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Case No: PT-2021-BRS-000071

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Rolls Building
Fetter Lane,
London, EC4A 1NL

Date: 05/12/2023

Before :

MR JUSTICE RICHARDS

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Between :

SHARON BARNARD	**Claimant**
- and –	
(1) GWENDOLYN RUTH BRANDON **(2) MARTIN BRANDON** **(3) MATTHEW POTTS** **(4) DAVID CLIVE RICHARDS** **(5) RUPERT CLIFFORD BRANDON**	**Defendants**

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Christopher Jones (instructed by **Brewer Harding & Rowe LLP**) for the **Claimant**
Rowan Morton (by direct access) for the **First and Third Defendants**
Cecily Crampin and **Taylor Briggs** (pro bono and by direct access) for the **Fourth Defendant**
Julia Petrenko (instructed by **Stephen Rimmer LLP**) for the **Fifth Defendant**

Hearing dates: 27 October (reading) and 30 October to 2 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 5 December 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

MR JUSTICE RICHARDS :

1. C and D4 are former partners. D1 and D3 are current partners. D1, D2 and D5 are siblings. The present proceedings largely require the Court to determine the fallout from previous proceedings involving various properties including "Home Barton Farmhouse" (the "Farmhouse") that will be described later in this judgment.

2. C and D4 sold the Farmhouse to D1, D2 and D3 in 2014. However, following a trial before HHJ Melville QC (the "Judge"), it was established that the contract of sale should be rescinded on the grounds of fraudulent misrepresentation. It might be thought that this would have resulted in C and D4 giving back the purchase price plus damages for the misrepresentation with D1 to D3 returning the Farmhouse. However, matters have not been that straightforward.

3. In these proceedings, the interests of D1, D2 and D3 are broadly aligned. However, D2 has played no real part in them and, while D2 and D3 are joint owners of the legal estate in the Farmhouse, D1 is not. I use the formulation "D123" to refer to D1, D2 and D3 and will distinguish between them only when necessary.

BACKGROUND AND INTRODUCTION

The judgments

4. On 14 November 2014, D123 purchased the Farmhouse from C and D4 for a price of £275,000 with a view to D1 and D3 running a bed and breakfast business there. It was not intended that D2 would live at the Farmhouse or help with the bed and breakfast business: his name appeared on the title to the Farmhouse because he provided some of the purchase price.

5. C and D4 had previously been in a relationship but separated in or before 2013, with the exact date of separation disputed but not material. In 2013, joint tenancies that C and D4 held in various pieces of land were severed including land registered with title number DN624054. The Farmhouse formed part of that title and so, following the sale of the Farmhouse, D123 were registered as proprietors of the Farmhouse and C and D4 continued to own the remainder of the title ("Property 1") as tenants in common in equal shares.

6. D4 owned, in his sole name, a further property, registered with title number DN624055 ("Property 2" and, together with Property 1 the "Properties"). After the sale of the Farmhouse to D123, C continued to live in a converted building on Property 2 (the "Milking Parlour") with her son. D4 occupied a building on Property 2 (the "Granary") and so was also a neighbour of D1 and D3 after the purchase of the Farmhouse.

7. On 18 December 2015, D1 transferred her share of the legal title to the Farmhouse to D2 and D3. D1, D2 and D3 executed a declaration of trust (the "2015 Trust") recording their shares of the beneficial interest in the Farmhouse. These transactions were effected to enable D2 and D3 to take out a mortgage to enable them to fund improvements to the Farmhouse.

8. D123 brought proceedings for misrepresentation against C and D4 in 2016. At the trial before the Judge, C did not dispute making fraudulent misrepresentations, though D4

did. Moreover, C gave evidence in support of D123's claim. In his judgment on liability (the "Liability Judgment") given on 24 February 2017 the Judge concluded that both C and D4 had made fraudulent misrepresentations to D123. Those misrepresentations consisted of (i) false statements that there were no disputes affecting the Farmhouse and (ii) false statements as to the number of properties that shared the Farmhouse's septic tank. The Judge concluded that, if the existence of disputes affecting the Farmhouse had been disclosed, D123 would not have purchased the Farmhouse (see [98] and [99] of the Liability Judgment).

9. In his judgment on remedies dated 15 May 2017 (the "Remedies Judgment"), the Judge concluded that the misrepresentations entitled D123 to the equitable remedy of rescission. He also awarded damages for the misrepresentation. This judgment was perfected in an order (the "Trial Order") sealed on 31 May 2017, whose details will be considered in more detail later in this judgment. In broad summary, it provided that:

    i) The contract for sale of the Farmhouse was rescinded.

    ii) C and D4 were ordered to pay D123 the sum of £524,125.98 (described as the "Judgment Sum"). They were made severally but not jointly liable for that sum, with C liable to pay 10% and D4 liable for 90%.

    iii) D4 was made solely liable to pay aggravated damages to D1 and D3 reflecting his behaviour to them while he was their neighbour.

Events after the judgments of HHJ Melville QC

10. D123 took steps to enforce payment of the Judgment Sum. On 24 August 2017 they obtained final charging orders ("Charging Orders") over the Properties. On 16 January 2018, District Judge Griffiths made orders (the "Orders for Sale") of:

    i) Property 1 for a price not less than £260,000 (unless varied by court order); and

    ii) Property 2 for a price not less than £350,000 (unless varied by court order).

11. C was concerned that the judgment debt owed to D123 could not be satisfied without the Farmhouse being sold as well as the Properties. She made an application in November 2017 for the Properties to be sold, but by the Orders for Sale that application was adjourned generally with liberty to apply. C sought to revive the prospect of a sale of the Farmhouse in a letter before claim sent to D1 on 26 November 2018. However, D123 opposed that.

12. The Orders for Sale gave D123 conduct of the sales of both Properties. Moreover, D123 were given power pursuant to s50 of the Trustee Act 1925 to execute documents conveying the Properties. C and D4 were required to give vacant possession of the Properties by 30 January 2018, later extended to 30 April 2018.

13. The Properties were subject to a mortgage (the "BR Mortgage") in favour of D4's mother (Mrs Betty Valerie Richards) securing a loan with principal amount of £70,000. Mrs Richards sadly passed away and D123 acquired the rights under the loan and mortgage for a consideration of £81,099.50 from her executors on 14 December 2018.

14. On or around 18 February 2019, D123 purported to transfer the Properties to D5, the brother of D1 and D2 (the "2019 Transfer"). D5 was registered as proprietor of the Properties on or around 26 February 2019. That transfer was expressed to be made for an aggregate consideration of £350,000 and stamp duty land tax ("SDLT") was paid by reference to that purchase price. The transfer was said to be made in pursuance of D123's rights as proprietor of the BR Mortgage rather than pursuant to the Orders for Sale and so was said not to be subject to the minimum sale prices referred to in paragraph 10.. D123 purported to credit approximately £268,000 (being £350,000 less the amount duty on the BR Mortgage) against amounts due from C and D4 following the 2019 Transfer.

15. Following the 2019 Transfer, D123 executed Land Registry documents that operated to discharge the BR Mortgage and that mortgage was removed from the register.

16. D5 did not actually pay £350,000 to D123 in return for the Properties, instead just paying the SDLT due and legal expenses. C and D4's position is that the 2019 Transfer was a void sale by a mortgagee in possession to itself. D123 do not accept that analysis of the transfer but accept that it was or became "ineffective" because of a failure of consideration. Accordingly, all parties agree that, following the transfer D5 held the Properties (as encumbered by the Charging Orders) as trustee for C and D4, in the case of Property 1, and as trustee for D4 alone, in the case of Property 2.

17. On or around 12 February 2020, D5 sold (the "2020 Transfer") part of Property 1 to Mr Browne and Ms Wilson, who were the owners of a neighbouring property known as Top Shippon, for £35,000. That parcel of land is now registered under Title DN724747 ("Property 3"). C and D4 assert, and D123 deny, that this transfer was at an undervalue.

18. At all times since the Trial Order, D1 and D3 have remained in occupation of the Farmhouse. At all times since 30 April 2018, when they acquired vacant possession of the Properties pursuant to the Orders for Sale, D1 and D3 have been in possession of the Properties, other than Property 3 after its sale. Since being in possession of the Farmhouse and the Properties, D1 and D3 have undertaken significant and expensive works there.

The present proceedings

19. With that background it is possible to understand the present proceedings that are before me. Matters are complicated by the fact that C brings claims against D123 and D5 with D4 bringing significantly overlapping claims by way of Part 20 claim. The parties have helpfully agreed a List of Issues. Those involve the following strands which I will use as a structure for this judgment:

    i) There are questions of construction of the Trial Order, that relate to the nature and extent of the interests that C and D4 have in the Farmhouse and the related question of who is entitled to occupy the Farmhouse.

    ii) There are questions as to the effect of the 2019 Transfer and specifically whether that was a void "sale to self" by a mortgagee in possession.

    iii) There is a question as to the amount of judgment debt that is owed by C and D4, the basis on which interest is to accrue on that debt and the extent to which that

interest can be recovered on a sale of the Properties by virtue of the Charging Orders.

iv) Initially D123 resisted C's claim, and D4's Part 20 claim, for an order that the Farmhouse be sold. However, all parties now accept that the Farmhouse should be sold and the Orders for Sale already require the Properties to be sold. There is, however, a dispute between the parties as to various matters relating to the sale process and the account that should be performed between various interested parties reflecting matters that have taken place since the Trial Order and/or the Orders for Sale.

v) D123 raised a counterclaim for harassment against C. However, this was abandoned in closing and therefore I say no more about it.

20. All parties agreed at trial that, following hand-down of this judgment, there would need to be a further hearing before me (the "Consequentials Hearing"). That will need to deal with usual matters such as costs and form of order. It will also need to set a timetable for a further hearing before District Judge Woodburn (the "District Judge") that HHJ Paul Matthews ordered should take place pursuant to paragraph 6 of his order of 25 September 2023 (the "PTR Order").

The evidence

21. I had evidence of fact from the following witnesses:

i) C, who was cross-examined by D1;

ii) D1, who was cross-examined by C, D4 and D5;

iii) D4, who was cross-examined by D1 and by D5;

iv) D5 who was cross-examined by D1 and D4.

22. I regarded both C and D5 as honest and reliable witnesses.

23. Whereas C and D5 were cross-examined on relatively self-contained issues, D1 and D4's cross-examinations were more wide-ranging. D1's cross-examination was particularly lengthy and she was in the witness box for around a day and a half. There is a considerable history to this dispute and both D1 and D4 showed a tendency to try to get their point of view across sometimes at the expense of providing a clear and straightforward answer to questions put to them. My impression of their evidence suffered as a result.

24. D5 invited me to conclude that D1 was lying in her account of circumstances surrounding the 2019 Transfer. I will not make that finding. D1 and D5 gave substantially similar evidence about what happened in important respects: they both agreed that D5 did not pay, and was not expected to pay, any consideration for the 2019 Transfer unless and until he decided to purchase part of the Properties. D1 accepted in cross-examination that there was some kind of understanding that the Properties could be returned to D123 and she also accepted that unless and until D5 purchased part of the Properties, he would deal with them in accordance with D123's wishes and that D123 would retain profits and losses associated with the Properties. D1 did not,

therefore, lie about important matters although she and D5 had different perceptions on conclusions that should be drawn in the light of those matters. Ultimately I preferred D5's explanation but not because I considered D1 to be lying.

25. D4 made wide-ranging accusations in his evidence, including that D5 and D2 had vandalised his Land Rover. I do not need to decide whether everything he said in his evidence was true, but I am satisfied that he was not lying as regards those parts of his evidence that matter for the purposes of this judgment.

26. D3 provided a witness statement but did not attend for cross-examination. A medical reason for his non-attendance was alluded to, but I was not invited to conclude that there was a good reason for his absence and I was not shown any medical evidence. In the circumstances, none of the parties disagreed with the proposition that his witness statement should be admitted as evidence but should be ascribed little weight given the absence of cross-examination.

27. I had an expert report (the "Expert Report") prepared by Mr Andrew Lane MRICS FAAV, a chartered surveyor and valuer as the single joint expert (the "Expert") on matters going to the value of the Farmhouse and of the Properties. The Expert's opinions and expertise were not challenged and I accept the opinions set out in the Expert Report.

The terms of the Trial Order

28. I will set out detailed extracts from the Trial Order given the issues of construction of that order that are central to these proceedings. So far as relevant, the Trial Order provided as follows:

> *1. There be judgment for [D123] on the claim for fraudulent misrepresentation.*
>
> *2. The contract of sale for Home Barton Farmhouse ("the Property") exchanged on 18th July 2014 and completed on 14th November 2014 for the sum of £275,000 is hereby rescinded.*
>
> *3 [C and D4] shall pay to [D123] the sum of £524,125.98 in satisfaction of the claim ("the Judgment sum"). The apportionment of liability is such that [D4] shall pay 90% of the Judgment sum and [C] shall pay 10% of the Judgment sum.*
>
> *4. The Judgment sum is broken down as follows:*
>
> *a Purchase price: £275,000*
>
> *b Costs of sale: £9,716.88*
>
> *c Capital loss: £176,500*
>
> *d Loss of income: £54,917.10*
>
> *e Storage: £708*
>
> *f Mortgage: £7,284*

> *5. Until such time as the Judgment Sum is paid in full, [D123] shall hold [the Farmhouse] on trust for [C and D4].*
>
> *6. On payment of the Judgment Sum [the Farmhouse] will re-vest in [C and D4].*
>
> *7. Payment of the Judgment Sum shall be made within 14 days of the date of this Order. Thereafter [D123] have the right to enforce the Judgment Sum as well as other damages, interest and costs…*
>
> *[Provisions relating to the aggravated damages payable by D4 are omitted as they are not material to the present dispute]*
>
> *10. By way of a prohibitory injunction [D4] shall not interfere with lawful use of the access track to [the Farmhouse], shall not damage the access track or prevent others repairing it.*
>
> *11. By way of a specific performance injunction [C] shall immediately remove the bollard (as referenced in the proceedings) and shall not replace it with anything, nor restrict access in any other way.*
>
> *12. [C and D4] shall pay [D123's] costs, apportioned again at 90% to [D4] and 10% to [C] in the sum of £36,336 within 14 days of the date of this order.*
>
> *13 Interest to accrue at the Judgment rate of 8% on the sums awarded if payments are not made within 14 days of the date of this order.*

29. The parties have different views on the effect of the Trial Order. However, they agree that, at a very high level, the Trial Order either effected, or recorded, a rescission of the contract for sale of the Farmhouse and so sought to return the Farmhouse to C and D4 and the £275,000 purchase price to D123.

30. The Trial Order was not limited, however, to the matter of rescission. It also made provision for C and D4 to pay damages to D123 which formed part of the "Judgment Sum". The following aspects of the definition of "Judgment Sum" in paragraph 4 of the Trial Order merit some comment:

    i) It is common ground that C and D4 are only severally liable to pay the Judgment Sum with C's share of that several liability being 10%. It appears from paragraph [54] of the Remedies Judgment that the Judge imposed a liability on that basis because he considered C to be less culpable than D4 in the making of the fraudulent misrepresentations. I can quite understand how the Judge might have applied that approach to damages for the fraudulent misrepresentation. I do not immediately understand why considerations of culpability should mean, in effect, that C should be obliged to return only 10% of the purchase price of £275,000 given that, ostensibly, she would have originally received 50% of that purchase price by virtue of her 50% interest in the Farmhouse. However, no party invited me to do anything other than accept the proposition that C had a several liability only to pay 10% of the "Judgment Sum" which, as defined, includes the £275,000 original purchase price.

ii) It is common ground that the "Judgment Sum" is the fixed sum of £524,125.98. The "Judgment Sum" does not increase as interest at the rate of 8% accrues in accordance with paragraph 13 of the Trial Order. It follows that, whatever effect payment of the "Judgment Sum" has, that effect is complete once £524,125.98 is paid, even if C and D4 continue to owe interest on that sum which remains unpaid.

iii) The heads of damage recorded in paragraphs 4a, 4b, 4e and 4f are self-explanatory. Other heads of damage require some further explanation:

a) The "capital loss" of £176,500 represents the difference between (i) the value of the Farmhouse at the date of the 2017 trial, on the assumption that there were no disputes affecting it and (ii) the £275,000 purchase price (see [41] of the Remedies Judgment). This appears to seek to put D123 in the position they would have been in if the representation had been true, rather than the position they would have been in if no representation had been made and I do not completely follow it. However, since the Trial Order has not been challenged on appeal, I say no more about it.

b) The "loss of income" of £54,917.10 represents the Judge's determination of the income D123 could have earned from a bed and breakfast business carried on at the Property (see [43] and [44] of the Remedies Judgment). Again, I do not fully understand this, but it is not material for present purposes..

c) The mortgage costs of £7,824 are those associated with the loan taken out to refurbish the Farmhouse described in paragraph 7. above. It is not clear whether this figure comprises interest only or whether it also covers the principal element of loan repayments.

CONSTRUCTION OF THE TRIAL ORDER

31. The dispute between the parties as to the proper interpretation of the Trial Order centres on paragraphs 5 and 6 of that order, although the parties refer to other paragraphs of the order in support of their respective constructions.

32. C and D4 argue that paragraph 5 of the Trial Order gave them an interest in possession in the Farmhouse that vested as soon as the Trial Order was made. By virtue of the Trial Order, none of D123 had any equitable or beneficial interest in the Farmhouse and instead D2 and D3 (the registered proprietors) held the legal estate on trust for C and D4. C and D4 argue that the "re-vesting" provided for by paragraph 6 of the Trial Order is a reference to the legal estate only. C and D4 go on to argue that, since none of D123 have held any equitable interest in the Farmhouse since the date of the Trial Order, they have had no right to occupy the Farmhouse, and so have been trespassers, since that date.

33. D123 argue that the interest of C and D4 for which paragraph 5 of the Trial Order provides was not an interest in possession but was instead an interest that was contingent on payment of the Judgment Sum. Until payment of the Judgment Sum, D123 hold an interest in possession of the Farmhouse. Once the Judgment Sum is paid, paragraph 6 of the Trial Order provides for a "re-vesting" consisting of a transfer of

both the legal and equitable interest in the Farmhouse to C and D4. A corollary of D123's argument is that, until the Judgment Sum is paid, they have a right to occupy the Farmhouse with C and D4 having no such right.

The principles to be applied to the construction of court orders

34. No doubt by coincidence, the sole authority to which I was referred on the proper approach to the construction of court orders, was my own judgment in *Banca Generali SPA v CFE (Suisse) SA and another* [2023] EWHC 323 (Ch). All parties were agreed that I should follow the approach set out in paragraphs [18] to [22] of that judgment. Ignoring those principles that are applicable to the construction of injunctions which are not applicable in the present case (there being no dispute as to the meaning of paragraphs [10] and [11] of the Trial Order) the parties' common approach can be summarised as follows:

    i) The sole question for the court is what the Trial Order means. Issues as to whether the Trial Order should have been made and, if so in what terms, are not relevant to construction. The court should not succumb to any temptation to stretch legal analysis to capture what are seen as the merits or lack of merits of the case that led to the making of the Trial Order.

    ii) The words of the Trial Order are to be given their natural and ordinary meaning and are to be construed in their context, including their historical context, and with regard to the object of the Trial Order.

    iii) The reasons the Judge gave for making the Trial Order in his judgment or judgments are an overt and authoritative statement of the circumstances which the Judge regarded as relevant. Those reasons are admissible for the purposes of construing the Trial Order.

    iv) However, caution should be exercised before engaging in an excavation and analysis of the parties' submissions to the Judge to discover their motives for seeking particular orders with a view to construing the Trial Order. That runs the risk of being a difficult and dubious exercise with parallels to admitting evidence of negotiations in construing a contract.

Conclusions on the construction of the Trial Order

<u>The equitable interest in the Farmhouse</u>

35. Paragraphs 5 and 6 of the Trial Order are not to be construed in isolation. Context is important and it is significant that paragraph 2 of the Trial Order provides for the contract of sale of the Farmhouse to be rescinded because of the fraudulent misrepresentations of C and D4. In *Johnson v Agnew* [1980] AC 367, Lord Wilberforce explained that, if a contract is rescinded because of fraud, it is treated in law "as never having come into existence". C and D4 rely heavily on this proposition pointing out that, if there had been no contract for the sale of the Farmhouse, then C and D4 would have continued to have an absolute interest in possession in the Farmhouse. Accordingly, they submit, paragraph 5 of the Order is intended to achieve that outcome by providing for D2 and D3 (the registered proprietors) to hold the Farmhouse on trust for C and D4 absolutely.

36. C in her submissions went further. She argued that achieving a rescission of the contract required no judicial intervention at all, relying on statements in paragraphs 4.18 of the current edition of *Cartwright on Mistake Misrepresentation and Non-Disclosure* to the effect that "the right to set aside or rescind the transaction is that of the representee, not that of the court" and that rescission is effected "by an unequivocal act of election by the representee which demonstrates clearly that he elects to rescind the contract and to be no longer bound by it". Accordingly, she argued that the Trial Order was incapable of doing anything with the ownership of the Farmhouse other than recording that C and D4 were absolute beneficial owners of it.

37. That submission raises difficult issues. At common law, a rescission on the grounds of a fraudulent misrepresentation could be effected simply by the innocent party giving a notice to that effect (see *Car & Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525) provided that there was no bar to the remedy of rescission. However, rescission at common law was available only where the parties could be restored precisely to the position they were in before the contract. Equity was more flexible since it envisaged rescissions that did not restore the parties to their precise pre-contract position but, through the principles of equitable accounting and similar, permitted them to be restored to their approximate or equivalent positions. In this case, it might be said that a precise restoration of the parties to their pre-contract positions would not be possible because, as C confirmed in her evidence to this court, she and D4 no longer had the £275,000 they received from D123. Moreover, it might be said that some assistance from equity is needed to achieve a rescission of the contract for sale of the Farmhouse given that legal title had passed to D123 and mere notification of exercise of a right of rescission would not satisfy the formalities necessary to convey that legal title back.

38. I therefore consider it likely that C's submission, set out in paragraph 36. above, is not correct since D123 sought remedies in equity that required the court's intervention. I do not, however, consider that I need to resolve difficult questions on the interaction between rescission at law and rescission in equity since the Judge stated expressly in paragraph [32] of the Remedies Judgment that he considered he had a discretion whether to grant the remedy of rescission or not. Rightly or wrongly, that is how he approached matters and the Trial Order should be construed in the light of that approach.

39. The fact that the court made the Trial Order in circumstances where it considered it was giving effect to a rescission in equity points against D123's interpretation of that order. The point of such a rescission was to put all parties in the position, or an equivalent position, to that they would have been in had the contract never come into existence. If C and D4 had never contracted to sell the Farmhouse, they would have remained absolute beneficial owners and would not have been owners of an interest subject to any contingency.

40. Moreover, the wording of the Trial Order contains little support for D123's interpretation. If, as they argue, C and D4's interests were contingent on payment of the Judgment Sum, then it might be expected that the court would say as much in the Trial Order. It might also have been expected to specify that D123 had an equitable interest in the Farmhouse until the Judgment Sum is paid. However, not only does the Trial Order fail to state that C and D4's interest is contingent, it indicates that D123 have no equitable interest in the Farmhouse since the sole beneficiaries of the trust set out in paragraph 5 are C and D4.

41. There is a still further linguistic pointer against D123's interpretation. By paragraph 5 of the Trial Order, D123 are expressed to hold the Farmhouse on trust for C and D4 "until such time as the Judgment Sum is paid in full". The Judgment Sum was obviously unpaid at the date of the Trial Order. The use of the word "until" indicates that even while the Judgment Sum remains unpaid D123 are to hold the Farmhouse on trust for C and D4. Indeed the word "until" suggests that a different provision is to be made when the Judgment Sum is finally paid. There is a clear indication that the different provision in question is that set out in paragraph 6 of the Trial Order, namely that the Farmhouse "re-vests" in C and D4 on payment of the Judgment Sum. This is both consistent with, and supportive of, C and D4's interpretation namely that, until the Judgment Sum is paid, D123 hold the Farmhouse on trust for C and D4 with that trust coming to an end when the Judgment Sum is paid since at that point D123 must convey the legal title to the Farmhouse to C and D4 to complete the "re-vesting".

42. D123's arguments in support of their interpretation focus on the context in which the Trial Order was made and assertions as to the purpose of that order. They point out that rescission is concerned not just with the return of the Farmhouse to C and D4 but also with the return of the purchase price to D123. As Lord Wright put it in *Spence v Crawford* [1939] SC (HL) 53 at 77:

> *To take the simplest case if a plaintiff who has been defrauded seeks to have the contract annulled and his money or property restored to him, it would be inequitable if he did not also restore what he had got under the contract from the defendant. Though the defendant has been fraudulent he must not be robbed nor must the plaintiff be unjustly enriched as he would be if he both got back what he had parted with and kept what he had received in return.*

43. D123 argue that the inequity to which Lord Wright refers would arise on C and D4's interpretation of the Trial Order since they would have an absolute interest in possession in the Farmhouse before they have paid a single penny of the Judgment Sum, with no clawback of that interest if they fail to pay.

44. There is force to that submission. Subject to considerations of the right of occupation set out in the section below, an unattractive feature of C and D4's interpretation is that, as soon as the Trial Order was pronounced, they could in theory have exercised their rights as absolute beneficial owners of the Property to require D1 and D3 to move out thereby having the practical benefit of both the Property as well as retaining the purchase price that D123 paid. However, there would be unattractive aspects to D123's interpretation as well. If C and D4 have no interest in the Farmhouse until the Judgment Sum is paid in full, then in theory they could sell the Farmhouse at any point before receipt of the Judgment Sum, retain the sale proceeds (on the basis that at that point they are the sole persons with an interest in the property) and still sue C and D4 for the Judgment Sum.

45. Neither the Trial Order nor the related judgements contain any explanation as to how either type of unfairness referred to in paragraph 44. is to be avoided. It follows, in my judgment, that much of the force of D123's submission is directed at the question whether (i) D123 should have exercised their remedy of rescission in the first place or (ii) whether the Court should have made the order it did once that remedy was exercised.

46. As to point (i), D123 complain that neither C nor D4 alerted them, prior to, or during the trial before the Judge, that they were impecunious or that rescission was impossible. They argue that, if C and D4 had done so, D123 might not have elected to rescind at all and instead might have chosen to keep the Farmhouse and damages. However, whether or not D123 now regret their election to rescind says nothing about the correct interpretation of the Trial Order.

47. As to point (ii), it is clear from paragraphs [32] and [33] of the Remedies Judgment that the Judge did not address the question of whether it was possible to restore all parties to their pre-contract position given that C and D4 no longer had the purchase price. It is reasonable to assume that this was because the point was not brought to his attention. If the Judge had this issue in mind, he might well have made an order in different terms to address the difficulties that D123 have identified. However, as I have noted in paragraph 34. above, the question before me is as to the proper construction of the order that the Judge did make, and not the question of what different order he could or should have made.

48. D123 placed some reliance on the parties' understanding of the Trial Order. In cross-examination, both C and D4 appeared to accept that their initial understanding was that they would not obtain any entitlement to the Farmhouse until the Judgment Sum was repaid. There is some support for that in contemporaneous documentation. In a text message to D4 which is undated, but from its context was sent after the Trial Order was made, C records her understanding that until D4 paid "all the debt off [D123] could do basically what they wanted". In a letter dated 26 November 2018, C's solicitors wrote a pre-action letter to D1 explaining that they proposed to take action seeking an order for sale of the Farmhouse. C's solicitors explained that they would not seek a sale before the Properties are sold because C "recognises that the purpose of the trust created in the [Trial Order] is to provide you with protection against being forced to vacate before receiving the Judgment Sum".

49. However, the difficulty with these submissions is that the parties' understanding of the Trial Order after the event sheds little light on what that order means, applying the uncontroversial principles of construction that are set out in paragraph 34. above.

50. In my judgment, C and D4's interpretation of the Trial Order is to be preferred insofar as it relates to the equitable interest in the Farmhouse. Until the Judgment Sum is paid, C and D4 have an interest in the possession in the Farmhouse and not a merely contingent interest. They cannot, however, call for a conveyance of the legal interest until the Judgment Sum is paid. D1 to D3 have not, since the date of the Trial Order, had any equitable interest in the Farmhouse. Their sole ownership interest consists of D2 and D3's holding of the legal estate on trust for C and D4. If and when the Judgment Sum is paid in full, but not before, D123 must execute a conveyance of the legal estate in the Farmhouse to C and D4.

The right to occupy the Farmhouse

51. In written and oral submissions at trial, C and D4 and D123 approached the question of the right to occupy the Farmhouse as a corollary of their respective positions on equitable ownership. C and D4 argue that, since D123 had no equitable interest in the Farmhouse they could have no right of occupation either, with the result that they were

trespassers from the moment of the Trial Order. D123 argue that, since they alone have an interest in possession in the Farmhouse, they alone are entitled to occupy it.

52. Since I have rejected D123's argument that they have an interest in possession in the Property until the Judgment Sum is paid, I also reject their argument that the asserted interest in possession confers a right of occupation.

53. In her written and oral submissions on behalf of D123, Ms Morton did not explicitly argue that, even if D123 had no equitable interest in the Farmhouse, the Trial Order nevertheless gave them a right to occupy. However, there was a hint at such an argument. For example, Ms Morton said in closing that the purpose of the Trial Order was to provide D123 with protection against being forced to vacate before receiving the Judgment Sum. She was critical of C and D4's assertion that D123 were "trespassers".

54. I acknowledge that there are some hints in the Trial Order and the related judgments that the Judge may have been proceeding on the basis that D123 might continue to occupy the Farmhouse for a while:

    i) The Judgments demonstrate that the Judge was well aware that D1 and D3 were living in the Farmhouse at the time of the Trial Order. If the Trial Order truly did make D123 trespassers from the moment it was made, it might have been expected that it would contain some order for D123 to give vacant possession of the Farmhouse.

    ii) Paragraphs 10 and 11 of the Trial Order contain injunctions requiring D4 to remedy interferences with D123's use of the Farmhouse that had clearly caused D123 significant problems. It is not obvious why the Judge would make those injunctions in the Trial Order if D123 were trespassers.

55. However, these hints are an insufficient basis on which to conclude that the Judge ordered that D123 should have a right to occupy the Farmhouse. Court orders impose obligations on people that they might find unwelcome. Serious consequences can flow from a breach of a court order. In those circumstances, a mere hint as to what the Judge might have had in mind is not sufficient to amount to an order conferring a right of occupation on D123 when there is no express order to this effect. To construe the Trial Order as conferring a right of occupation on D123 would amount to making a different order, which the Judge could or should have made, in breach of the principle set out in paragraph 34.i) above.

56. Since the Trial Order says nothing express about any person's right to occupy the Farmhouse, that matter must be determined by reference to general principles. By s12 of the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA"), C and D4's interest in possession under the trust of the Farmhouse entitles them to occupy the Farmhouse if:

    i) the purposes of the trust include making the Farmhouse available for their occupation; or

    ii) the land is held by D123 so as to be available for C and D4's occupation.

57. The "trust" in question is that imposed by the Trial Order. The "purposes" of that trust can only be ascertained from the words of the Trial Order itself and relevant surrounding circumstances including, particularly, the reasons given in the Judge's judgments.

58. In my judgment the trust's purposes did not include making the Farmhouse available for C and D4's occupation. As D123 observe, that would have been an unusual purpose indeed since it would mean that C and D4, having perpetrated a fraudulent misrepresentation on D123, would obtain both the entire equitable interest in the Farmhouse and a right to live there to the exclusion of D123 before they had repaid a single penny of the purchase price they had received, to say nothing of the damages that they owed. In my judgment, Mr Jones, in his submissions on behalf of C, provided an accurate summary of the "purpose" of the trust. That trust, which resulted in the legal and equitable interests in the Farmhouse being separated, was intended to offer some protection to D123 by ensuring that, even though C and D4 were the immediate beneficial owners of the Farmhouse, they could not call for a conveyance of the legal title, and so could not transfer good registered title to the Farmhouse, until they had paid the Judgment Sum.

59. Nor were D123 holding the Farmhouse so as to be available for C and D4's occupation. I conclude that s12 of TOLATA does not confer any right of occupation on C or D4.

60. That leads to the question of whether D123 do have a right of occupation by virtue of TOLATA. D1 is not herself a trustee of the Farmhouse since, as noted in paragraph 7. above, she has not since December 2015, held any legal interest in it. However, D2 and D3 are trustees and, by s6 of TOLATA have all the powers of an absolute owner for the purpose of exercising their function as trustee. In principle it seems to me that, particularly since C and D4 do not have rights of occupation, D2 and D3 could properly exercise that power by allowing D3 and his partner D1 to occupy the Farmhouse to exercise the trustee's function of looking after the Farmhouse that would otherwise be unoccupied.

61. I quite recognise that, in exercising the power under s6 of TOLATA in this way, D3 would be obtaining some personal benefit. He and D1 occupied the Farmhouse as their personal home and will not have spent all their time when living there looking after it for C and D4. I also acknowledge that D2 and D3's decision to resist a sale of the Farmhouse since November 2017 has involved a breach of trust (see paragraph 102. below) and they have not, therefore, had sufficient regard to the rights of beneficiaries as required by s6(5) of TOLATA which might well have pointed towards an earlier sale of the Farmhouse. In a similar vein, I do not consider that they have consulted adequately with beneficiaries as required by s11 of TOLATA.

62. However, in my judgment, these are matters to be considered when determining the right account between D123 and C and D4. Even though there were flaws in the way they exercised that power, D2 and D3 had the power as trustees to permit D3 and D1 to remain in occupation of the Property. None of D123 have been trespassers on the Property since the Trial Order.

THE "SALE TO SELF" ISSUE

63. D123, C and D4 all proceed on the basis that the Charging Orders and the Orders for Sale impose the same rights and obligations on D123 as would be imposed if they were holders of an equitable charge. It is also common ground that, at the time of the 2019 Transfer, D123 were mortgagees in possession pursuant to the BR Mortgage. The current edition of *Emmet & Farrand on Title* states at 25.109:

> *It has long been established that, unless the mortgage deed provides otherwise, a mortgagee may not sell to itself in exercise of the power of sale, nor may it sell to a trustee or agent for itself, or pursue any scheme for getting the property into its own hands under the guise of sale.*

64. C, D4 and D5 argue that this prohibition was breached when D123 effected the 2019 Transfer, transferring the Properties to D5.

65. There was some dispute as to whether I should determine whether there was a breach of the principle as part of the present proceedings. D123 argued in their closing submissions that the issue had been rendered academic by their acceptance recorded in the Order of HHJ Paul Matthews dated 25 September 2023 following the Pre-Trial Review (the "PTR Order") that the sale to D5 was "not effective, and as such the status quo ante, since [the date of the purported transfer], is that [D123] are mortgagees in possession and that [the Properties] are held on trust by [D5] for [C and/or D4]". D123 also point out that the question whether the transfer of the Properties was a void "sale to self" did not appear on the agreed case summary and list of issues that the parties prepared pursuant to paragraph 2 of the PTR Order.

66. However, even if the "sale to self" issue did not appear on the agreed list of issues, the matter of the proper account between C and D4 and D123 in relation to the Properties certainly did. C and D4 argue that this account will be informed by the outcome of the "sale to self" issue. Moreover, when I canvassed with the parties at the beginning of the trial whether, in view of the agreement between the parties recorded in the PTR Order, it was necessary for me to determine whether there was a void "sale to self", D123 did not seek to persuade me that I should not do so. Their position, therefore, appears to have hardened, perhaps when they saw the extent of cross-examination that took place on the issue (although there was no objection to the cross-examination when it took place).

67. In view of the above matters, and so that I am making determinations on all issues that might have a bearing on the present proceedings, I consider that it is appropriate for me to make findings on the "sale to self" point and I will do so.

The nature of the prohibition

68. The extract from *Emmet & Farrand on Title* that I have quoted in paragraph 63. suggests that there are three limbs to the prohibition: the first prohibiting a sale to the actual mortgagee, the second prohibiting a sale to an agent or nominee for the mortgagee and the third prohibiting a sale to any person as part of the scheme for getting the property back into the hands of the mortgagee.

69. D5's closing submissions suggested that there might not be three limbs to the prohibition and that there is a single prohibition to the effect that the sale by the mortgagee must not be calculated to get the property back into the mortgagee's hands whether by a (purported) transfer to the mortgagee direct, a transfer to an agent or nominee or by means of any other device. I do not consider that I need to resolve this relatively minor point of disagreement between the parties. D4 contends that the "sale to self" prohibition was engaged because D5 was some kind of agent or nominee for D123 as regards the Properties. D5 puts the point slightly differently, arguing that there was an expressly agreed shared intention between D123 and D5 to the effect that both Properties would in due course be transferred back. No one has suggested that either D4 or D5's formulation would be insufficient to engage the prohibition.

Factual findings relevant to the "sale to self" issue

70. The 2019 Transfer has to be understood in the context of events that led up to it.

71. In 2018, D123 had achieved some measure of success in their attempts to enforce the order to pay the Judgment Sum against the Properties as they had obtained the Orders for Sale. However, D1 was concerned that their success risked being illusory. She was concerned that a sale of the Properties would not achieve the £610,000 aggregate minimum sale price or that C and D4 would attempt to sabotage efforts to achieve a sale at that price. Since Mrs Betty Richards had passed away in November 2017, D1 worried that her executors might seek to sell the Properties at public auction. That gave rise to a risk, as D1 saw it, of C and D4 interfering in the auction process and procuring a situation where an associate of D4 acquired the properties at a low price paving the way for D4 to remain her neighbour.

72. By spending some £81,000 to acquire the BR Mortgage, D123 hoped to address two risks: first the possibility that the Properties might be sold at public auction at too low a price and second that the purchasers might turn out to be unwelcome neighbours.

73. Following acquisition of the BR Mortgage, D1 turned her mind to the exercise of the power of sale that the mortgage conferred since it was significantly in arrears. Given her wish to control who became her neighbours, her first instinct was to exercise the power of sale by selling the Properties to some friends (Messrs Moss) for cash. She had discussions with Messrs Moss in late 2018 or early 2019 but the sale did not go ahead. D1 says that was because she decided to sell the Properties to D5 instead. D5 says that D1 preferred an arrangement with D5 which resulted in D1 retaining control over the Properties. I will resolve this disagreement in the light of my later findings on the nature of the arrangement with D5.

74. On 14 January 2019, D1 obtained written advice from a barrister at Tanfield Chambers in London ("Counsel's Opinion") on D123's options relating to the Properties. She has waived privilege as regards Counsel's Opinion which was in evidence before me, although I have not seen any written instructions that were given to counsel. Paragraph 11 of Counsel's Opinion states:

> *[D1] seeks advice on whether the claimants [defined in paragraph 1 as D123] are able (and if so how best) to purchase the [Properties].*

75. D1 could be expected to speak frankly to counsel and counsel could be expected to record carefully the result that D1 was seeking. It is significant, in my judgment, that on 14 January 2019, D1 was seeking advice on whether D123 could exercise their power of sale by selling the Properties to D123 themselves. D1 was not asking for advice as to whether it would be "too close to the line" for the Properties to be sold to friends or to family other than D123. Counsel's Opinion accordingly focused on this narrow question. It did not mention that the "sale to self" prohibition could be engaged if D123 conveyed the Properties to persons other than themselves to hold as agent or nominee or pursuant to a scheme whereby the properties would eventually be conveyed back to D123. I infer that this was because counsel was not asked (prior to giving his written opinion) to advise on the consequences of a transfer to anyone other than D123 themselves.

76. Counsel advised that there was an absolute prohibition against D123 selling the Properties to themselves. He canvassed the possibility of D123 selling the properties to themselves in their capacity as "next in line of mortgagees" (by which he was referring to D123's interest in the property created by the Charging Orders). However, he concluded that such a course was risky and advised against it. He advised that D1's best option was to negotiate with C and D4.

77. Just over a month after Counsel's Opinion, D123 executed a Form TR2 conveying the Properties to D5 in purported exercise of their power of sale over those properties. The consideration expressed to be payable on the Form TR2 was £350,000. It is common ground that D5 did not pay D123 £350,000 in cash and I will make findings later in this judgment on the nature of the arrangement between D5 and D123. Nevertheless D5 paid SDLT on the basis that £350,000 of consideration had been given. D5 also paid the costs of the 2019 Transfer. He was reimbursed for the SDLT and expenses out of the proceeds of sale of Property 3 described below.

78. In their written and oral evidence, D5 and D1 gave sharply differing accounts of the nature of the agreement under which D5 acquired the Properties:

    i) D5's evidence is that there was an understanding between him and D123 that he would hold the Properties "on a temporary basis" and transfer them back to D123 in due course. That arrangement was made with a view to enabling D123 to own the Properties "outright themselves". The arrangement acknowledged that D5 could, if he wished, retain ownership of the "Big Barn" on Property 2. If he did so, he would need to pay cash of around £85,000, but if he did not wish to do so, he would simply hand the Properties back to D123 for no consideration.

    ii) D1's evidence was that there was a true outright sale to D5 with deferred consideration. She characterised the arrangement as being that D5 acquired the full legal and beneficial interest in the Properties on terms that he could decide which parts of those properties he wished to retain and which he wished to sell on. She denied that there was any arrangement or understanding to the effect that D5 would transfer "unwanted" parts of the properties back to D123 but accepted that this might happen if it was necessary as part of the conveyancing process for sale of those parts.

79. I prefer D5's account principally because it is more consistent with the contemporaneous documentation.

80. On 22 January 2019, D5 sent an email to D1 and D3 which contained the following:

> *A few thoughts I have that might be worth running past a barrister while you have his services.*
>
> *1 Working on the basis that we split lots after I acquire titles and assuming that these bar the big barn I pass to you, M&M [i.e. D2 and D3] at nil value does this incur any tax implication? I want to know that this process will be exempt from capital gains tax.*
>
> *2 If I "sell" at nil value presumably there is no further stamp duty land tax (SDLT) to pay by anybody to anybody? Can this be avoided now that market value does not need to be demonstrated upon sale?*

81. Points 1 and 2 of this email, written at a time when D1 and D5 had a good relationship with each other and were speaking frankly about the arrangement, makes the understanding explicit.

82. By early 2020 it was clear that D5 was not interested in acquiring the "Big Barn" and discussions about him acquiring other parts of the Properties had led to nothing. D123 and D5 therefore had to turn their minds to the status of D5's ownership interest in the Properties. D1 and D3 formed the view that D5 was being obstinate in refusing to transfer those properties back and wrote D5 two letters on 3 June 2020 and 6 June 2020.

83. The letter of 3 June 2020 included the following:

> *We would have bought the properties we had possession of following Court Orders ourselves but received advice from Counsel that this was not possible. At the time you intended to purchase some of the property and as we needed to safeguard them from any dealings with Mr Richards or the Estate [of Mrs Betty Richards] including Martin, following legal advice from Slee Blackwell in Barnstaple, that the property would be transferred to you and the consideration deferred. Slee Blackwell then undertook the conveyancing advising us that the property transferred to you without any payment (minus any that you subsequently paid for which you have not) could be transferred at a later date and that this process is all perfectly legal.*

84. The arrangement for "unwanted" property to be re-transferred to D123 is made explicit in the following extract from the letter of 6 June 2020:

> *The property transferred to you by agreement with no consideration actually paid was always transferred on the understanding that any property you did not then have would be transferred to all three of us when requested. That request has been made.*

85. In her oral evidence, D1 suggested that D5's analysis of the arrangement made no sense and involved D5 misunderstanding her intentions. She said that she and D3 were very short of money at the time and so it would make no sense for her to enter into the kind of arrangement that D5 described as it would not generate any cash. I do not accept that. Both D1 and D5 agreed in their evidence that the arrangement would not generate any cash except to the extent that D5 decided to purchase some of the land comprised

within the Properties such as the Big Barn. D1 and D3 therefore accepted at the time that the arrangement with D5 might not generate any cash. Indeed they made a conscious decision to stop discussions with Messrs Moss on a transaction that would have generated cash and to prefer, instead, an arrangement with D5 that might not. I have concluded that D5's explanation of their reasons for that decision, which I have summarised in paragraph 73. above, are more likely to be correct than D1's explanation.

86. Nor do I agree that a transaction of the kind that D5 described would be devoid of commercial sense, even if D1 and D3 were short of money. D1 herself explained the rationale behind a sale of the Properties under which "no money needs to change hands" in an email she sent to D3 and D5 on 22 January 2019. By that time C had recently served a Letter of Claim seeking an order for sale of the Farmhouse. D1 reasoned that if £350,000 of the Judgment Sum was treated as discharged by a transfer of the Properties to D5 (even a transfer for which D5 paid no cash consideration), the value of the Farmhouse would broadly equate to the remainder of the Judgment Sum. She believed that there would then be no incentive for C to press ahead with her attempt to force a sale of the Farmhouse as there would be no opportunity for her or D4 to engineer a situation where a purchaser bought it at an unrealistically low price.

87. I accept that, at the time he acquired the Properties, D5 had a real interest in purchasing either the Big Barn or some other property. Until relations between him and D1 soured he had a real interest in the works that D123 were undertaking and visited periodically to see how they were progressing. However, genuine though his interest was, it does not alter the fact that the understanding between D123 and D5 was that, unless he decided to purchase some of the Properties (with there being no obligation on him to do so), he would re-transfer the Properties in the future.

88. Some specific consequences flowed from that arrangement:

    i) D5 had no obligation to pay £350,000, or indeed any other sum, to D123 at or before the 2019 Transfer. If, after the 2019 Transfer, D5 had decided to purchase all or some of the Properties, a contract may have been negotiated at that stage. However, there was no agreement before the 2019 Transfer that any consideration would be paid and so no contractual obligation on D5's part to pay anything at the time of the 2019 Transfer. It follows that D1 is wrong to characterise the arrangement as one where consideration was agreed but left outstanding. There never was any consideration payable. The Form TR2 was wrong to state that consideration of £350,000 had been given and it was not a "failure of consideration" that caused the 2019 Transfer to be void.

    ii) D5 was never given any keys to buildings on the Properties and nor was he consulted, or asked to pay for, the works that D1 and D3 were performing there.

    iii) Unless and until D5 chose to purchase any part of the Properties, it was understood and agreed between him, D1 and D3 that D5 would follow D1 and D3's instructions in relation to the Properties, including the question whether they should be sold and, if so to whom. This is precisely what happened when Property 3 was sold as considered later in this judgment.

Conclusion on the "sale to self issue"

89. In my judgment, both the second and third limbs of the prohibition summarised in paragraph 68. were present. There was a common understanding between D123 on the one hand and D5 on the other that the Properties would be transferred back to D123 unless a supervening event took place that resulted in D5 acquiring a small part of the Properties. Moreover, D5 had given no consideration for the 2019 Transfer, not even consideration that was left outstanding. The transfer to D5 was gratuitous and, accordingly, the transfer, if effective, would have involved D5 holding the Properties as nominee under a constructive or resulting trust for D123. In addition, D5 also agreed expressly with D123 that he would dispose of the Properties in accordance with their wishes. It follows that the 2019 Transfer was a "transfer to self".

90. In her witness statement, D1 explained that following the 2019 Transfer, D123 credited £82,262 of the stated consideration of £350,000 against the BR Mortgage. That was not challenged in cross-examination and I infer, therefore, that it was D123's mistaken belief that the 2019 Transfer operated to convey the legal and equitable interest in the Properties that caused the BR Mortgage to be discharged as described in paragraph 15.. It follows that D123 are entitled to apply to court pursuant to paragraph 2 of Schedule 4 of the Land Registration Act 2002 for the register to be altered or updated so as to reinstate the BR Mortgage as a charge against the titles to the Properties. No such application has been made to date although I did not get any impression from C or D4 at the hearing before me that, if made, such an application would be resisted.

THE AMOUNT OF THE JUDGMENT DEBT OWED BY C AND D4

The Principal Amount

91. As I have noted in paragraph 30.ii) above, there can be no doubt as to the "Judgment Sum" specified in the Trial Order. That is a fixed amount which does not increase even as interest accrues in accordance with the Trial Order.

92. The parties were not agreed on the total amount owed to D123 taking into account the Trial Order, costs awarded in the meantime pursuant to other interlocutory orders, payments made to date and the accrual of interest. Some of the issues were narrowed during the trial: for example D1 accepted that calculations she had prepared impermissibly provided for "interest on interest" whereas the Trial Order and the Judgments Act provide for only simple interest to be payable. However, the parties have not agreed either the principal amount of the judgment debt or a daily rate of interest accrual on that debt. Since I have heard no argument on the detail of this matter, I am not able to express a judgment on it. The calculation will, therefore, to the extent it is not agreed, have to wait until either the Consequentials Hearing or the hearing before the District Judge.

"Switching off" the interest accrual

93. C argues that what she regards as the wrongful acts of D123 in selling the Properties to D5 should operate to prevent interest from accruing on her judgment debt from the date of the 2019 Transfer.

The principle relied on

94. C relies on paragraph 54.44 of the current edition of *Fisher and Lightwood's Law of Mortgage* which, after noting that "interest is payable on a charge by mere deposit of title deeds and, generally where the principal sum is a charge on specified property" includes a "Footnote 4" which includes the following:

> *a mortgagee will be allowed no interest upon a debt which would have been satisfied but for his wrongful or inequitable act, during such time as the debt has thereby remained unsatisfied: see* Thornton v Court *(1854) 3 De GM & G 293 at 301*

95. In my judgment, *Thornton v Court* does not stand for the broad proposition that is stated in Footnote 4 and C's reliance on this authority is misplaced. The facts of *Thornton v Court* were somewhat unusual. Thornton bought a parcel of land from Court. In the deed of conveyance, Court gave a covenant of quiet enjoyment promising that Thornton could peaceably occupy the land in question. Having acquired the land, Thornton mortgaged it to Bolshaw. It turned out that Court's title to the land was defective and in fact Lord Delamere owned it. Lord Delamere took action against Thornton that resulted in Thornton being evicted from the land.

96. Thornton wished to take action against Court for breach of the covenant of quiet enjoyment. Court sought to frustrate that action by paying off Thornton's mortgage to Bolshaw, obtaining an acknowledgement from Bolshaw that he (Court) had acquired all of Bolshaw's rights in respect of that mortgage and arguing that since it was Bolshaw (as mortgagee) who had the right to take action for breach of the covenant of quiet enjoyment, Thornton's case against Court could not succeed.

97. For reasons that are not material, Court's scheme failed and it was held that Thornton could pursue a claim against Court for breach of the covenant of quiet enjoyment. In that claim, Court raised a further point, arguing that any damages for breach of the covenant should be reduced to take account of all the interest that had accrued on the mortgage which Court had paid in his dealings with Bolshaw on the basis that this would otherwise have been an expense that Thornton had to meet.

98. That argument failed as well since it was held that, but for Court's failed attempt to frustrate Thornton's claim for breach of the covenant, Thornton would have received damages from Court which would have enabled him to repay the mortgage much earlier. Thornton was, accordingly, not entitled to the account that he claimed.

99. *Thornton v Court* is not a case that sets out principles governing a mortgagee's entitlement to interest. Bolshaw's entitlement to interest was not in question. Rather, the case concerned the account, if any, that Court should obtain on paying that interest. The conclusion, that Court could not claim an account in equity for an increased cost that he had himself engineered, is an unremarkable application of equitable principles. It has no bearing on C or D4's liability to pay interest which was fixed in the Trial Order by application of the Judgments Act 1838. Nor does it have any bearing on the ability of D123 to recover the interest component of the judgment debt from the proceeds of sales of the Properties pursuant to the Charging Orders.

D123's conduct in declining to agree to a sale of the Farmhouse

100. I make findings on this issue, not to address the "principle" in *Thornton v Court* but because it is relevant to some later aspects of this Judgment.

101. At the trial before me, there was much discussion of the "arithmetic", namely the point at which D123 had in their control sufficient assets to enable C and D4's judgment debt to be discharged. As I explain below, I consider this focus misses the point, but since significance was attached to it, I make the following brief findings:

    i) I do not accept C's argument that, in May 2018, once C and D4 gave vacant possession of the Properties pursuant to the Orders for Sale, a sale of the Properties and the Farmhouse would have discharged the judgment debt. C's argument was based on the combined value of the Properties being £345,000 (as set out in in a "Red Book" valuation prepared by Mr White of Phillips Smith & Dunn on 30 May 2018) and the Farmhouse having a value of £450,000 (the figure set out in the Remedies Judgment). However, this analysis is flawed. The Properties could not be sold for £345,000 (as the minimum sale price which the court had fixed at C and D4's insistence was £610,000). The £450,000 value of the Farmhouse was based on an assumption that there were no disputes affecting it and in May 2018, the possibility of disputes remained. Moreover, even if the Farmhouse were sold for £450,000, D123 could only collect £52,412.60 (10% of the Judgment Sum) from C's share of the sale proceeds.

    ii) For essentially the same reasons, I do not consider the position was materially different in November 2018. By then an "offer" had been made by someone running a welding business to purchase the Properties for £510,000. However, that figure was an outlier: other estimates of the value of the Properties at this time were much lower and so I do not consider it would have proceeded to a successful sale. In any event, this figure was still below the £610,000 minimum sale price.

102. I have, however, concluded as C invites me to that, from 26 November 2018, the date of a letter from C's solicitors to D1 indicating that C sought an order for the Farmhouse to be sold, D2 and D3, who were trustees of the Farmhouse, acted in breach of trust by resisting a sale. They realised that, if the Farmhouse were sold, they could be left without the Farmhouse and without a significant amount of the judgment debt. Their personal interests drove them to seek to avoid that result. They did not give any attention to the rights that C and D4 had as beneficiaries of the trust created by the Trial Order which made it in C and D4's interests for the Farmhouse to be sold to permit at least part of the judgment debt to be satisfied and so stop interest from accruing at 8%. D3 obtained a benefit as a consequence of this breach of trust (consisting of his and D1's continued occupation of the Farmhouse without having to pay any rent). C and D4 suffered loss as a consequence of the breach of trust (consisting of further interest accrual on the judgment debt).

103. I note that there was some suggestion that C at least was pressing for a sale of the Farmhouse in November 2017. However, perhaps conscious of the fact that D4 had not agreed to a sale of the Farmhouse at that point, C did not invite me to make findings that the breach of trust started in November 2017 and I do not do so.

ISSUES RELATING TO THE SALE OF THE FARMHOUSE

104. As I have noted, all of C, D123 and D4 are now agreed that the Farmhouse should be sold. I will, therefore, make an order for sale of the Farmhouse. I turn, therefore, to the other issues in relation to the Farmhouse that the parties have raised in their List of Issues.

Restrictions against the title to the Farmhouse

105. In consequence of my conclusions on the interpretation of the Trial Order, C and D4 currently each hold, as tenants in common by way of interest in possession, 50% of the equitable estate in the Farmhouse. C and D4 argue that they are entitled to have this interest protected by means of a restriction recorded against the registered freehold title held by D2 and D3. I agree and see no force in the arguments of D123 to the contrary.

106. I understand that the position is complicated somewhat by the fact that there is already a restriction against the freehold title in D1's favour (arising out of her transfer of her share in the legal estate in December 2015 referred to in paragraph 7. above). Moreover, it appears as though D1's restriction may be somewhat unfortunately drafted in that it prevents a transfer of the freehold taken place without a certificate to the effect that Clause 3.1 of the 2015 Trust has been complied with. However, Clause 3.1 simply records D123's respective interests in the Farmhouse without setting out any conditions that can be "complied with".

107. I have heard no detailed argument on how to resolve these issues. I hope that the parties can agree a suitable form of words. It may be that D1's restriction simply has to be removed from the register since she holds no equitable interest in the Farmhouse.

Who should have conduct of the sale?

108. At the trial, all parties appeared agreed that, in view of the mistrust on all sides, the best course is for there to be a court-appointed receiver tasked with effecting the sale. I regard that as a shame since it will involve still further costs that will erode what equity remains in the Farmhouse and the Properties. However, regrettable though it is, I understand why the parties are agreed on it and the alternative, of selecting a representative or representatives of the factions to conduct the sale, itself runs the risk of provoking even more dispute and costs.

109. I am prepared in principle to appoint a receiver. However, the parties will need to work together to agree the frames of reference, powers, duties, remuneration and identity of the receiver. I will therefore revisit this matter at the Consequentials Hearing, by which time I hope that there will be a proposal that I can consider.

Should the Farmhouse be sold separately, or as a lot with the Properties?

110. The Expert's opinion is that, as at 24 May 2023, the Farmhouse had a value of £550,000, Property 1 had a value of £340,000 and that Property 2 had a value of £550,000. He concluded that a single lot, consisting of all three properties, would be worth £1,300,000.

111. In the Expert's opinion, selling the three properties individually would achieve an aggregate sale price £140,000 higher than would be received on the sale of a single lot.

Nevertheless, I agree with C that, if a receiver is to be appointed to have conduct of the sale, it should be left to that receiver to decide how to market the three properties. No doubt the receiver will pay careful attention to the Expert's opinion. However, it possible that circumstances might change or a prospective purchaser might have a particular interest in acquiring all three properties and be prepared to pay a good price for that opportunity. In my judgment, if a receiver is to be appointed, it would be premature to rule out altogether the possibility of the three properties being sold together.

What should the minimum sale price be?

112. If the Farmhouse is sold individually, the minimum sale price should be £550,000. If Property 1 is sold separately, the minimum sale price should be £340,000. If Property 2 is sold separately, the minimum sale price should be £550,000. If sold as a single lot, the minimum sale price should be £1,300,000, these being the values set out in the Expert Report.

113. D4 submitted that the minimum sale price of the Farmhouse should be higher than £550,000 because of D123's evidence that they had accepted an offer for £750,000 in late 2021 (higher than the Expert's estimate of the Farmhouse's value) which fell through because of C's application to the Land Registry to register a restriction against the title. However, in my judgment, the Expert's opinion, having been commissioned, should be given weight. Moreover, even if D123 had accepted an offer of £750,000 there can be no guarantee that a sale would have resulted at that price.

114. Consistent with her approach set out in paragraph 111., C suggested that the sale price should simply be left to any receiver that is appointed. However, it seems to me that this would give the receiver too much discretion and corresponding exposure to risk. If the minimum sale prices set out in paragraph 112. above come to appear optimistic, it would be preferable for the parties to make an application to the Court to reduce the price rather than requiring a receiver to make a decision that would be contentious.

When should D123 give vacant possession?

115. As I have explained earlier in this judgment, D3 and D1 who presently occupy the Farmhouse are not trespassers. Even if a receiver is appointed to conduct the sale process there remains a role for D3 to occupy the Farmhouse as trustee not least to ensure that it is secure and well maintained. Moreover, the receiver cannot be expected to undertake all the tasks that will be necessary to achieve a sale of the Farmhouse and the Properties, such as ensuring that they are attractively presented and letting in estate agents who wish to conduct viewings.

116. D4 suggested that there was a risk that D123 might intentionally damage the Farmhouse and Properties, but I see little such risk. I do not, therefore, accept C and D4's primary position that D123 should give vacant possession of the Farmhouse forthwith. Instead, they should be permitted to continue to occupy the Farmhouse until it is sold on suitable conditions including that they keep the properties in a marketable condition and comply with the reasonable requests of the appointed estate agent, selling solicitor and receiver as regards the marketing of the Farmhouse.

The account between D123 and C to D4

117. In their written and oral submissions the parties referred to the concept of "an account" to capture the idea that there should be a general "reckoning up" as between D123 and C and D4 in relation to expenditure incurred and benefits received in connection with the Farmhouse. That is a convenient shorthand, but it is necessary to bear in mind that this is not a case such as *Murphy v Gooch* [2007] EWCA Civ 603 where, as Lightman J explained, the court's task was to "strike a balance between co-owners". D2 and D3 are not "co-owners" of the Farmhouse; they are trustees. C and D4 alone are the beneficial owners of the Farmhouse. Accordingly, the court's task will ultimately be to ensure that D2 and D3 account properly to C and D4 for the property that they hold on trust for them. That process engages the following principles:

    i) D2 and D3 are, as trustees, by s31 of the Trustee Act 2000 (the "Trustee Act") entitled to be reimbursed from trust funds, and may pay out of trust funds, expenses properly incurred when acting on behalf of the trust.

    ii) D2 and D3 are individuals who are not acting as trustees in a professional capacity. Accordingly, they are not entitled by s29 of the Trustee Act to reasonable remuneration for acting as trustee. I was not shown on any other basis on which D2 and D3 are entitled to receive remuneration (as distinct from expenses) and I conclude that they are not so entitled.

    iii) D2 and D3, as trustees, would be acting in breach of fiduciary duty to the extent they make a profit by reason of, or in virtue of, their fiduciary office. If they make any such profit, they are required to account to C and D4 for it.

    iv) Since D2 and D3 are trustees of a trust to which TOLATA applies, either they or C and D4 can apply under s14 of TOLATA for an order relating to the D2 and D3's exercise of their functions under TOLATA.

118. The PTR Order provided that the "account" described above would not be performed at the trial before me. Rather, it will take place at the hearing before the District Judge. Accordingly, I have heard little evidence on the detail that is relevant to the matters specified in paragraph 117.. The parties nevertheless asked me to set out some principles that the District Judge should apply when performing that account. That I will do. To illustrate some points, I use examples, but I should not be taken as concluding that those points apply only to particular examples. Nor should it be assumed that the principles set out are exclusive: the District Judge may need to consider others.

<u>Expenses incurred by D2 and D3</u>

119. As I have noted, it is only D2 and D3 who are trustees and so it is only their expenses that can be reimbursed from trust funds under s31 of the Trustee Act. Of course, that does not mean that if a particular expense happened to be paid by D1 it cannot be reimbursed under s31 of the Trustee Act since D1 may well have been incurring that expense on behalf of D2 and/or D3. I have not been asked to consider whether there is any basis for D1 to recover expenses that she incurred otherwise than on behalf of D2 or D3.

120. D1 has prepared a spreadsheet of the costs she considers that D2 and D3 should be reimbursed in connection with the Farmhouse. The grand total of those expenses was £152,599.78 including interest. I am in no position to express any conclusions on the entitlement or otherwise of D2 and D3 to reimbursement of that sum. That will be a matter for the District Judge in due course. However, it seems to me that the correct approach when considering each individual item or category of items is as follows:

    i) First, it must be considered the extent to which the item is an "expense" at all.

    ii) Second, it must be considered whether it was incurred by D2 and D3.

    iii) Finally, it is necessary to consider whether the expense was incurred by D2 and D3 while they were acting on behalf of the trust.

121. In my judgment, although this will ultimately be a matter for the District Judge, some of the items set out in D1's spreadsheet fail to meet the criteria set out in paragraphs 120.i) and 120.ii) above. By way of example only, a claim is made for the costs of "internal annual painting" of the Farmhouse. D1 confirmed in cross-examination that the figures under this heading included both sums paid to decorators and an allowance for D1's own time when she undertook painting herself. To the extent a figure relates to D1's own time, it is not an "expense" of D2 and D3 unless, of course, D2 or D3 paid her to do the painting. Rather, a claim for compensation for D1's time is a claim for remuneration (and not even remuneration of a trustee) that is precluded by s29 of the Trustee Act.

122. In *Price v Saundry and another* [2019] EWCA 2261 the Court of Appeal explained that the purpose s31(1) of the Trustee Act is "to ensure that a trustee is not out of pocket when acting in his capacity as trustee on behalf of the trust and that the trust is efficiently and properly administered". That articulation of purpose is, in my judgment, inconsistent with it being a pre-condition to reimbursement for D2 and D3 consciously to have thought about their status as trustees when incurring the expense in question.

123. I can quite accept that, when they were paying £260 for "storm repairs" consisting of the provision of labour, scaffolding and materials, D2 and D3 would not consciously have been thinking about C and D4's interest in the Farmhouse. However, it seems to me that expenditure on such repairs is perfectly capable of being indemnified under s31 on the basis that safeguarding and preserving trust property is a paradigm duty of a trustee with the results that, to the extent they paid for important repairs, they were acting on behalf of the trust. The District Judge may well consider that a similar analysis applies to other necessary repairs.

124. On a more general level, when considering the requirement of paragraph 120.iii), the District Judge will wish to ask the two questions identified in paragraph [24] of *Price v Saundry* namely (i) whether the expenses were properly incurred and (ii) whether they were incurred by D2 and D3 when acting on behalf of the trust. When considering point (ii) it will be necessary to take into account the nature of that trust. As I have explained, the legal and beneficial interests in the Farmhouse were separated so as to preclude C and D4 from dealing with it until the Judgment Sum was paid. Moreover, both D2 and D3 were aware since early 2018 that C and D4 were unlikely to be able to pay the Judgment Sum unless the Farmhouse was sold. Therefore, D2 and D3 could sensibly be regarded as "acting on behalf of trust" if they incurred expenditure of the kind that

would be necessary to achieve a sale of the Farmhouse. There was some suggestion in the evidence that the Farmhouse would need its own separate water supply to be saleable. If correct, that would suggest that the costs of achieving that separate water supply should be reimbursed pursuant to s31.

125. It may be that certain expenses perform a dual function. For example, maintaining a tidy garden may be important in enabling the Farmhouse to be presented well when it is marketed for sale. However, no doubt D3 and D1 obtained a personal benefit from a pleasant garden. In such circumstances, the District Judge may consider directing that a proportion of an expense only should be reimbursed.

126. It will be necessary to take care to ensure that there are no "double counts" as part of the process I have outlined above. For example, I note that D1's schedule includes £43,866.12 in respect of mortgage costs. The mortgage in question was taken out to fund improvements and therefore, it is to be assumed that the principal amount of the mortgage is reflected elsewhere in the spreadsheet when it was spent on the improvements in question. D1 accepted in cross examination that the figures she provided include both interest and principal on the mortgage. I consider that reimbursing D2 and D3 for the principal element of their mortgage repayments would involve a double count. I express no view on whether the interest element should be reimbursed or not.

127. I note that D1 has applied an 8% interest rate to every expense listed on the schedule. I find it difficult to see how D2 and D3 could recover this as an expense under s31 of the Trustee Act. I can quite see that D2 and D3 faced an opportunity cost by using their own funds to meet expenses on behalf of the trust since, by doing so, they were unable to deploy those funds elsewhere. I do not immediately see, however, that this opportunity cost constitutes an "expense" for the purposes of s31. D2 and D3 have not identified any basis other than s31 of the Trustee Act under which they are entitled to a payment of interest.

128. I see no need to make an order under s14 of TOLATA in respect of expenses that D2 and D3 have already incurred. The relevant question in relation to those expenses is whether they should be reimbursed or not. I see the sense of D4's suggestion that D2 and D3 be ordered under s14 of TOLATA to pay future outgoings and expenses while they continue to be in occupation of the Farmhouse. However, D4 also expressed an opposite concern, namely that if D2 and D3 were permitted to remain in occupation they would incur unreasonable expenses and seek to pass the cost on to C and D4. I have decided, therefore, to make no order under s14 of TOLATA at this stage. D3 will be living in the Farmhouse for a while yet and therefore will naturally need to pay ordinary outgoings and expenses. Neither D3 nor D1 have shown any reluctance to pay necessary outgoings associated with the Farmhouse to date. If they incur unreasonable costs they proceed at their own expense since they will not be reimbursed. C and D4 can apply in the future if they are concerned that D2 or D3 are not paying proper expenses associated with the Farmhouse.

Benefits accruing to D123 from their occupation

129. D123 have clearly obtained some benefit from their continued occupation of the Farmhouse. C and D4 seek what was described as an "occupation rent" reflecting this benefit. D123 argue by reference to the judgment of the Court of Appeal in *Ali v Khatib*

and others [2022] EWCA Civ 481 that something more, beyond mere occupation, needed to be shown to make it just and equitable for them to have to account for such an occupation rent.

130. I consider the reliance on *Ali v Khatib* to be misplaced. That was a case where multiple co-owners had a right to occupy, with one co-owner asserting that right to the exclusion of the others. This is not a case of that kind: D2 and D3 alone were entitled to occupy the Farmhouse and C and D4 were not. Nevertheless, D2 and D3 have some liability to C and D4 as a consequence of my finding of a breach of trust set out in paragraph 102..

131. In principle there appear to be a number of bases on which that liability could be determined. D2 and D3 could be required to account for an "occupation rent" that results in them giving up the benefit of their occupation of the Farmhouse since 26 November 2018. Alternatively, C and D4 could be compensated for loss that they have suffered as a consequence of the fact that the Farmhouse was not sold following C's request of 26 November 2018 (which could be calculated by reference to interest accruing on the Judgment Sum that could have been saved if the Farmhouse were sold earlier). I am prepared to hear further argument as to the basis of that liability at the Consequentials Hearing. The quantification of the liability will be a matter for the District Judge.

Benefits accruing to D2 and D3 from operating a business.

132. There is evidence that a bed and breakfast business is being operated from the Farmhouse. I am not in a position to decide the amount of profit that business has generated. To the extent that profits of the business belong to D2 and D3 they represent profits that have been earned by a trustee by using trust property. As such, D2 and D3 are obliged to account to C and D4 for any profits made.

Use of sale proceeds/accounting between C and D4

133. I need further submissions on how the sale proceeds should be applied, that take into account my conclusions in this judgment, before I can decide this matter. Suggestions that seem superficially attractive (for example that net sale proceeds after payment of expenses be paid into court pending the taking of a proper account) suffer from practical drawbacks. D2 and D3 will no doubt need to use their share of the proceeds of sale of the Farmhouse (and of the Properties) to purchase another property. Moreover, they are likely to need access to that cash as soon as the Farmhouse is sold since, from that moment, they will need to live somewhere else. Against that, C and D4 have a legitimate interest in ensuring that D123 do not receive "too much" if the process of taking an account will result in them incurring a liability to C and D4. These are not straightforward matters and have the capacity to resonate in the future. I hope that, in the light of this judgment, the parties will be able to agree a framework which I can fill in, to the extent disputes remain, at the Consequentials Hearing.

134. The possibility of an account between C and D4 was canvassed in case the entirety of the Judgment Sum plus interest was recovered from the proceeds of selling the Farmhouse leaving C to recover 40% of that sum from D4 (so that ultimately she has borne just 10% of it as set out in the Trial Order). However, at the trial all parties were agreed that, since C's obligation to pay the Judgment Sum plus interest is several only, only 10% of that amount can be recovered from the proceeds of sale of the Farmhouse.

Accordingly, the parties agree that no account between C and D4 will be needed because only 10% of the liability for the Judgment Sum plus interest can be taken out of C's entitlement to the proceeds of sale of the Farmhouse in the first place.

ISSUES IN RELATION TO THE SALE OF THE PROPERTIES

Issues overlapping with those relating to the Farmhouse

135. I consider that restrictions should be entered for the benefit of C and D4 for reasons similar to those set out in paragraph 105. above.

136. Issues surrounding the conduct of the sale, minimum sale price, whether the sale should be separately or as a single lot, use of proceeds and the need (if any) for an account between C and D4 are as set out in the previous section.

137. D123 indicated that they are in principle prepared to give vacant possession of the Properties. If that is agreed, I am content to make an order in those terms. However, as matters stand the Orders for Sale required C and D4 to give vacant possession to D123. If these sales are to be managed by a receiver, as the parties appear to agree, there may still be a benefit in D123 having some access to the Properties to facilitate viewings.

An account in relation to the Properties

138. D123, C and D4 agree on the following propositions of law that are set out in paragraphs 17 to 19 of *Silven Properties Ltd v Royal Bank of Scotland plc* [2003] EWCA Civ 1409:

    i) As mortgagees/equitable chargees in possession (whether by virtue of the Charging Orders and Orders for Sale or the BR Mortgage while it subsisted) D123 were free, in their own interests as well as those of C and D4, to investigate whether and how they could "unlock" the potential for an increase in value of the Properties (for example by applying for planning permission or undertaking works on the Properties).

    ii) D123 are entitled to charge C and D4 for the costs incurred in such an exercise provided they acted reasonably in incurring those costs and fairly balanced the costs of the exercise against the potential benefits.

    iii) When they exercised their power of sale in relation to Property 3, D123 were under a duty in equity to C and D4 to take all reasonable precautions to obtain "the fair" or "the true market" value of or the "proper price" for Property 3. If they fail in this duty, they can be required to account not just for what they actually received on the sale of Property 3 but for what they should have received.

139. I have concluded that D123 failed to discharge their duties set out in paragraph 138.iii) when Property 3 was sold since the true value of Property 3 at the time of the 2020 Transfer was £50,000, whereas the sale price was just £35,000. I reach that conclusion for the following reasons:

    i) As I have concluded in connection with the "transfer to self" issue, D5 was acting at the direction of D123 when he effected the 2020 Transfer.

ii) The Expert's conclusion is that Property 3 was worth £50,000 at the time of the 2020 Transfer.

iii) That is an opinion only. Conceptually, D123 could have explained why the Expert's conclusion was wrong or, even if it was right, why it was nevertheless reasonable for Property 3 to be sold for just £35,000. However, I have concluded from D1's evidence, as tested by Ms Briggs's skilful cross-examination, that D123 gave little real thought to the true value of Property 3 at the time. Rather, they performed a rough and ready estimate of value by reference to previous valuations of Property 1. They came up with an estimate of £35,000 that was acceptable to Mr Browne and Ms Wilson. However, since D123 did not market Property 3 separately there is no "market testing" of the price that I consider sufficient to displace the Expert's conclusion referred to in paragraph ii) above.

140. It follows that D123 are obliged to account to C and D4 for a £15,000 undervalue on the sale of Property 3.

141. D123 argue that, in addition to the category of expenses set out in paragraph 138., they are entitled to expenses as trustees, on the basis set out in s31 of the Trustee Act, because the Orders for Sale appointed them to convey the Properties pursuant to s50 of the Trustee Act 1925. I would need to hear further argument on that point to be satisfied that it is correct. I see scope for an opposing argument that the appointment under s50 did not constitute D123 as actual trustees, so as to engage the right to reimbursement of trustee expenses under s31 of the Trustee Act, but simply gave them the power to transfer good title to the Properties. If this point is pressed, I can consider it further at the Consequentials Hearing.

142. More generally, I have heard no argument on the extent to which D123 are entitled to recover expenses otherwise than on principles derived from *Silven Properties* (set out in paragraph 138.), although I note that the Orders for Sale permit D123 to apply proceeds of sale of the Properties in or towards discharging costs and expenses of effecting the sale.

143. D123 assert that, when they took possession of the Properties in April 2018, they were in such a poor condition, and subject to such onerous requirements under s215 of the Town and Country Planning Act 1990, that there was no prospect of either selling them, or realising any income from them, until substantial clearance works were undertaken. D4 disagrees, arguing that the s215 notices were not as extensive as D123 indicate and, indeed, that some of the issues identified in those notices were "beyond enforcement". D4 goes further, arguing that D123 should have generated some income from the Properties after acquiring possession of them and should therefore account to C and D4 for income that has been forgone. I am in no position to determine this dispute which will have to be determined by the District Judge as necessary. The District Judge will also have to consider the implications of the ineffective 2019 Transfer. Since D123 thought that they had sold the Properties to D5, they did not sell them to anyone else with the result that funds that could have discharged part of the C and D4's judgment debt have not been realised. Even though I have not accepted C and D4's arguments based on *Thornton v Court*, it seems equitable for some allowance to be made for this factor. The District Judge will need to weigh up this matter against an allowance to D123 for expenses on the Properties which appear, on their face, to have had a material effect on the Properties' value.

144. As she did with the Farmhouse, D1 prepared a schedule of expenses on the Properties that she asserts are liable to be reimbursed. The total of those expenses, including interest at the rate of 8%, came to £292,420.57. It seems clear to me that some of these expenses will be reimbursable pursuant to the principles I have identified above. As D4 accepts, D123 retain an entitlement to be reimbursed for expenses even though the 2019 Transfer was a "transfer to self". However, some are clearly not reimbursable. I see little prospect of D123 obtaining payment of the £45,000 annual sums claimed for "labour" which, as D1 confirmed in cross-examination, are round number figures computed by reference to a notional salary for D3. D123 have not said anything to contradict D4's assertion, based on *Leith v Irvine* (1833) 1 Mylne & Keene 277 that a mortgagee in possession is precluded from charging a mortgagor for his services in connection with enforcing the security. In my judgment, a charge computed by reference to the mortgagee's own time, unless specifically authorised by the mortgage deed, would fall outside the scope of reimbursable expenses described in *Silven Properties*.

145. In a similar vein, the principle set out in *Silven Properties* sets out a basis on which D123 can recover expenses that they incurred. It does not set out a general principle to the effect that D123 are entitled to claim the benefit of any increase in value of the Properties while they have been in possession of them.

146. D123 placed some reliance on Clause 4.1 and Clause 4.4 of the BR Mortgage as entitling them to recover expenses associated with the Properties from C and D4. I heard no argument on the scope of those clauses, but note that they can only avail D123 for the limited period of time from 14 December 2018 (when they acquired rights under the BR Mortgage) to March 2019 when the mortgage was discharged.

147. I have heard no argument on the extent of D123's obligations to account for income received from the Properties (for example some letting income said to have been received). C said in her closing submissions that it was common ground that D123 had to account to C and D4 for any such income and, since D123 did not say otherwise in their closings, I assume that to be the case.

CONCLUSION

148. During argument, D123, C and D4 accused each other of raising issues that had not been pleaded. D123 said that C and D4's claim for an account in respect of "occupation rent" on the Farmhouse was not pleaded and nor was their assertion that interest on the Judgment Sum should cease to accrue on the basis of *Thornton v Court*. For their part, C and D4 argued that D123 had not pleaded any claim for reinstatement of the BR Mortgage.

149. It is true that the issue of "occupation rent" and *Thornton v Court* are not pleaded. However, in the PTR Order, the parties were required to exchange submissions on various matters. In those submissions, C and D4 raised the question of an occupation rent and C also alluded, in general terms, to an argument that interest on the Judgment Sum should cease to accrue from the date of the 2019 Transfer. Therefore, even though not "pleaded" in the strict sense, I consider that D123 were on notice of these arguments and so I have considered them.

150. I agree with C and D4 that D123 have not pleaded a claim to reinstate the BR Mortgage. For that reason, I have not dealt with such a claim in this judgment although I will consider dealing with it at the Consequentials Hearing if D123 amend pleadings to claim such relief. D123 have the court's permission to make such an amendment if they wish, with any amendment Defence and Counterclaim to be served within 14 days of the hand-down of this judgment.

151. My clerk will be in touch with the parties to arrange the Consequentials Hearing. I close with something that I hope all parties will reflect on. This dispute has used up a great deal of the parties' financial and emotional resources. It has resulted in a rift between D1 and D5, sister and brother, the destruction of a friendship between C and D1 to say nothing of its effect on other parties. I would urge the parties to adopt a more realistic and less confrontational attitude to each other going forward. Specifically, both sides' approaches to the question of accounting for expenses that D123 incurred in connection with the Farmhouse and Properties are unrealistic: C and D4 are quite wrong to assert that D123 should get nothing; D123's schedule of reimbursable expenses is clearly excessive.

152. With compromise and realism on all sides, the outstanding issues identified in this judgment could either be agreed or substantially agreed. That might enable the parties to retain something more of the value of the Farmhouse and the Properties and might go some way to counteracting some of the evident bitterness that the dispute has generated thus far.