ground floor of the Property together with such additional areas (if any) as you shall reasonably specify;
>
> 2. To effect such reduction by means of a deed of surrender or such other means as you shall reasonably require;
>
> 3. Notwithstanding the reduction in the extent of the demise the rent payable under the Lease shall remain at the level passing thereunder at the date at which such reduction takes place;
>
> 4. No consideration shall be payable by you to us for such surrender or variation;
>
> 5. Neither party shall be released from any existing breaches of the terms of the Lease notwithstanding the surrender or variation of the Lease save that we shall not enforce against you any breach of your obligation under the Lease to maintain

> and/or repair those parts of the Property which are to be removed from the area demised to you in accordance with the terms of this letter ;
>
> We confirm and agree that the terms of this letter will bind our successors in title to our interest under the Lease."

28. In the event, the freehold was transferred to Jolan, rather than Jolan's parent company, on 9 April 2009. On the same day Jolan provided a further side letter ("the Second Side Letter") in substantially the same terms as the earlier side letter.

The main proceedings

29. It is not necessary to elaborate on the 1954 Act proceedings. All the issues on the appeal arise in relation to the main proceedings.

30. Philip Noble, Piccadilly and Crossco, who are the claimants in the main proceedings, claim in those proceedings that the discussions on 18 February 2009 and various communications between that date and the date of the demerger on 10 March 2009 prevent Jolan from seeking to operate the break clause in the Lease in relation to the ground floor of the Building. They contend in the proceedings that a binding oral agreement was reached on 18 February 2009 which has that consequence; alternatively, the formal contractual documents ought, if necessary, to be rectified to produce that result; alternatively, equitable principles as to estoppel and constructive trust can be relied upon so that Jolan is not able to rely on the break clause in the way it has sought to do. The defendants to the main proceedings are Jolan, its parent company, Mr Barnsley and Gill Noble.

31. The Judge dismissed all those claims. The appeal is restricted to his decisions on estoppel and constructive trust.

The Judge's judgment

32. The Judge heard oral evidence from Philip Noble, Mr Horrocks and Mr Barnsley as to what was discussed at the meeting on 18 February 2009. He summarised as follows Philip's evidence as to what was discussed:

> "89. In his witness statement, Philip Noble gave only brief evidence about the discussion relating to the building at this meeting. He said that the proposal was that the building would go to Gill's side and that the Trading Group would continue to run its business from the ground floor with the upper floors being released to Gill, so that she could redevelop them. The value at which the building would go to Gill's side would be £5 million. The Trading Group would pay for the ground floor the same rent that it currently paid for the whole building. "
>
> 90. When cross-examined, Philip Noble stated that the proposal was that Gill would have the upper floors for redevelopment and that Philip Noble would keep the ground floor to trade from. He later changed his evidence to refer to the ground floor

> and basement. He said that he would pay the same rent for the ground floor and basement as he had been paying for the whole building. He did not know if there would be a new lease of the ground floor and basement. He expected that his company would occupy under a lease. He believed that, after the meeting, thought would have to be given to the practicalities of splitting the building and shared exits. The discussion was in very broad terms. Later in his evidence he said that, depending on what Gill's side wanted to do with the upper floors, his side would accommodate that in any way possible. Nothing was said about the duration of the lease of the ground floor and basement; he imagined that if there had been an existing lease, the duration of the lease of the ground floor and basement would have been however long that lease had to run."

33. Having summarised the evidence of Mr Horrocks and Mr Barnsley about the meeting on 18 February 2009, the Judge set out as follows his findings as to what was discussed about the future of the Building at the meeting:

> "96. Philip Noble agreed to Mr Barnsley's proposal that the freehold of the building would be transferred to Gill's side. There was no discussion as to the legal steps to be taken to achieve that. Philip Noble and Mr Barnsley agreed that the freehold would be transferred in return for a value shift of £5 million. The parties did not discuss in any detail how that figure of £5 million was derived or how it was to be justified. The fact that the same figure had appeared in the Colliers CRE valuation as a value of the freehold with vacant possession was not referred to.
>
> 97. The proposal involved, either expressly or by implication, the arcade business continuing on the ground floor. There was no discussion about what use would be made of the basement but it was contemplated that the basement would be available for use by Philip's side. The proposal involved the upper parts of the building not being occupied by Philip's side so that those parts would be available for Gill's side. There was no discussion as to the precise extent of the ground floor which would be occupied by the arcade business.
>
> 98. Philip Noble proposed that he would pay the same rent for the ground floor and basement as the business had been paying for the whole building. However, he later said that he would want to check up the position as to rent.
>
> 99. The parties at the meeting did not know whether there was an existing lease of the building. It was expected that Philip's side would occupy the ground floor and basement under a lease but it was not known whether that would be the existing lease or a new lease. The question of the duration of any lease was not considered. No one referred to the fact that the existing

> lease contained a break clause. Similarly, the other terms of any lease were not considered.
>
> 100. Finally, I find that at the meeting on 18th February 2009, there was only a passing reference to a future development of the upper parts of the building."

34. The Judge made the following findings as to knowledge of the break clause prior to the date of the transfer on 9 April 2009. He found (at [160]) that, on Gill's Side, Mr Dalzell and Mr Wooldridge knew of it not later than 19 February 2009. He found (at [110]) that, in relation to the period up to and including 18 February 2009, Mr Barnsley had no awareness of there being a break clause in the Lease, or even if there was a lease of the Building; and if he had been told of the Lease before then, he had no thought of its terms when he met Philip Noble on 18 February 2009 and the issue of the break clause did not register with him. The Judge found (at [160]) that Mr Barnsley's lack of awareness did not alter before 9 April 2009. The Judge found (at [184]) that Mr Barnsley did not become aware of the break clause, or at any event its significance, until a meeting on 20 April 2009. It was not suggested that Gill Noble knew of the break clause before then.

35. The Judge also found (at [163] – [173]) of his judgment that neither Philip Noble, nor any relevant person on Philip's Side, was aware of the existence of the break clause between 18 February 2009 and the demerger.

36. The Judge found (at [174] – [181]) of his judgment that no one on Gill's Side was aware or suspected or turned a blind eye to the possibility that Philip's Side had missed the break clause. He said the following of Mr Dalzell and Mr Woodridge at [177]:

> "Considering the probabilities of the situation at the time, I find that anyone in the position of Mr Dalzell and Mr Wooldridge would have thought that it was highly likely, perhaps even inevitable, that Philip's side would have been aware of the break clause. They knew that Philip's side had a copy of the lease in their records. Mr Dalzell had had to go to Mr Thompson to get a copy of the lease for Gill's side. They also knew that Philip's side knew that Mr Dalzell had been looking at the lease. The two sides began discussing the question of whether to have a deed of variation or a new lease. That would tend to suggest that Philip's side would be looking at the lease. On 20th February 2009, Gill's side were told that Mr Biesterfield had become involved in connection with the question whether there should be a deed of variation or a new lease. Gill's side were told that Mr Biesterfield had expressed a view to Mr Horrocks on that point. Mr Biesterfield was, and was known to be, a careful and punctilious lawyer. He demonstrated those attributes when he raised points about the lease of the Palatine in the period before completion of the demerger. Mr Biesterfield also asked for the side letter in relation to the building to be amended so that there was to be a

> release from the repairing covenant. That suggested that Mr Biestefield was aware of the terms of the lease."

37. As I have said, the Judge rejected the appellants' first and foremost case that the meeting on 18 February 2009 resulted in a binding contract on all the matters discussed in connection with the demerger, including contractual terms in relation to the Building.

38. The appellants' argument was that there were express terms of a binding agreement in relation to the Building as follows: (1) the freehold would be transferred to Gill's Side; (2) the freehold would be given a value of £5 million for the purposes of the demerger; (3) Gill's Side would have the use of the upper floors of the Building; (4) Philip's Side would continue to have the use of the ground floor and basement; (5) Philip's Side would continue to pay, for the part of the Building which they would continue to use, the same rent as they were currently paying for the whole Building; and (6) Philip's Side would confirm the parts of the ground floor and basement that they wished to continue to use.

39. It was submitted for the appellants that those express terms, in the factual context, meant that the continued use of the ground floor and basement was not to be subject to any right enjoyed by Gill's Side to determine that use at any time on service of three months' notice pursuant to the break clause. It was then said that the contract made on 18 February 2009 took effect from 20 February 2009 as a contract in relation to the ground floor, and excluding the basement; and that variation happened either pursuant to the express term agreed on 18 February 2009 that Philip's Side would confirm the part of the ground floor and basement which they wished to continue to use, or, alternatively, the contract as varied on 20 February 2009. The appellants also contended that the Second Side Letter was legally binding.

40. In rejecting those arguments, the Judge said as follows:

> "223. In my judgment, the parties did not make a contractually binding agreement on 18th February 2009. There was no overall contract dealing with all of the demerger matters discussed on 18th February 2009 and there was no specific contract dealing with the building on its own. Indeed, the Claimants do not contend that there was a separate contract in relation to the building if I am not prepared to find that there was an overall contract dealing with all the matters discussed on 18th February 2009. I will give my reasons for holding that there was no binding contract in relation to the building arrived at on 18th February 2009 before giving my reasons as to why there was no binding contract on any subject arrived at on that date.
>
> 224. On 18th February 2009, the building was only briefly discussed. A brief discussion does not necessarily mean that no contract was arrived at, but this brief discussion did not, even in general principle, settle a large number of matters which were essential to be settled before a binding contract would be made. At that meeting, the parties did not know whether there was an existing lease. They did not agree anything in relation to an

> existing lease, such as a variation of such a lease. They did not agree upon the grant of a new lease, as they did not know if there was an existing lease. They did not agree on the extent of the premises which would be occupied by Philip's side. It was clear that that extent would not include the upper parts of the building. It was thought that it would include all or part of the basement. It was thought that it would include part, but not all, of the ground floor. The parties knew that they would need to discuss and agree at a later time which part of the ground floor would remain available to Philip's side. They did not agree a formula, which was sufficiently certain to have contractual effect, as to how the extent of the ground floor was to be determined, for example by an independent person or by the court, if the parties could not agree. Thus, the extent of the part of the building which was to be occupied by Philip's side was contractually uncertain. The length of time that Philip's side would be entitled to occupy the relevant part of the building was not even mentioned. If the parties had known at the meeting on 18th February 2009 that there was an existing lease, it might have been possible to infer that they must have contemplated that the duration of the entitlement would be governed by the terms of the existing lease. That result would not have particularly helped Philip's side as the duration of the existing lease was itself governed by the break clause in the lease. Further, the parties did not know whether it would be necessary or appropriate to enter into a new lease of the relevant part of the ground floor and they had not discussed what the term of any such lease might be. In addition, the parties did not agree the rent which would be payable for the relevant part of the building. Philip Noble said that he wanted to have confirmation from Mr Thompson as to whether it was appropriate to continue to pay the existing rent for the relevant part, although Philip Noble indicated at the meeting that he was in principle prepared to pay that rent.
>
> 225. In my judgment, the only possible conclusion in relation to the alleged contract, or contractual terms, in relation to the building is that there was no binding agreement in relation to the building…"

41. The Judge, rejecting the appellants' case that a much wider agreement was reached on 18 February 2009, emphasised (at [226]) the immense complexity of the demerger and that, although the parties had agreed commercial terms on most matters, the steps needed to give effect to those commercial terms were not mere machinery and the documents to give effect to the demerger were critically important because of the tax consequences of the different possible arrangements. The Judge rejected (at [226]) the appellants' submission that Mr Barnsley's use of the words "we have now finalised the commercial agreement between each "side" …" in his e-mail of 20 February 2009 indicated final contractual agreement. He said that the expression

used in that e-mail and the lack of essential detail in it were more consistent with the parties having agreed non-contractual heads of terms.

42. By the time of closing submissions the appellants had accepted that the First Side Letter was not legally binding, but they continued to argue that the Second Side Letter was legally binding. The Judge rejected that argument for reasons which it is not necessary to set out in this judgment.

43. The appellants' alternative claim to rectification was based on Crossco's lack of awareness, which the Judge accepted, that the Lease contained a break clause. The Judge described (at [238]) the difficulties faced by the appellants in formulating the precise rectification they sought, causing the appellants to put forward several different suggested forms of rectification. In particular, difficulties were caused by the absence of any definition of the part of the ground floor where the break clause could operate and the part where it could not and as to the extent of the ground floor to be included in any new lease. The Judge said (at [239]) that he did not have to resolve those difficulties because the claim to rectification essentially failed on the findings of fact which he had made. The claim for rectification for unilateral mistake failed on the Judge's finding that none of the relevant persons on the respondents' side knew, or were wilfully blind to the possibility, that the appellants were making a mistake. The Judge said:

> "244. The simple fact is that the Claimants made their mistake because they did not read the lease in circumstances where it was to be expected that they would and where the Defendants had no reason to think that they had not read the lease and had missed the fact that it contained a break clause. This is not an unprecedented state of affairs, as is demonstrated by the facts of *The Nai Genova* [1984] 1 LL R 353 at 365-366. …"

44. The Judge rejected (at [248]) the appellants' claim to rectification for common mistake on the ground that directors of both Jolan and its parent company knew full well of the existence of the break clause.

45. The Judge then turned to the appellants' argument that rectification should be ordered on the principles set out in the obiter remarks of Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at [48] to [66], with which the other members of the House of Lords agreed. That approach requires an assessment of whether or not there was objectively a consensus to which the final executed documents failed to give effect. The Judge disposed of the appellants' argument on this aspect as follows:

> "245. I will now attempt to apply the approach in *Chartbrook* in this case. I am to ask whether the contract as executed in the present case "correctly reflected the prior consensus": see per Lord Hoffmann at [57]. I have therefore to consider whether there was some expression of consensus prior to 10th March 2009 when the parties expressed themselves in a way which was different from the terms of the contract of 10th March 2009 and/or the transfer of 9th April 2009. In my judgment, there was no earlier expression of the consensus of the parties which

> differed from the terms of the executed documents. The parties did not at any earlier point refer to the existence of the break clause nor to the duration of Piccadilly's entitlement to remain as lessee of the premises. The executed documents are not different from what the parties said and wrote to each other between 18th February 2009 and 10th March 2009 or 9th April 2009; the executed documents faithfully give effect to those communications. The mistake that the Claimants made was that they were unaware of the existence of the break clause. That is no doubt why the Claimants' first two submissions in support of a claim to rectification stressed that mistake on their part. One result of that being the mistake was that there was simply no earlier expression of the parties' consensus which when objectively construed and compared with the terms of the executed documents shows a disparity between the executed documents and the earlier consensus. "

46. The Judge then turned to the appellants' alternative claims based on estoppel or a constructive trust. He addressed these with great care and detail between [256] and [370] of his judgment. In the course of doing so, he analysed a very large number of authorities. It is not necessary to set out or summarise what he said in relation to them. Once again, the Judge's findings of fact precluded any relief to the appellants. In [335] of his judgment the Judge said that the appellants needed to establish that there was a representation that Philip's Side could remain on the ground floor for the remainder of the length of the term of the Lease and without the break clause. The Judge held that the appellants had failed to do so. He said as follows:

> "336. I will first consider whether there was an express representation or assurance of the kind alleged at the meeting on 18th February 2009 or in the communications from that date up to 10th March 2009. I have set out my detailed findings as to what was said at the meeting on 18th February 2009. The arrangement discussed appeared to involve Philip's side continuing to trade from most of the ground floor (at that stage, together with the basement). However, the duration of any entitlement to continue was not discussed. The parties did not know whether there was an existing lease and they did not know the length of the remaining term of any existing lease. They did not know that the existing lease contained a break clause. I am not able to find that anything that was said amounted to an express representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause.
>
> 337. I have set out in detail the communications between the parties between 18th February 2009 and 10th March 2009. Those communications are open to two interpretations. One is that Gill's side indicated to Philip's side that Philip's side could have a lease in the same terms as the existing lease, save that

the premises demised by the lease would be reduced in extent to part of the ground floor only. The other interpretation is that Gill's side indicated to Philip's side that Gill's side was prepared, following the demerger, to negotiate with Philip's side the terms of a new lease. Neither of these interpretations of the communications amounts to a representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause. The difficulty for Philip's side was that they, by mistake, had overlooked the existence of the break clause in the existing lease but that was not as a result of any representation from Gill's side that the existing lease did not have a break clause nor was there anything amounting to an assurance from Gill's side that they would not seek to rely upon the break clause.

338. I will next consider whether the discussion on 18th February 2009 and/or the communications between 18th February 2009 and 10th March 2009 amounted to an implied representation or assurance that Philip's side could remain on the ground floor for the remainder of the length of the term of the existing lease and without the break clause. I have referred to what was said at the meeting and to the two possible interpretations of the communications thereafter. In my judgment, there is no basis for holding that the statements made by Gill's side carried with them an implied representation or assurance from Gill's side to that effect. As before, Philip's side mistakenly believed that they had a lease without a break clause but that was not the result of anything from Gill's side.

339. The Claimants also say that the agreed value shift for the purposes of the demerger, to reflect the fact that Philip's side was acquiring a business, which included the business in the building, carried with it an implied representation or assurance that the business would be able to continue in the building for some period or other. Philip's side would contend that the relevant period is the remainder of the term of the existing lease but, of course, not subject to the break clause.

340. The Claimants submit that the way in which the valuation of the overall business was arrived at by Close Brothers supports the Claimants' contention. They say that Close Brothers would probably not have arrived at the same valuation if they have been told that there was a significant risk that at some indefinite time in the future the carrying on of the business at the building might cease without being relocated. I accept that it is probable that the Close Brothers valuation would have been lower by an amount that, on the evidence, I am not able to quantify. However, that does not seem to me to be enough to support a finding that Gill's side, by agreeing on

> values by reference to the Close Brothers valuation, were representing to Philip's side that Philip's side had, or would be given, an entitlement to occupy the ground floor for any particular period of time.
>
> 341. It will be remembered that Mr Wells gave evidence that the Close Brothers valuation did not have regard to the period of the leases of the various properties. If one were to investigate what Close Brothers were told about the tenure in relation to the building, it would emerge that the schedule of properties given to Close Brothers stated that the building was held on a freehold and not on a lease. In my judgment, Philip's side cannot argue that negotiations as to price based on the Close Brothers report amounted to an implied representation by Gill's side that Philip's side would have a freehold tenure of the building. If that is so, then I do not see how such negotiations could be said to amount to a representation by Gill's side that Philip's side would enjoy any specific period of tenure following demerger.
>
> 342. I have also held that the actual discussions between the parties from 18th February 2009 to 10th March 2009 did not expressly or by implication involve a representation or assurance of the kind alleged. In those circumstances, in my judgment, the way in which the parties negotiated the value of the overall business, which included the business carried on at the building, did not involve any such representation or assurance, expressly or by implication."

47. The Judge said (at [343]) that those findings prevented the appellants from succeeding in relation to the allegation of promissory estoppel.

48. The Judge rejected (at [345]) the appellants' claim to proprietary estoppel for the same reason. He added that Philip's Side did not rely on a representation or assurance from Gill's Side but on their own mistaken belief as to the terms of the Lease.

49. In dealing with other submissions of the appellants on estoppel, the Judge said as follows:

> "349. In my judgment, this is not a case of an expectation created or encouraged by Gill's side that Philip's side would, as a result of a deed of variation or the grant of a new lease, end up with a lease which was more than a short term lease. Philip's side believed, wrongly, that they already had something which was more than a short term lease. As to any future deed of variation or new lease, Philip's side knew that they had no legal entitlement to such a deed of variation or new lease. On 23rd February 2009, the parties deliberately agreed that they would not have further negotiations about the deed of variation or a new lease. Philip's side did not want to settle the extent of the ground floor until they were clear as to the effect of a revised

> demise on the premises licences for "split areas". Further, the side letter which allowed Philip's side to give up part of the building, to avoid liability for the empty parts of the building, was clearly expressed to be something which was not legally binding. In my judgment, and in accordance with the decision in Cobbe, Philip's side cannot say that they have a right in equity to a deed of variation or a new lease, without a break clause, when it was expressly agreed between the parties that the terms of a deed of variation or a new lease depended upon the outcome of future negotiations."

50. The Judge rejected the suggestion that there were any relevant fiduciary obligations or that Gill's Side behaved in an untrustworthy way. He said:

> "351. I accept that the demerger transaction was not a totally arms-length commercial transaction. However, there were clearly two sides with different and competing interests. Each side was entitled to protect its own interests and expect the other to look after itself. I do not think that the family connections and the use of one set of advisers ultimately changed the nature of the duties owed by one side to the other side. In particular, I do not think that one side owed fiduciary obligations to the other. It was suggested during the cross-examination of some of the witnesses that Mr Barnsley might have owed fiduciary obligations, or some other duty, to Philip Noble. It was also suggested in the course of the evidence that, prior to demerger, while a company was owned jointly by Gill's side and by Philip's side, a director of such a company owed duties to the ultimate shareholders; if that proposition were correct, it would be said that, for example, Mr Dalzell owed a duty to Philip Noble.
>
> " 353. As regards the submission that the parties were expected to trust each other, I do not think that Gill's side behaved in an untrustworthy or tricky way prior to the demerger. Gill's side behaved properly in proposing the terms which were agreed in principle on 18th February 2009. I do not think that Gill's side caused Philip's side to make a mistake about the break clause in the lease. I do not think that Gill's side set out to trap Philip's side in that respect. I do not think that Gill's side ought to have reminded Philip's side of the break clause in circumstances where Gill's side had no reason to think that Philip's side was making a mistake. Accordingly, whatever was called for in relation to trustworthy behaviour from Gill's side, I find that Gill's side are not at fault in any such respect. "

51. The Judge observed (at [357]) that the appellants did not really develop any separate case in relation to estoppel by convention. He rejected the claim in the light of his findings of fact and reasoning in relation to the other forms of estoppel. The Judge summarised the overall position in relation to the estoppel claims, as follows:

> "351. Standing back, the position is a simple one. The parties were content for the freehold to be transferred to Gill's side and for the question of the lease of the ground floor to be considered later, with neither party binding itself in relation to future negotiations as to the lease. Philip's side were content to proceed in that way because they believed they had a satisfactory lease of the whole building. They were mistaken about the lease because, in fact, it was subject to a three month break clause. That mistake was not attributable to any representation or assurance from Gill's side. Gill's side did not cause Philip's side to make this mistake. Gill's side did not even know that Philip's side was making this mistake. Gill's side did not commit itself by a promise or assurance about their future conduct as to any negotiations about a deed of variation or a new lease, nor as to the extent of any development. Philip's side did not rely on any such promise or assurance; they relied on their mistaken belief as to their rights under the existing lease. There is nothing there to raise an equity against Gill's side. "

52. As regards the appellants' claim for a constructive trust, the Judge recorded (at [362]) that the appellants' submission was that they were asserting an equity to have a lease of the ground floor of the Building for the duration of the Lease and on the terms of the Lease, but without the break clause, and that they relied on *Banner Homes*. The Judge observed (at [364]) that the court can only impose a constructive trust in this type of case where the behaviour of the party who asserts that he is free of any obligation to the other party is unconscionable behaviour. The Judge rejected the claim to a constructive trust because he concluded that the conduct of Gill's Side, following the demerger, in relying on the break clause in the Lease was not unconscionable. He said as follows on that aspect:

> "368. In connection with the alleged constructive trust, the following factors seem to me to be important:
>
> (1) Philip's side made a unilateral mistake about the terms of the existing lease;
>
> (2) the mistake was not induced by any representation or assurance from Gill's side;
>
> (3) the mistake was not caused, or contributed to, by Gill's side;
>
> (4) Gill's side did not know that Philip's side was making a mistake;
>
> (5) Philip's side knew that they did not have a binding agreement for a deed of variation or a new lease;
>
> (6) Philip's side did not rely upon the prospect of there being a binding agreement for a deed of variation or a new lease;

> (7) Philip's side relied upon the existing lease but in the mistaken belief that the existing lease was not subject to a break clause.
>
> 369. When considering a possible argument as to estoppel by convention, I referred to the fact that there was some element of common assumption in this case, namely, that in February and March 2009, both parties expected that any future development by Gill's side would be restricted to a development of the upper parts of the building. I have therefore considered whether it might have been argued that a constructive trust arose in the present case whereby, in some way or other, Gill's side would be prevented from relying upon the break clause in the lease to recover possession of the ground floor of the building for the purposes of redevelopment. In my judgment, there was no constructive trust which operated in that way. First of all, the way in which I have described the submission is not an assertion of a constructive trust but is really an assertion of an estoppel; I have already explained why I think that there was no estoppel of that kind. Secondly, the parties did not discuss in any detail what the extent of any future development might be; Philip's side did not rely upon any such discussion or any promise or representation about the extent of such a development, because there was no such promise or representation. What Philip's side relied upon was its belief as to its rights under its existing lease. Philip's side mistakenly overlooked the break clause in that lease but that mistake was not attributable to the conduct of Gill's side and Gill's side did not even ap/preciate that Philip's side was making a mistake.
>
> 370. In my judgment, it is not unconscionable for Gill's side, following demerger, to assert the existence of their freehold title and to rely upon the terms of the existing lease. It does not seem to me to matter that the parties did not in fact, after 9th April 2009, pursue negotiations as to a deed of variation or a new lease in relation to most of the ground floor of the building. If there had been such negotiations, Gill's side would have been entitled to insist upon the break clause remaining in the varied lease, or in the new lease, relating to the ground floor, as Gill's side had not bound itself by a contract or an estoppel or a trust to act otherwise."

53. The Judge then held in favour of Jolan on the 1954 Act proceedings on the footing that it had served a valid notice under the break clause in the Lease and a valid notice under section 25 of the 1954 Act, and had established the ground of opposition to the grant of a new tenancy in section 30(1)(f) of the 1954 Act.

The appeal

54. It would be impossible to set out the very many submissions made on the appellants' behalf without extending this judgment to an unacceptable length. Some measure of

the extent of those submissions can be gathered from the fact that, quite apart from Mr Michael Driscoll QC's extensive oral submissions, the written submissions on behalf of the appellants, embracing a skeleton argument, a supplementary skeleton argument, further written submissions arising out of *Jones v Kernott* [2011] UKSC and a statement of critical facts, extend to 104 single space printed pages and 281 paragraphs. The so called "skeleton" arguments were written in the form of fully-fleshed written argument, with foot-notes. What is, or should be, at the end of the day a relatively short case has sometimes been obscured by the detail of factual and legal analysis, packaged one way and then another, partly overlapping and partly not. It was precisely for that reason that, during the course of the hearing, we asked the appellants to produce a concise statement of the facts that they regard as critical for the legal analysis. In the following paragraphs I shall attempt to summarise the appellants' case on the appeal. I shall do so as briefly as possible, sufficient to give the reader an adequate flavour of the arguments, but without descending into anything like the detail of the submissions we received.

55. The appeal is restricted to the decisions of the Judge rejecting the appellants' case on constructive trust and estoppel. There is no appeal on the other aspects, in particular the judge's rejection of the appellants' case that there was a binding contract that the appellants should have a lease of part of the ground floor of the Building without a break clause and their alternative case for rectification.

56. An overview of the appellants' case on the appeal may be summarised as follows. The Judge was wrong not to find that the respondents hold the freehold of the Building on constructive trust to give effect to the agreement, common assumption and common expectation reached before the freehold was transferred to the respondents, and on the basis of which the freehold was transferred to them.

57. That agreement, common assumption and common expectation, which the appellants have called "the shareholders' agreement", was reached in the discussion between Philip Noble, representing Philip's Side, and Mr Barnsley, representing Gill's Side, between 18 February 2009 and 20 February 2009. The shareholders' agreement was that, in return for agreeing that the freehold should be transferred to Gill's Side for an agreed demerger value of £5 million, Philip's Side should continue to run their business from the ground floor but give up possession of the upper floors to Gill's Side. The shareholders' agreement, and the context in which it was reached, namely the demerger of interests in a family business with one set of professional advisers and with the intention that there should be a division of equal value between the two sides, make it unconscionable for Gill's Side to rely on their strict legal rights as owners of the freehold and landlord to evict the tenant on three months' notice. The principles for establishing a common intention constructive trust apply in the present case so that Gill's Side acquired the freehold of the Building on a constructive trust which prevents them from relying on the break clause in the Lease to evict Piccadilly from the ground floor. On the same facts and matters, Gill's Side are estopped from relying on the break clause in the Lease in order to obtain possession of the ground floor currently occupied by Piccadilly.

58. I turn from the overview to the more detailed submissions advanced on behalf of the appellants. As I have said, my summary will not attempt to set out all those

submissions. I shall describe them sufficiently to understand the issues for resolution on the appeal.

59. No criticism is made of the principles of law set out by the Judge or of the Judge's findings of primary fact. It is said by the appellants that the error of the Judge was in applying the principles to the facts.

60. Mr Driscoll emphasised the following as critical facts. At the meeting on 18 February 2009 the two sides to the demerger were represented. One side was represented by Philip Noble, who owned one third of the shares in the Group and who also represented the trustees of his family settlements, who owned one sixth. The other side was represented by Mr Barnsley, who represented the executors of Michael Noble's will, who owned one third of the shares in the Group. He also represented the trustees of Michael Noble's family settlement, who owned the remaining one sixth. The agreement they reached was clear, namely that the freehold of the Building would be transferred to Gill's Side at a value of £5 million, but Philip's Side would continue to conduct the existing successful amusement arcade business on the ground floor. They never deviated from that agreement prior to the transfer of the freehold of the Building. They discussed and reached that agreement because there was a disparity of some £10 million in favour of Philip's Side in the values of the assets to be divided between the two sides. That gap had to be eliminated both because it was important for each side to take assets of equal value, but also because the intended tax savings could not be achieved unless there was an equal division of the assets.

61. The agreement was possible because Philip's Side wished to give up possession of the upper floors of the Building. They had no use for them since the amusement arcade was run from the ground floor. They were empty, and in need of repair. They were ripe for development, but that was not something that the trading side of the business was equipped or interested in doing. They were carrying a liability for empty rates. The dilapidations were going to cost in excess of £300,000, and the void rates liability amounted to over £150,000 per annum.

62. The agreement between the principals was confirmed in Mr Barnsley's e-mail of 20 February 2009, which I have set out earlier in this judgment, in which he said that "we have now finalised the commercial agreement between each side."

63. The appellants' case is that the Judge wrongly found that the agreement, common assumption and common expectation of the principals arising from their agreement made between 18 February 2009 and 20 February 2009 was affected by the conduct and intentions of the managers and directors for each side, and by the professionals acting for both sides, after that date. The appellants' case is that the only intentions that mattered were those of the principals. The directors and managers were not their agents and had no authority or power to change the agreement reached between the principals. The appellants say that the agreement between the principals was not in any way affected or undermined by the existence of the break clause in the Lease both because neither Philip Noble nor Mr Barnsley was personally aware of the Lease on 18 February 2007 and because neither of them was personally aware of the existence of the break clause at the date of the transfer of the freehold.

64. The appellants attack as a critical error of the Judge his conclusion that the reason the freehold was transferred to Gill's Side, without a binding agreement as to lease terms

on which Piccadilly was to continue to occupy the ground floor, was not because of any representation or assurance by Gill's Side but because of a mistake by Philip's Side that the Lease did not contain a break clause. The Judge, they say, reached that erroneous conclusion because he wrongly attributed to the principals, that is to say the shareholders represented by Philip Noble and Mr Barnsley, the beliefs and intentions of managers and directors and professionals, none of whom were authorised to change the fundamentals of the shareholders' agreement.

65. The appellants' case is that there would be no difficulty in arriving at the terms of an appropriate new lease to be granted to Piccadilly consistently with the shareholders' agreement (or by way of a variation of the Lease). Prior to the transfer of the freehold of the Building, it had already been agreed that, in addition to the upper floors, Philip's Side would also give up the basement. It had also been agreed that the rent for the ground floor should be the same as the rent for the entire Building. There would be no difficulty in identifying the precise area of the ground floor which would continue to be occupied by Philip's Side consistent with sufficient access to permit the development of the upper floors by Gill's Side. The other terms would be those in the standard lease between Group companies (15 years' duration, not contracted-out of the protection of the 1954 Act and without a break clause) or the terms of the Lease, other than the break clause and with such other variations as would be consistent with Piccadilly's continued use and occupation of the ground floor alone. Mr Driscoll referred to an e-mail on 20 February 2009 between those representing Gill's Side, which indicated what kind of variations to the Lease would be necessary to deal with repairs and a service charge.

66. Mr Driscoll laid particular emphasis on the following in relation to the appellants' arguments on the unconscionability of Gill's Side in refusing to give effect to the shareholders' agreement.

67. The agreement was reached in the context of, and for the purpose of, achieving the overall commercial and tax efficient aim of a division of the Group's assets in shares of roughly equal value. That would not be achieved if Gill's Side, having received a transfer of the freehold of the Building at a notional value of £5 million did not permit Philip's Side to continue the arcade amusement business on the ground floor as agreed. The business assets of the Group were valued by Close for the purposes of the demerger on the basis of a five year projection from 2008 to 2013, part of which was actual earnings and part projected earnings. The appellants says that, had there been any reason to believe that a business would close within that five year period, that is something that the valuers would have been expected to have been told, and it would have affected the value. Mr Driscoll elaborated the point. He said that the valuers applied multiples to the EBITDA of groups of businesses, and not to individual businesses. For the purposes of the amusement arcade, the multiple used was between 5 and 6, with the overall average something like 4.7 or at least below 5. Mr Driscoll submitted that, if one applies the multiplier used by the valuers to the EBITDA of Piccadilly's business on the ground floor of the Building, one arrives at a value of at least £2.5 million. Mr Driscoll acknowledged that the Judge felt he was unable to place any precise value on the amusement arcade business, but the Judge did accept that it would have had an effect on the overall valuation provided by Close. Mr Driscoll submitted that, one way or another, a significant value attached to Piccadilly's business on the ground floor (which the appellants say was acknowledged

by the Judge in the course of argument), which was included in the value on the demerger for which, in effect, Philip's Side had to pay by way of assets of equal value passing to Gill's Side. It was in that context that the value of £5 million was agreed on 18 February 2007 as the value to be attributed to the freehold of the Building.

68. The only reason that the shareholders' agreement was not fully worked out and fully documented in a binding legal agreement at the date of the completion of the merger was because of time constraints. Both sides wanted a delay for their own purposes. Philip's Side wanted to be sure that any reconfiguration of the ground floor, that is a change in extent of the area demised to Piccadilly on the ground floor, would not prejudice their existing licensing position with the local authority, under which they had licences for five different units. Gill's Side wanted time to consider how much of the ground floor they needed to retain in order to carry out the development of the upper floors. The delay was, therefore, for each side's mutual benefit and had nothing to do with disagreement over the principles underlying the shareholders' agreement.

69. Numerous cases were cited in Mr Driscoll's oral submissions and the appellants' written submission. In the briefest outline, so far as concerns the claim based on constructive trust, the appellants rely on the so-called *Pallant v Morgan* equity (named after *Pallant v Morgan* [1953] Ch 43), as explained by Chadwick LJ in *Banner Homes*. Mr Driscoll described the relevant type of constructive trust as a common intention constructive trust, and submitted that it is an institutional and not a remedial trust. For that analysis, and the application of that type of trust in a commercial context, he relied not only upon *Banner Homes* and the cases cited in it by Chadwick LJ, but also the statement of principle by Lord Kingsdown in *Ramsden v Dyson* (1866) 1LR 1HL 129, at 170-171, cases like *Holiday Inns Inc v Broadhead* (1974) 232 EG 951 and 1089, *Yaxley v Gotts* [2000] Ch 162, *Kilcarne Holdings Ltd v Targetfellow (Birmingham) Ltd* [2005] EWCA Civ 1355 and *Clarke v Corless* [2010] EWCA Civ 388, and the endorsement of *Banner Homes* in *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55, [2008] 1 WLR 175. He highlighted as a feature of that type of constructive trust that it does not depend upon an enforceable agreement or even one where all the terms have been agreed.

70. So far as concerns proprietary estoppel, Mr Driscoll submitted that the facts fall within the well established requirements of a representation or assurance by the defendant, reasonable reliance on it by the claimant, and detriment suffered by the claimant as a result. He referred in that context to Lord Walker's summary in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 162, at [29].

71. Mr Driscoll did not materially elaborate on estoppel by convention, but I understood his submission to be that the well established principles of that doctrine also apply on the facts of the present case.

72. Mr Driscoll distinguished the present case from *Cobbe* on the basis that the facts of the present case concern a pre-acquisition agreement and are not purely commercial since they involved a group of family businesses being divided between members of the same family, and were conducted with a high expectation of trust, both aspects being exemplified by various e-mail exchanges and by the fact that a single set of professionals acted for both sides on the demerger.

The Respondents' Notice

73. The respondents issued a Respondents' Notice to uphold the judgment of the Judge on additional grounds. There is no need for a separate consideration of those grounds at this stage. They are taken into account in the discussion which follows.

Discussion

74. In *Banner Homes*, the plaintiff and the first defendant were both potential purchasers of a site which they proposed to acquire and develop together through a joint venture company. The first defendant subsequently decided to proceed without the plaintiff's participation, effecting its purchase of the site through the second defendant, its wholly owned subsidiary. The plaintiff claimed to be entitled to an interest in the property either pursuant to a contract or by way of a constructive trust over half the shares in the second defendant. The trial judge, Blackburne J, held that the first defendant led the plaintiff to understand that it intended to enter into a joint venture but subsequently had second thoughts, which it kept to itself for fear that the plaintiff, if alerted, might make a rival bid. He found that no contract was concluded and rejected the claim in equity on the ground that it sought to turn an arrangement or understanding, which was implicitly qualified by the right of either side to withdraw, into an unqualified undertaking. The plaintiff appealed in relation to the claim in equity. The appeal was allowed. The only reasoned judgment was given by Chadwick LJ, with whom Evans and Stuart-Smith LJJ agreed.

75. Chadwick LJ considered the authorities in detail. In particular, he analysed *Chattock v Muller* (1878) 8 Ch D 177, *Pallant v Morgan* [1953] Ch 43, *Holiday Inns*, *Time Products Ltd v Combined English Stores Group* (unreported) 2 December 1974 (Oliver J), and *Island Holdings Ltd v Birchington Engineering Co Ltd* (unreported) 7 July 1981 (Goulding J). Chadwick LJ also referred to and quoted from the judgment of Millett LJ in *Paragon Finance plc v D.B. Thakerar & Co* [1999] 1 All ER 400, 408-409.

76. Chadwick LJ then set out as follows the features giving rise to a *Pallant v Morgan* equity:

> "(1) A *Pallant v. Morgan* equity may arise where the arrangement or understanding on which it is based precedes the acquisition of the relevant property by one party to that arrangement. It is the pre-acquisition arrangement which colours the subsequent acquisition by the defendant and leads to his being treated as a trustee if he seeks to act inconsistently with it. Where the arrangement or understanding is reached in relation to property already owned by one of the parties, he may (if the arrangement is of sufficient certainty to be enforced specifically) thereby constitute himself trustee on the basis that "equity looks on that as done which ought to be done;" or an equity may arise under the principles developed in the proprietary estoppel cases. As I have sought to point out, the concepts of constructive trust and proprietary estoppel have much in common in this area. *Holiday Inns Inc. v. Broadhead* , 232 E.G. 951 may, perhaps, best be regarded as a proprietary estoppel case; although it might be said that the arrangement or understanding, made at the time when only the five acre site

was owned by the defendant, did, in fact, precede the defendant's acquisition of the option over the 15-acre site.

(2) It is unnecessary that the arrangement or understanding should be contractually enforceable. Indeed, if there is an agreement which is enforceable as a contract, there is unlikely to be any need to invoke the *Pallant v. Morgan* equity; equity can act through the remedy of specific performance and will recognise the existence of a corresponding trust. On its facts *Chattock v. Muller* 8 Ch.D. 177 is, perhaps, best regarded as a specific performance case. In particular, it is no bar to a *Pallant v. Morgan* equity that the pre-acquisition arrangement is too uncertain to be enforced as a contract - see *Pallant v. Morgan* [1953] Ch. 43 itself, and *Time Products Ltd. v. Combined English Stores Group Ltd*. , 2 December 1974 - nor that it is plainly not intended to have contractual effect - see *Island Holdings Ltd. v. Birchington Engineering Co Ltd.*, 7 July 1981.

(3) It is necessary that the pre-acquisition arrangement or understanding should contemplate that one party ("the acquiring party") will take steps to acquire the relevant property; and that, if he does so, the other party ("the non-acquiring party") will obtain some interest in that property. Further, it is necessary that (whatever private reservations the acquiring party may have) he has not informed the non-acquiring party before the acquisition (or, perhaps more accurately, before it is too late for the parties to be restored to a position of no advantage/no detriment) that he no longer intends to honour the arrangement or understanding.

(4) It is necessary that, in reliance on the arrangement or understanding, the non-acquiring party should do (or omit to do) something which confers an advantage on the acquiring party in relation to the acquisition of the property; or is detrimental to the ability of the non-acquiring party to acquire the property on equal terms. It is the existence of the advantage to the one, or detriment to the other, gained or suffered as a consequence of the arrangement or understanding, which leads to the conclusion that it would be inequitable or unconscionable to allow the acquiring party to retain the property for himself, in a manner inconsistent with the arrangement or understanding which enabled him to acquire it. *Pallant v. Morgan* [1953] Ch. 43 itself provides an illustration of this principle. There was nothing inequitable in allowing the defendant to retain for himself the lot (lot 15) in respect to which the plaintiff's agent had no instructions to bid. In many cases the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market. That will usually be both to the advantage of the acquiring party - in that he can bid without competition from the non-acquiring party - and to the

> detriment of the non-acquiring party - in that he loses the opportunity to acquire the property for himself. But there may be advantage to the one without corresponding detriment to the other. Again, *Pallant v. Morgan* provides an illustration. The plaintiff's agreement (through his agent) to keep out of the bidding gave an advantage to the defendant in that he was able to obtain the property for a lower price than would otherwise have been possible; but the failure of the plaintiff's agent to bid did not, in fact, cause detriment to the plaintiff because, on the facts, the agent's instructions would not have permitted him to outbid the defendant. Nevertheless, the equity was invoked.
>
> (5) That leads, I think, to the further conclusions: (i) that although, in many cases, the advantage/detriment will be found in the agreement of the non-acquiring party to keep out of the market, that is not a necessary feature; and (ii) that although there will usually be advantage to the one and correlative disadvantage to the other, the existence of both advantage and detriment is not essential - either will do. What is essential is that the circumstances make it inequitable for the acquiring party to retain the property for himself in a manner inconsistent with the arrangement or understanding on which the non-acquiring party has acted. Those circumstances may arise where the non-acquiring party was never "in the market" for the whole of the property to be acquired; but (on the faith of an arrangement or understanding that he shall have a part of that property) provides support in relation to the acquisition of the whole which is of advantage to the acquiring party. They may arise where the assistance provided to the acquiring party (in pursuance of the arrangement or understanding) involves no detriment to the non-acquiring party; or where the non-acquiring party acts to his detriment (in pursuance of the arrangement or understanding) without the acquiring party obtaining any advantage therefrom."

77. The appellants say that all of the ingredients of the *Pallant v Morgan* equity identified by Chadwick LJ are present here.

78. In *Cobbe* at [30] to [33] Lord Scott, with whom three of the other members of the Judicial Committee expressly agreed, referred to *Pallant v Morgan*, *Holiday Inns*, *Banner Homes*, and *Time Products*. Although he distinguished those cases on the ground that they all concerned pre-acquisition agreements, whereas *Cobbe* concerned a post-acquisition agreement, he did not disagree with the outcome in those cases, and regarded them as examples of a situation in which a constructive trust arises out of joint ventures relating to property. He described that situation in general terms at [30] as follows:

> "A particular factual situation where a constructive trust has been held to have been created arises out of joint ventures relating to property, typically land. If two or more persons agree to embark on a joint venture which involves the

> acquisition of an identified piece of land and a subsequent exploitation of, or dealing with, the land for the purposes of the joint venture, and one of the joint venturers, with the agreement of the others who believe him to be acting for their joint purposes, makes the acquisition in his own name but subsequently seeks to retain the land for his own benefit, the court will regard him as holding the land on trust for the joint venturers. This would be either an implied trust or a constructive trust arising from the circumstances and if, as would be likely from the facts as described, the joint venturers have not agreed and cannot agree about what is to be done with the land, the land would have to be resold and, after discharging the expenses of its purchase and any other necessary expenses of the abortive joint venture, the net proceeds of sale divided equally between the joint venturers."

79. In the light of the speech of Lord Scott in *Cobbe*, and other cases in the Court of Appeal in which reference has been made to *Banner Homes* without disapproval, such as *London & Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355 and *Corless*, the decision in *Banner Homes* cannot be doubted at the level of this Court. That must be so even though in both of those cases, as in *Cobbe*, *Banner Homes* was distinguished and its principles held inapplicable on the facts.

80. We were not referred to any of the academic literature specifically on *Banner Homes* and the *Pallant v Morgan* equity. It is clear from that literature, however, that the analysis in *Banner Homes* has received a very mixed reception among academic commentators, with no consensus on the proper analysis of the *Pallant v Morgan* equity. In *Banner Homes* Chadwick LJ considered there was a close relationship between proprietary estoppel and the *Pallant v Morgan* equity, and in that connection he referred (at p. 391F) to the views expressed to that effect by Sir Nicholas Browne-Wilkinson V-C in *Grant v Edwards* [1986] Ch. 638 and by Robert Walker LJ in *Yaxley*. Indeed, Chadwick LJ characterised *Holiday Inns* as a proprietary estoppel case (at p. 398A). That close overlap is now in some doubt both as a result of the analysis and decision in *Cobbe* on proprietary estoppel in a commercial context (to be contrasted with its practical operation in *Thorner* in a domestic context), and the more cautious thoughts of Lord Walker in *Stack v Dowden* [2007] UKHL 17, [2007] 2 AC 432, at [37] on the assimilation of proprietary estoppel and common interest constructive trusts espoused in *Grant v Edwards* and *Yaxley*. Furthermore, since *Banner Homes* the common intention constructive trust has been extensively analysed by the House of Lords in *Stack* and most recently by the Supreme Court in *Jones v Kernott* [2011] UKSC 53 in ways which highlight a distinction between domestic and commercial cases. I therefore propose to look again, albeit relatively briefly, at the basis for the so-called *Pallant v Morgan* equity as explained and applied in *Banner Homes*.

81. As I have said, Mr Driscoll submitted that the *Pallant v Morgan* equity, as explained in *Banner Homes*, is properly analysed as a common intention constructive trust, and such a trust is an institutional and not a remedial trust. Mr Romie Tager QC, for the respondents, submitted that the proper explanation is rather to be found in breach of fiduciary duty.

82. The academic literature provides support for two other possible analyses of the constructive trust in *Banner Homes*. One of them is that it is a particular instance of an equity which arises if (a) the purchaser has made an undertaking to confer on another a right relating to the property to be purchased, and (b) the purchaser has, by means of that undertaking, acquired an advantage in relation to the acquisition of that property: Ben McFarlane, "*Constructive trusts on a receipt of property sub conditione*" (2004) LQR 667. The other is that it is a particular instance of a constructive trust which arises when a person, acting in reasonable reliance on another's undertaking, forgoes the opportunity to achieve the substance of the undertaking in some other way: Simon Gardner "*Reliance-Based Constructive Trusts*" in Constructive and Resulting Trusts ed Charles Mitchell (2010).

83. I agree with Mr Driscoll that, whatever may be the proper explanation for the *Pallant v Morgan* equity, it cannot be a remedial constructive trust as that term is understood by equity jurists. The distinction was described by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale Islington LBC* [1996] AC 669 at 714G-715A as follows:

> "Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to the third parties who in the interim have received the trust property) are also determined by rules of the law, not under a discretion. A remedial constructive trust… is different. It is a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court."

84. Although Lord Browne-Wilkinson's divide is not universally accepted (see, for example, William Swadling "*The Fiction of the Constructive Trust*" Current Legal Problems (2011) 1) the current general view is that English law does not at present recognise a remedial constructive trust of the kind described by Lord Browne-Wilkinson with its critical features of judicial discretion and retrospectivity. That remains the case, even with the Supreme Court's latest analysis of the common intention constructive trust in *Jones v Kernott*. In that respect, our law differs from that in some other jurisdictions, most notably the US and Canada. In *Thorner* at [20] Lord Scott said that he would prefer to keep proprietary estoppel and constructive trust as distinct and separate remedies, to confine proprietary estoppel to cases where the representation on which the claimant has acted is unconditional, and to address the cases where the representations are of future benefits via the principles of "remedial constructive trusts". I doubt whether Lord Scott was there using the expression "remedial constructive trusts" in the sense explained by Lord Browne-Wilkinson in *Westdeutsche*, but, if he was, he was not supported in that respect in any of the other speeches.

85. I do not accept Mr Driscoll's argument that the *Banner Homes* constructive trust is properly analysed as an example of a common intention constructive trust. The label "common intention constructive trust" can be traced to the analysis of Viscount

Dilhorne and Lord Diplock in *Gissing v Gissing* [1971] 1AC 886. The *Pettitt v Pettitt* [1970] AC 777,*Gissing, Lloyd's Bank v Rossett* [1991] AC107, *Stack* and *Kernott* line of cases on the common intention constructive trust can be seen clearly in retrospect as a specific jurisprudential response to the problem of a presumption of resulting trust and the absence of legislation for resolving disputes over property ownership where a married or unmarried couple have purchased property for their joint occupation as a family home: see *Stack* at [40] to [46]; *Kernott* at [25], [56], [57], [61], [78]. The jurisprudence in that distinctive area is driven by policy considerations and the special facts that normally apply in the dealings between those living in an intimate relationship. They include the fact that such parties do not normally take legal advice about, or expect to reduce to a formal or indeed any written agreement, their mutual property rights and interests in the family home. Further, those rights and interests must be seen in the context of an enduring but often-changing relationship of inter-dependency, mutual co-operation, compromise and joint contributions. Those special features are why, as the jurisprudence has now clearly established, the usual presumption of a resulting trust does not apply in such a situation, and the parties' respective property rights in the family home are to be ascertained by having regard to their intentions as disclosed by what they have said and done over the entire course of their ownership or, where it is clear that the beneficial interests are to be shared but it is impossible to divine a common intention as to the proportions in which they are to be shared, by imputing to them the intentions which they would have had as reasonable and just people if they had thought about it: *Stack*, *Kernott*. Since the parties' actual, inferred or imputed intentions might change over time, the common intention constructive trust has been described as an "ambulatory" trust.

86. Those special features, in terms of policy, facts and law, do not apply in a commercial context. They did not apply in *Banner Homes*. They did not apply in any of the cases to which Chadwick LJ referred as examples of the application of the *Pallant v Morgan* equity. In attempting to find some underlying coherence in the cases, Chadwick LJ drew on the principles of the common intention constructive trust as applied in *Gissing* and *Rosset*, and on judicial statements endorsing a close relationship between the common intention constructive trust and proprietary estoppel to be found in *Yaxley* and *Grant v Edwards.*

87. The passage of time and developments in the law have, in my judgment, shown the connection between the common intention constructive trust and the *Pallant v Morgan* equity as explained and applied in *Banner Homes* to be untenable. In a commercial context, it is to be expected that the parties will normally take legal advice about their respective rights and interests and will normally reduce their agreements to writing and will not expect to be bound until a contract has been made: see, for example, Lord Walker in *Cobbe* at [68] and [81]. They do not expect their rights to be determined in an "ambulatory" manner by retrospective examination of their conduct and words over the entire period of their relationship. They do not expect the court to determine their respective property rights and interests by the imputation of intentions which they did not have but which the court considers they would have had if they had acted justly and reasonably and thought about the point.

88. It is not necessary to resort to the common intention constructive trust to provide an explanation for the cases in which the *Pallant v Morgan* equity was, or is said to have

been, applied. They can all be explained, and, in my judgment, ought to be explained in wholly conventional terms by the existence and breach of fiduciary duty. In *Chattock v Muller* Sir Richard Malins V-C held that the defendant had attended the auction as the plaintiff's agent. Similarly, in *Pallant v Morgan* Harman J held that the defendant's agent bid for lot 16 on behalf of both parties. *Holiday Inns*, *Time Products* and *Island Holdings* were joint venture cases, in which it is to be inferred that the particular nature of the relationship between the joint venturers was such as to give rise to fiduciary duties. In the absence of agency or partnership, it would require particular and special features for such fiduciary duties to arise between commercial co-venturers. It is clear, however, that in special circumstances they can arise: Snell's Equity (32nd ed) at 7-006; *Murad v Al-Saraj* [2004] EWHC Ch 1235 at [325]-[341], [2005] EWCA Civ 959. In my judgment, the result in *Banner Homes* can only properly be explained on that basis.

89. Mr Driscoll cited *Yaxley*, *Kilcarne* and *Corless* as Court of Appeal authority in favour of his preferred approach. In *Yaxley* (simplifying the facts) the defendant offered to give the plaintiff, a builder, the ground floor of a house which he was proposing to purchase in return for which the plaintiff would convert the house into flats. That offer was orally accepted. The house was duly purchased by the defendant and the plaintiff performed his side of the bargain. The defendant refused to give the plaintiff an interest in the property. The trial judge held that the plaintiff was entitled to an interest in the ground floor by reason of proprietary estoppel, and he ordered that the defendant grant the plaintiff a 99 year lease rent-free of the ground floor. The defendant appealed raising, for the first time, the point that the agreement was void by virtue of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 since the agreement was not in writing. The appeal was dismissed on the ground that the findings of the trial judge equally provided the basis for the conclusion that the plaintiff was entitled under a constructive trust to the same long leasehold interest as the trial judge had ordered on the ground of proprietary estoppel (and so did not fall foul of the prohibition in section 2 of the 1989 Act). Walker LJ, with whom Clarke LJ agreed on the point, said (at p. 176D) that the overlap between estoppel and constructive trust was of central importance to the determination of the appeal. He said (at p. 176E) that in the area of joint enterprise for the acquisition of land the two concepts coincide, and in that regard he referred to Lord Diplock's speech in *Gissing* and Lord Bridge's speech in *Rosset* and observations of Sir Nicholas Browne-Wilkinson V-C in *Grant v Edwards*. As I have already said, Lord Walker rowed back from that position in *Stack* at [37] where he said that he was now rather less enthusiastic about the notion that proprietary estoppel and "common interest" constructive trusts can or should be completely assimilated. That revised assessment is borne out by the decisions in *Cobbe* and *Kernott*. Importantly, the *Pallant v Morgan* equity was nowhere addressed in *Yaxley.*

90. In *Kilcarne* the plaintiff argued for a constructive trust of a lease granted to the defendant. Lewison J dismissed the claim, and the appeal was dismissed by the Court of Appeal. In the Court of Appeal (see para [10]) the constructive trust was put on the basis of either "a *Gissing v Gissing"* constructive trust or a *Pallant v Morgan* constructive trust. The trial judge dismissed the *Pallant v Morgan* constructive trust claim in the light of his finding of fact that there was no common intention or understanding that the plaintiff was to have a beneficial interest in the lease and his rejection of the plaintiff's case that there was an oral agreement to that effect. In the

Court of Appeal Nourse LJ, with whom the other two members of the Court agreed, having referred to the trial judge's findings of fact, said:

> "24. It is unnecessary to go further. On the facts of this case it is difficult, if not impossible, to discern any material difference between the application of the *Gissing v Gissing* and *Pallant v Morgan* principles. For myself, I would have thought that it was the former that fitted the case better than the latter. But whether that be right or wrong it is clear that, if the case is not covered by the former, it will not be covered by the latter."

91. It seems to me that, far from supporting Mr Driscoll's submission that the *Pallant v Morgan* equity is a common intention constructive trust, the comments of Nourse LJ undermine it. Nourse LJ appears to regard the two doctrines as distinct. In any event, Nourse LJ did not seek to explain the basis of the *Pallant v Morgan* equity.

92. In *Corless* the Court of Appeal dismissed an appeal from Proudman J's dismissal of a claim to a *Pallant v Morgan* constructive trust. The only reasoned judgment was given by Patten LJ, with whom the other two members of the Court agreed. In [41] of his judgment Patten LJ made a reference to Lord Diplock's speech in *Gissing* in the context of the quality of the assurance given by the defendant and whether the claimant's reliance on it was therefore reasonable. There is no other reference to any of the common intention constructive trust cases. No explanation of the rationale for the *Pallant v Morgan* equity was undertaken.

93. In those circumstances I do not consider that *Yaxley* or *Kilkarne* or *Corless* precludes or is inconsistent with an analysis of the *Pallant v Morgan* equity, as applied in *Banner Homes*, as resting on the existence and breach of a fiduciary duty. Furthermore, such an explanation is entirely consistent with the approach of Millett LJ in the following passage in *Paragon Finance* at 408-409 (which Chadwick LJ quoted in *Banner Homes* at pp. 383E-384A, and referred to at 397D):

> "Regrettably, however, the expressions "constructive trust" and "constructive trustee" have been used by equity lawyers to describe two entirely different situations. The first covers those cases already mentioned, where the defendant, though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and preceded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff.
>
> A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is

> not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v Grogan* (1869) 4 App.Cas. 82 (a case of a secret trust) and *Rochefoucald v Boustead* [1897] 1 Ch. 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1953] Ch. 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property."

94. It is not possible to do full justice in the context of this judgment to the alternative explanations put forward by McFarlane and Gardner (mentioned in [82] above) for the *Pallant v Morgan* equity and *Banner Homes*. Their merit is that they are put forward as principled explanations for a range of constructive trusts, including, for example, (in addition to the *Pallant v Morgan* equity and *Banner Homes)* secret trusts, trusts arising under the doctrine of *Rochefoucauld v Boustead* [1897] 1 Ch 196 and, in Gardner's case, those associated with mutual wills and proprietary estoppel. Neither Mr Driscoll nor Mr Tager argued in favour of them. It is sufficient for the purpose of this judgment to say that (1) they provide explanations of a range of constructive trusts at a high level of abstraction, but (2) the cases in which the *Pallant v Morgan* equity has been applied can be explained in a wholly conventional way as examples of breach of an existing fiduciary duty, and (3) it is a sound policy that they should be so explained and confined. It is sound policy because, by contrast with the common intention constructive trust, such a policy recognises the need for certainty in commercial transactions, and it reflects the usual practice and desirability for business transactions to be effected by binding written contracts, often after the receipt of legal advice.

95. If the cases in which the *Pallant v Morgan* equity has been applied are interpreted as I suggest, then they can be seen as cases in which the Court is, pursuant to the constructive trust, depriving the defendant of the advantage obtained in breach of trust. The irrelevance of lack of complete agreement, whether documented or not, is then easily explained, as is the latitude with which the Court devises the best way to deprive the defendant of the unconscionable advantage: compare *Holiday Inns* (where the plaintiff's expectation was to receive a lease, but it was granted a beneficial interest) and *Yaxley* (in which the plaintiff was granted a 99 year lease rent free).

96. If the *Banner Homes* constructive trust is properly explained as arising out of breach of a fiduciary duty, then this appeal must inevitably fail. The Judge found at [351] of his judgment that the respondents did not owe the appellants any fiduciary duty. There has been no appeal against that finding of the Judge.

97. Even if, contrary to my view, the *Banner Homes* constructive trust is an example of a common intention constructive trust, then the appellants cannot succeed for another

legal reason. Such a trust concerns the implementation of the common intention of the parties, or their imputed intention, as to their respective beneficial interests. No beneficial interest is being claimed, or could be asserted, by the appellants in the present case. It was intended that Gill's Side would acquire the entire beneficial interest in the Building. The appellants never had and never expected that Philip's side would have anything more than a leasehold interest. *Yaxley* does not help them. Quite apart from the fact that the constructive trust in that case turned on the now abandoned rationale of a complete coincidence between proprietary estoppel and constructive trust, the plaintiff there relied upon an assurance of an unspecified interest in the ground floor. By contrast, in *Holidays Inns* the plaintiff's expectation was of a lease, but it was given effect by the grant of a beneficial interest. That was consistent with Chadwick LJ's view in *Banner Homes* that *Holiday Inns* was a case of proprietary estoppel. Lord Scott in *Cobbe* thought it was better understood as a *Pallant v Morgan* type case, and the relief granted of a beneficial interest in the land would not have alerted him to any difficulty in that analysis.

98. Quite apart from those matters, the facts and the factual findings of the Judge make it impossible for the appellants to succeed in their claim to a constructive trust or, indeed, an estoppel, for the following reasons.

99. The appellants' case rests upon confining the survey of facts and their consequences to the period between 18 February 2009, when the meeting between Philip Noble and Mr Barnsley took place, and 20 February 2009, when Mr Barnsley sent his e-mail saying that the commercial agreement between each side had been finalised. The Judge refused to accept that approach. He was right to do so. It is patently unrealistic. A great deal happened between 20 February 2009 and the transfer of the freehold of the Building on 9 April 2009 in relation to the agreement in respect of the Building which casts light on the legal analysis.

100. What was discussed on 18 February 2009 between Philip Noble and Mr Barnsley about the Building is repeatedly described in the Particulars of Claim as a "proposal". That is what it was. The discussion was extremely brief. As the Judge said (at [224]) the discussion did not, even in general principle, settle a large number of matters that would need to be settled before a binding contract would be made. That was inevitable because at the time of the discussion neither Philip Noble nor Mr Barnsley was aware whether there was an existing lease of the Building and, if so, what its terms were. There was, at that stage, no agreement as to the rent to be paid by Piccadilly for the ground floor, the duration of any demise of the ground floor to Piccadilly, or the precise part or parts of the ground floor to be occupied by Piccadilly. The proposal had to be the subject of considerable further clarification and discussion.

101. By 20 February 2009 both sides were aware of the Lease. By that date also agreement had been reached on the rent and that all parts of the Building, other than the ground floor, would be given up by Piccadilly. What had still not been agreed, and what was never agreed by the completion of the demerger or indeed the date of the transfer of the Building, was the precise extent of the ground floor that would be occupied by Piccadilly. It was for that reason that, on completion of the demerger on 10 March 2009, neither Philip's Side nor Gill's Side wished to enter into a legally binding agreement reflecting the terms discussed on 18 February 2009. Philip's Side was concerned to ensure that any restriction or reconfiguration of the space occupied

by Piccadilly on the ground floor would not prejudice its five gaming licences, and it wished to have discussions with the local authority about that. Gill's Side was concerned to establish that the proposed arrangement with Piccadilly remaining on the ground floor would permit sufficient access to enable the upper floors to be developed (as a hotel) and then used once the re-development had been completed. Neither side had reached a decision on those matters before the completion of the demerger.

102. Mr Driscoll criticised the Judge for not having made a finding on the amount of space needed to be retained on the ground floor by Gill's Side for access for re-development of the upper floors after having heard days of evidence on the point. The very fact that there were days of expert and non-expert evidence on the point only goes to underline the difficulty of the issue and why both sides wanted to take time to consider the implications before committing themselves to a binding contract.

103. When, on completion of the demerger on 10 March 2009, the sale contract was formally entered into, the parties recorded in the First Side Letter a new consensus that was quite different from the proposals discussed on 18 February 2009. Faced with a situation in which both parties were agreed that the transfer of the Building should take place, and that in principle Philip's Side should be able to give up those parts of the Building which were empty and for which it had no use (and which carried substantial liabilities for dilapidations and vacant rates), but neither side was in a position to agree precisely what part or parts of the ground floor would continue to be occupied by Piccadilly, a pragmatic solution was agreed and recorded. The solution was that the transfer was to be subject to the Lease, and Piccadilly was to be entitled in its discretion to decide how much of the Building to give up as it should reasonably specify. This left the initiative entirely with Philip's Side as to the space within the Building it would or would not continue to lease. As Mr Tager emphasised, this was quite different from what the parties contemplated between 18 and 20 February 2009, namely that there would be a new lease or a varied lease restricting Piccadilly's demise to an agreed part or parts of the ground floor.

104. The appellants' argument, as I have said, is that everything that took place after 20 February 2009 should be ignored because the principals had reached an agreement by 20 February 2009 and no one else had authority to vary it. The Judge rejected that approach, and he was entitled and right to do so. It was obvious, as I have said, that the proposal discussed on 18 February 2009 would need to be clarified and worked through in several fundamental respects. It was equally plain, and was indeed the reality, that the managers and directors would do that, those in the trading group advising and acting on behalf of Philip's Side and those in the property group acting on behalf of Gill's Side. It is relevant to note that in paragraph 3 of the Particulars of Claim Mr Biesterfield, Mr Horrocks, Mr Gill, Mr Imrie and Mr Thompson were each defined as "a representative of Philip's side", and Mr Dalzell, Mr Woodridge and Mr Wright were each defined as "a representative of Gill's side". Mr Tager pointed out that Mr Biesterfield said in cross-examination that it was his job to look out for pitfalls for Philip Noble, and Philip Noble said in cross-examination that he was relying on Mr Biesterfield to look after his interests after 18 February 2009 when it came to a new lease or a varied lease of the Building.

105. It is obvious in any event that both PwC and Dickinson Dees were acting for Philip's Side, and they were responsible for the legal documentation. Among that documentation were the Side Letters. Far from disowning the First Side Letter and

the Second Side Letter, the appellants' initial stance in the litigation was that both the First Side Letter and the Second Side Letter were legally binding, and their subsequent stance was that Second Side Letter alone was legally binding. In the event, the Judge found that neither was legally binding. The relevant point, however, is that the appellants' stance that the Side Letters were legally binding was entirely inconsistent with a claim that no one had authority after 20 February 2009 to negotiate and vary what had been discussed and agreed in respect of the Building by that date. Further, as Mr Tager also pointed out, both the appellants' claim to rectification and the Judge's rejection of that claim proceeded on the basis that the knowledge, intentions and beliefs of the directors and managers could be attributed to the respective principals acting for each side.

106. Accordingly, whatever was discussed and agreed in respect of the Building prior to 20 February 2009 had been superseded by a new consensus by the date of the demerger.

107. Even if that factual analysis is for some reason flawed, there are other insuperable difficulties in the way of a constructive trust (whatever its jurisprudential basis) based on what took place between 18 and 20 February 2009. While it is true that the absence of a concluded agreement on all terms is not necessarily a bar to a *Banner Homes* constructive trust, the commercial context and the absence of agreement on critical parts of the commercial deal may indicate that there was never a common intention to enter into any kind of legal commitment: *Herbert v Doyle* [2010] EWCA Civ 1095 at [57] (Arden LJ). In the present case, the parties' conduct and the evidence given at the trial shows that neither Philip's Side nor Gill's Side wished to commit themselves until they had separately satisfied themselves as to the extent of Piccadilly's demise of the ground floor that was compatible with their respective commercial objectives and they had reached an agreement on the matter consistent with those objectives.

108. Further, I agree with the respondents' submission that the evidence shows that both Philip's Side and Gill's Side always intended that (save in respect of a handful of specific matters not relevant to the main proceedings) all aspects of the demerger agreement between them should be embodied in formal written contractual documentation. The demerger was an immensely complex transaction, concerning properties with a gross value in excess of £300 million. Dickinson Dees were retained as solicitors for both sides. The demerger involved the execution of over 200 documents on 9 and 10 March 2009. Specifically in relation to the discussions concerning the Building, both an e-mail on 20 February 2009 from Mr Dalzell to Mr Horrocks and Mr Barnsley, and a reply on the same day from Mr Horrocks to Mr Dalzell, Mr Barnsley and Mr Thompson referred expressly to instructions to be given to Dickinson Dees once agreement had been reached on the area of the demise, repairs, service charge and rent. Even if the negotiations over the Building were not formally or expressly made "subject to contract" the mutual intention of the parties not to be bound until a binding written agreement had been made is fatal to the claim to a constructive trust: *London & Regional Investments Ltd*.

109. Then there is the issue of unconscionability. The Judge found that Gill's Side was not guilty of any unconscionable conduct such as to raise an equity against them. Again, I consider he was both entitled and right to reach that conclusion. The alleged constructive trust is one under which Jolan is precluded from exercising the break clause in such a way as to terminate Piccadilly's right to remain on the ground floor of

the Building. The Judge found that there had never been any assurance, express or implicit, by Gill's Side that the break clause would not be operated in that way. On the facts found by the Judge, that was plainly right. On 18 February 2009 neither Philip Noble nor Mr Barnsley was aware there was any existing lease of the Building, let alone one which contained a landlord's break clause. Mr Noble's evidence at the trial was that, if he had known there was a lease and thought about it, he would probably have thought that the lease would be in the Group's standard form, but that is quite a different issue. On 18 February 2009 he must have contemplated the possibility that it would be necessary to negotiate and agree a new lease and its duration. That would require balancing the commercial objectives of Philip's Side to continue trading from part of the ground floor, yet to be negotiated and agreed, and the commercial objectives of Gill's Side to redevelop the rest of the Building. It is quite impossible to know what ultimately would have been agreed in those hypothetical circumstances. The Building had in fact been earmarked as a potential development site for a considerable time within the Group, and it is impossible to ignore the likelihood that the landlord's three month break clause was inserted for that reason.

110. By 20 February 2009 both Gill's Side and Philip's Side knew that the Building was subject to the Lease. Gill's Side, who had been given a copy of the Lease by Philip's Side, knew that it contained a break clause, but Philip's Side apparently did not. Astonishing as it may seem, they never checked the terms of the Lease until after the transfer of the Building, even though the sale agreement provided expressly that the transfer was to be subject to the Lease, and defined the Lease, and the First Side Letter and the Second Side Letter recorded the then agreement of the parties as to the Lease. Moreover, the Judge found as a fact (at [177]) that Gill's Side reasonably believed that Philip's Side had read the Lease and was aware of the break clause. The Judge was right in the circumstances to conclude (at [345] and [349]) that the situation in which appellants found themselves after the demerger and the transfer of the Building to Jolan had nothing to do with any representation or assurance by Gill's Side about the non-use of the break clause, but was all to do with the mistake by Philip's Side about the provisions of the Lease which they had never bothered to check. That conclusion is also supported by the Judge's rejection of the appellants' claim to rectification, which has not been appealed. His finding on that claim (at [254]) was that there was no earlier expression of the parties' consensus which differed from the terms of the executed documents.

111. Mr Driscoll understandably emphasised the intention of both sides, for commercial and tax reasons, that there should be a roughly equal division in value of the Group's assets and that operation of the break clause would negate the value attributable to Piccadilly's amusement arcade business on the ground floor of the Building. Those points must be placed in a proper context. The appellants say that the value fairly attributable to that business for the purposes of the demerger was some £2.5 million. That was not a finding of the Judge. As I have said, Close did not value each business separately. They valued businesses by divisions. The Judge's finding (at [340]) was that "it is probable that the Close Brothers valuation would have been lower by an amount that, on the evidence, I am not able to quantify." He concluded (at [340] and [341]) that was not sufficient to support a finding that Gill's Side, by agreeing on values by reference to Close's valuation, were representing to Philip's Side that Philip's Side had, or would be given, an entitlement to occupy the ground floor for

any particular period of time. Furthermore, the appellants say that the constructive trust precludes Jolan from bringing the demise of the ground floor of the Building to an end before the Lease expires in 2022. Yet the methodology of the Close's valuation was to apply a projection of only 5 years, that is to say to 2013.

112. Further, as Mr Tager pointed out, on any footing the value attributable to Piccadilly's amusement arcade business was very small in the context of the demerger as a whole. Mr Horrocks accepted in cross-examination that £1 million would be marginal in the context of the demerger as a whole.

113. At the end of the day, the most critical point remains the same, namely that the problem that has arisen for the appellants is not due to any assurance or unconscionable conduct on the part of the respondents: [353] [361] and [368] of the judgment. The effect of the constructive trust for which the appellants contend would not only deprive Jolan of the right to break the Lease which Gill's Side reasonably thought it had when the sale contract was made and the transfer of the Building was executed, but it would place Gill's Side in a worse position than if the duration and extent of Piccadilly's continuing demise of the ground floor had been left to negotiation and agreement: see [370] of the judgment. It is difficult to understand why the law should place the innocent party in such a position to resolve a problem that has occurred solely due to the carelessness of the other party.

114. So far as proprietary estoppel is concerned, it is common ground that the main elements of the doctrine are a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance: *Thorner* at [29] (Lord Walker). It will be apparent from what I have said above in relation to the facts and factual findings of the Judge in the context of constructive trust, that the Judge was entitled and right to conclude that none of those requirements were satisfied in the present case. I would add that the appellants face an obvious further difficulty in relation to the claim to a proprietary estoppel. In view of the fact that Philip's Side and Gill's Side never reached agreement as to the vital question of the physical extent of Piccadilly's continuing demise of the ground floor, and they never discussed the duration of any leasehold interest that Piccadilly would continue to enjoy outside the terms of the Lease, it is impossible to see that Philip's Side had an expectation of "a certain interest in land" that is a requirement of proprietary estoppel: *Cobbe* at [19] and [20] (Lord Scott). The appellants were in a similar position to the claimant in *Cobbe*, in that at no time between 18 February 2009 and completion of the demerger did they expect to be entitled to remain in possession of the ground floor save pursuant to a lease, the vital terms of which as to area of the demise and duration had still to be negotiated and agreed.

115. The facts and factual findings of the Judge which I have discussed above are equally decisive that the Judge was right to dismiss the appellants' claim based on promissory estoppel and estoppel by convention.

Conclusion

116. For those reasons I would dismiss this appeal.

Lord Justice McFarlane

117. I also agree that the appeal should be dismissed; there is, however, a distinction in the analysis set out in the two judgments given my lady, Arden LJ, and my lord, Etherton LJ which requires me briefly to set out my own view on the point of difference.

118. In the discussion found at paragraph 74 onwards Etherton LJ tracks the development in case law following the decision of this court in *Banner Homes Group Ltd v Luff Developments Ltd* [2000] Ch 372 and concludes at paragraph 87 that the passage of time and developments in the law have, in his judgment, shown the connection between the common intention constructive trust and the *Pallant v Morgan* equity as explained and applied in *Banner Homes* to be untenable.

119. In contrast, at paragraph 129**,** Arden LJ states that, as the ratio in *Banner Homes* was clear and was firmly based on common intention constructive trust, and as *Banner Homes* is an authority that is binding on this court, it is not open to the court to determine this appeal on the basis that the case can be treated as having some other ratio.

120. The difference between my lady and my lord is narrow, but obviously not unimportant. Both agree that in *Banner Homes*, Chadwick LJ was describing a constructive trust. My lady refers to the manner in which this has been accepted as being a clear and firm reference to a common intention constructive trust, whereas my lord (at paragraph 88) explains the *Banner Homes* constructive trust as being one that arises from a fiduciary duty.

121. In order to arrive at his conclusion, Etherton LJ has considered the development of the law in subsequent decisions, which include determinations by the UK Supreme Court and the House of Lords. The approach in those subsequent cases leads my lord to the conclusion that, by implication, the *Banner Homes* decision must now be seen to be based upon fiduciary duty. My Lady, Arden LJ, at paragraph 133 sees advantage in the interpretation put forward by my lord. I for my part also understand the path that Etherton LJ has threaded through the decisions and particularly see the attraction of his conclusion at paragraph 85 that the line of cases from *Gissing v Gissing* [1971] 1AC 886 to *Jones v Kernott* [2011] UKSC 53 relating to domestic arrangements are driven by different policy considerations and may have features which are distinct from those arising from strictly commercial circumstances.

122. Whilst Etherton LJ may well be correct to interpret the oblique consequences of subsequent decisions as developing a construction of *Banner Homes* which is based on fiduciary duty, that approach was not expressly described by Chadwick LJ in the case itself, and has not been, or at least was not, the interpretation afforded to the decision at the time. Absent an express declaration from the Supreme Court, and despite being attracted to the analysis of Etherton LJ, I consider that the solid jurisprudential ground must remain as Arden LJ has described and I therefore agree with her that it is not open to this court to reinterpret the ratio of *Banner Homes* a decade after its genesis.

123. I agree with Etherton LJ (paragraphs 98 to 113) and with Arden LJ (at paragraph 131) that, if the matter is approached on the basis of a common intention constructive trust, the judge was right to dismiss the appellants' claim in that regard.

124. Save for these few observations, I agree with both my lady and my lord that this appeal must be dismissed.

Lady Justice Arden

125. I agree with the clear and comprehensive judgment of Etherton LJ for the reasons that he gives and subject to the points made in this short judgment about the claim based on *Pallant v Morgan* [1953] Ch 43. I adopt his definitions of the Building, Gill's Side, Philip's Side and the First Side Letter.

126. The background to the claims in issue on this appeal is that the parties to this appeal were shareholders in family-owned companies negotiating on a commercial basis about the terms of a demerger involving the division of the assets of those companies between Gill's Side and Philip's Side. Neither party had agreed to act for the other in respect of this project. Thus, when they were engaged on this project (as opposed to the situation when they were taking decisions as directors of the companies), they were not in any sort of pre-existing fiduciary relationship: see the judgment of the judge at [351].

127. There was pressure to complete the demerger transaction by the end of February 2009. Not everything was agreed by that date and each side had to trust the other side in respect of the outstanding issues. That means that they trusted each other to negotiate with a view to completing the outstanding matters, not that they understood that they owed any kind of fiduciary obligation to each other in respect of the outstanding matters.

128. The situation is thus far-removed from that in *Pallant v Morgan*. In that case, one of two prospective bidders at an auction made no separate bid in the auction on the understanding that the other party's agent would acquire the property and divide it between the two parties. The agreement was not sufficiently certain to be specifically enforceable but Harman J held that the successful bidder held the property on trust for both parties. I agree with Etherton LJ that Harman J's decision can be interpreted on the basis that the defendant's agent acted for both the plaintiff and the defendant at the auction in question. Thus, a fiduciary relationship was created between the parties. It is an elementary principle that a fiduciary cannot make a secret profit out of the trust: see, for example, *Keech v Sandford* (1729) Sel. Cas. Ch. 61. Indeed, in that situation it would be unnecessary to resort to a constructive trust of any kind. Millett LJ makes the last point in *Paragon Finance plc v Thakerar & Co* [1998] 1 All E.R. 400 in the passage cited at paragraph 93 of the judgment of Etherton LJ, above.

129. However, the reasoning in *Banner Homes v Luff Developments Ltd* [2000] Ch 372, which Etherton LJ has set out at paragraph 76 above, makes it clear that the ratio of that case is firmly based on a common intention constructive trust. By common intention constructive trust, I mean a constructive trust of the kind enunciated in *Gissing v Gissing* [1971] Ch 162. The analysis of *Banner Homes* which I have set out at the start of this paragraph was accepted by Lord Scott in *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752. The speech of Lord Walker in *Stack v Dowden* [2007] 2 AC 432 and the joint judgment of Lady Hale and Lord Walker in *Jones v Kernott* [2011] UKSC 53 may mean that common intention constructive trusts may be limited in the future to family cases, but I do not consider that that position is

so clear as to make it possible at this stage for this court to hold that *Banner Homes* cannot stand with decisions of the House of Lords and Supreme Court, and to treat the ratio of *Banner Homes* as not binding on it.

130. In those circumstances, it is not open to the court to determine this appeal on the basis that the case can be treated as having some other ratio. Applying the requirements for a constructive trust of this kind, as explained by Chadwick LJ in *Banner Homes* (see paragraph 76 above), the critical question in the constructive trust claim on this appeal is, therefore, whether the conduct of the Gill's Side was unconscionable.

131. The reason why Philip's Side were willing to transfer their interest in the freehold of the Building was to reduce their liabilities with respect to the floors of the Building that they did not require for the purposes of the amusement arcade business that they carried on on the ground floor. If the understanding between Philip's Side and Gill's Side had been that Gill's Side as freeholders would not take any step, which would have an adverse effect on the value of the amusement arcade business distributed to Philip's Side, then reliance by Gill's Side on the break clause in the lease after the demerger, which would have the effect of destroying that business, might have involved unconscionable conduct. But that was not the parties' understanding. The understanding between the parties after the original agreement by Philip's Side to transfer their interest in the freehold was made, and even after the First Side Letter was signed, was directed not to the maintenance of the value of the amusement arcade business but to the floor area that the lease would cover after the demerger, and other similar matters (see the judgment of the judge, [340] and [341]). Philip's Side had still not woken up to the fact that there was a break clause until after the demerger. This they did not do until 19 April 2009 (see the judgment of the judge, [184]).

132. Crucially, Gill's Side did not know that Philip's Side were labouring under a misapprehension as to the terms of the existing lease of the Building, and so Philip's Side's mistake in that regard could not make the conduct of Gill's Side unconscionable. In those circumstances, in my judgment, the judge was right to conclude that the claim in constructive trust should be dismissed.

133. *Banner Homes* is invoked, in practice, in circumstances where parties have been in commercial negotiations over the acquisition of some property but the negotiations have for some reason failed so that there is no legally enforceable agreement. The advantage of the re-interpretation of the case law proposed by Etherton LJ would be that it would restrict the number of situations in which *Banner Homes* can be used. That would be consistent with developments in the law of proprietary estoppel. The House of Lords made it clear that where parties have been dealing on the basis that their negotiations are "subject to contract", proprietary estoppel will not ordinarily be available: see *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752. The result is not unconscionable because the disappointed party will always have known that that was the position. This may be contrasted with the decision of this court in *Herbert v Doyle* [2010] EWCA Civ 1095, where the trial judge had made a clear finding that the parties had agreed to the adjustment of their interests in a site on a basis that was not subject to contract. For the law in general to provide scope for claims in respect of unsuccessful negotiations that do not result in legally enforceable contracts would, in my judgment, be likely to inhibit the efficient pursuit of commercial negotiations, which is a necessary part of proper entrepreneurial activity.

134. I therefore would also dismiss this appeal.