Neutral Citation Number: [2024] EWCA Civ 1323

Case No: CA-2023-000377
CA-2023-001911

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD) and PROPERTY, TRUSTS AND PROBATE LIST
Mrs Justice Bacon [2023] EWHC 59 (Ch)
PT-2022-000752
CH-2022-000075

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/11/2024

Before:

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE ZACAROLI

- -

Between:	
IFTIKHAR MALIK	**Appellant/ Respondent**
- and –	
VAQAR MALIK	**Respondent/ Appellant**
And Between:	
(1) VAQAR MALIK **(2) FAHIM MALIK** **(3) RAHIM MALIK**	**Appellants/ Respondents**
- and –	
IFTIKHAR MALIK	**Respondent/ Appellant**

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Stephen Jourdan KC (instructed by **Spencer West LLP**) for the **Appellant in CA-2023-000377 and the First to Third Respondents in CA-2023-000377**
Thomas Munby KC and James Kinman (instructed by **Stephenson Harwood LLP**) for the **Respondent in CA-2023-001911 and the Appellant in CA-2023-01911**

Hearing dates: 16 and 17 October 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on Monday, 4 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives
(see eg https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html).

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Lord Justice Zacaroli:

Introduction

1. This is an appeal from the order of Bacon J dated 2 February 2023, itself made on appeal from the order of HHJ Gerald in the County Court at Central London, dated 14 March 2022.

2. The appeal concerns a dispute between two brothers, Iftikhar Malik ("Iftikhar") and Vaqar Malik ("Vaqar") over the ownership of a two-bedroom flat at 7 South Lodge, 245 Knightsbridge, London.

3. The flat was purchased by Iftikhar in 1978 on a 150-year lease (extended, in 1984, to 999 years). HHJ Gerald concluded that it was purchased by him as the sole legal and beneficial owner, and there is no appeal against that finding. The essential remaining dispute is whether Vaqar can establish an interest in the flat under the doctrine of adverse possession.

4. That simple statement, however, ignores the complexities to which the dispute's long history has given rise. The history is set out in greater detail in the reserved judgments of HHJ Gerald and Bacon J ([2023] EWHC 59 (Ch)). I summarise the key points below.

Summary of the background

5. At the time of the purchase of the flat, Iftikhar was living in Pakistan. Vaqar, who was then living in London, assisted with the completion of the purchase, and went on to live at the flat from 1979 to 1981 and for a further period in 1982. Thereafter the flat was used by the brothers and members of their family when visiting London. In 1987 there was a major breakdown in family relations. Vaqar took up occupation of the flat, and refused access to Iftikhar and other family members. Vaqar has lived there since then.

6. On 3 July 1987, Iftikhar issued proceedings against Vaqar (and his wife, Saira) in the High Court seeking possession of the flat. I will refer to this as the "1987 Action". On 28 July 1987, Vaqar issued proceedings against his father ("Bilal"), his mother and his three brothers (including Iftikhar) claiming – among other things – that there was a family partnership, that the flat was partnership property and that he was entitled to occupy it on that basis.

7. Neither of those actions was pursued at the time. Iftikhar's action was stayed in December 1987 as a result of his failure to pay £25,000 into court as security for costs, pursuant to an order of Master Munrow.

8. From 1988 to 1991, the parties agreed not to pursue the actions pending resolution of related claims which Vaqar had issued in Pakistan.

9. There followed protracted attempts within the family to resolve the dispute. In late 1991, 1992 or 1993, an agreement was reached to the effect that Bilal would seek to resolve the disputes in the family. I will refer to this as the "1992 Agreement". The precise details of the 1992 Agreement, including when and where it was made, are disputed. It was common ground that it was agreed that the existing proceedings

would not be pursued, at least while Bilal sought to resolve the disputes. Vaqar contends, but Iftikhar disagrees, that it was agreed that the existing proceedings were to be withdrawn.

10. On 26 April 1999 the CPR came into force. By §19 of PD51A, if any existing proceedings did not come before a court between 26 April 1999 and 25 April 2000 they would be stayed, although any party could apply to lift that stay. Neither set of proceedings commenced in 1987 was brought before a court within that deadline.

11. The attempts to resolve the dispute within the family continued for many years. Vaqar contended, in evidence served in 2011, that the dispute had been resolved in his favour by Bilal in 2004. Iftikhar did not accept that. In the course of his judgment on the abuse of process issue, HHJ Gerald rejected Vaqar's case on this point. He concluded that the efforts to resolve the dispute ultimately broke down sometime around 2010 or 2011. At that point, Iftikhar paid the sum of £25,000 pursuant to the order of Master Munrow from December 1987, and applied to lift the stay of the 1987 Action.

12. That application was heard in February 2012 by John Jarvis QC sitting as a deputy High Court judge ("Mr Jarvis QC"). By this time, Vaqar had been made bankrupt on his own petition in April 2010 and any interest he held in the flat vested in his trustee in bankruptcy. At the hearing, Vaqar's trustee in bankruptcy appeared by counsel to oppose the application. Vaqar was present at the hearing. The exchanges between him and Mr Jarvis QC are relevant to a critical aspect of this appeal: specifically the extent to which, and the terms in which, Vaqar told Mr Jarvis QC that he was not making, and would not make, a claim in adverse possession. I return to these below. Mr Jarvis QC refused to lift the stay, in part because, in light of what Vaqar said about not bringing an adverse possession claim, he concluded that Iftikhar could bring fresh possession proceedings without prejudice to himself.

13. No further steps were taken for a further five years. In 2017, the freeholder of the flat brought proceedings against Iftikhar, Vaqar and two of Vaqar's sons who were living with him at the flat, Fahim and Rahim, for breach of covenant to allow access to the flat, following a leak from the flat into the premises below. Although Fahim and Rahim are parties to the action, their interests are fully aligned with those of Vaqar. They have not taken any part in the appeal.

14. By this time, Vaqar had been discharged from bankruptcy, and any interest he had in the flat had re-vested in him: see s.283A of the Insolvency Act 1986.

15. Vaqar filed a defence in which he contended that Iftikhar held the flat on trust for him absolutely. On 17 April 2018, Iftikhar issued a Part 20 claim against Vaqar (and his two sons), seeking possession of the flat, and mesne profits. Vaqar responded by re-asserting his claim that Iftikhar held the flat on trust for him and, in the alternative, asserting that he had acquired title through adverse possession by reason of his occupation of the flat since 1987.

16. Iftikhar, in addition to denying that he held the flat on trust for Vaqar, resisted the claim for adverse possession on the basis that Vaqar was estopped from making that claim because he had disavowed making any such claim before Mr Jarvis QC in 2012. In the alternative, he pleaded that to the extent that his possession claim failed by

reason of the law of adverse possession, that constituted a material change in circumstances which made it appropriate to lift the stay on the 1987 Action. He also denied that there was any claim for adverse possession, in circumstances where Vaqar's own position had been that he occupied the flat under licence from Bilal, or the family, or the family partnership.

17. I will refer to the possession proceedings brought by Iftikhar in the context of the proceedings commenced by the freeholder in 2017 as the "2017 Action".

18. By the time of the trial of the 2017 Action, Iftikhar also denied that there was a valid claim for adverse possession because Vaqar had asked him to pay, throughout, the service charges under the lease of the flat.

19. The trial commenced in January 2020, but was adjourned, and then further delayed because of the pandemic, resuming in March 2022. In his judgment, in addition to finding that Iftikhar had acquired the flat as the sole legal and beneficial owner, HHJ Gerald concluded that it was an abuse of process for Vaqar to advance a claim in adverse possession, because he had disavowed making any such claim before Mr Jarvis QC in 2012.

20. It was therefore unnecessary to consider the substance of the claim in adverse possession, but the judge gave brief reasons for his conclusion that the claim was not made out because Vaqar had requested Iftikhar to pay service charges on the flat. As to Iftikhar's contention that Vaqar could not establish adverse possession because he had claimed to occupy as licensee of Bilal, HHJ Gerald found that the parties had *not* agreed in 1992 that Bilal was the owner of the flat, from which it followed that he could not accept that Vaqar thought that he occupied as Bilal's licensee.

21. The judge granted possession of the flat to Iftikhar, and Vaqar was ordered to pay mesne profits for his unlawful occupation of the flat for the six years prior to the issue of the Part 20 claim.

22. Vaqar appealed HHJ Gerald's decisions: (1) that it was an abuse of process to advance the claim in adverse possession; and (2) that Vaqar did not have the necessary intent to establish adverse possession.

23. Iftikhar filed a respondent's notice seeking to uphold the judge's conclusion that Vaqar lacked such intent on three additional grounds: (1) from 1992 until some time between 2007 or 2010 Vaqar had been permitted (by Iftikhar) to occupy the flat as part of the 1992 Agreement, that Bilal would attempt to resolve the dispute between his sons, and accordingly Vaqar could not establish adverse possession for a 12-year period; (2) alternatively, Vaqar occupied the flat during that time on the basis of a permission given to him by Bilal; and (3) Vaqar did not have the requisite intent because his intention was to occupy the flat on the basis of the permission given to him under the 1992 Agreement.

24. Iftikhar also filed an application to lift the stay on the 1987 Action and for summary judgment in those proceedings, on the basis that it had been finally determined in the 2017 Action that Iftikhar was the true owner of the flat.

25. Bacon J allowed Vaqar's appeal, but granted Iftikhar's application, concluding (in brief summary) as follows:

    (1) Vaqar was not precluded, on the basis of abuse of process, from advancing an adverse possession defence to the 2017 Action;

    (2) The fact that Vaqar had asked Iftikhar to pay service charges on the flat did not demonstrate a lack of intention to possess the flat;

    (3) Iftikhar could not raise for the first time on appeal the contention that he had consented to Vaqar's occupation. Not only had the point not been pleaded, it was contrary to the position of both parties at trial and, had it been raised at trial, it would have required new evidence and would have resulted in a different approach to the evidence being taken at trial;

    (4) For similar reasons, Iftikhar could not raise for the first time on appeal the contention that Vaqar had occupied the flat as the licensee of Bilal (as opposed to the contention that he purported to do so);

    (5) Although Iftikhar's contention that Vaqar intended to occupy as Bilal's licensee was one that he was entitled to take on appeal, it failed on the basis of the facts found by the judge;

    (6) Notwithstanding Iftikhar's serious and substantial delay in applying to lift the stay on the 1987 Action, it was appropriate in all the circumstances to lift that stay; and

    (7) There being no defence to Iftikhar's claim for possession in the 1987 Action, Iftikhar was entitled to summary judgment.

26. Vaqar (and Fahim and Rahim) were ordered to pay 50% of Iftikhar's costs of the 2017 Action. Iftikhar was ordered to pay Vaqar's (and Fahim's and Rahim's) costs of the appeal against HHJ Gerald's order in the 2017 Action. Vaqar was ordered to pay Iftikhar's costs of the application to lift the stay on the 2017 Action.

The grounds of appeal to this Court

27. Vaqar appeals, with the permission of Snowden LJ, granted on 28 June 2023, against the order lifting the stay on the 1987 Action, and against Bacon J's order in respect of the costs of Iftikhar's application to lift that stay.

28. Iftikhar appeals, also with the permission of Snowden LJ, granted on 15 January 2024, against those parts of Bacon J's order allowing the appeal against HHJ Gerald's order. He contends that Bacon J erred in: (1) reversing HHJ Gerald's finding that it was an abuse of process for Vaqar to advance an adverse possession claim; (2) reversing HHJ Gerald's finding that the fact that Vaqar had requested Iftikhar to pay the service charges meant that he had not manifested the necessary intention so as to acquire title by adverse possession; and in (3) finding that Vaqar had manifested the necessary possessory intention so as to acquire title by adverse possession, notwithstanding his representations that he was occupying the property pursuant to a licence.

29. If those grounds fail, then Iftikhar contends that he is entitled to various remedies that were not considered by either Bacon J or HHJ Gerald (because on their respective findings they did not arise), but these are not matters that we are asked to determine.

30. By a respondent's notice dated 23 February 2024, Vaqar contends that HHJ Gerald's decision on the abuse of process point was flawed for one or more of four reasons, in addition to that on which Bacon J based her decision: (1) Vaqar's statements to Mr Jarvis QC did not secure a result which otherwise might not have been achieved; (2) HHJ Gerald based his decision on a highly critical assessment of Vaqar's character, which was not open to him; (3) HHJ Gerald failed to take into account the serious consequences of his decision on the abuse point; and (4) HHJ Gerald's decision was outside the ambit within which reasonable disagreement is possible.

Summary of conclusions

31. For the reasons which follow, I have concluded that the appeal against Bacon J's decision on the question of abuse of process should be allowed. If the other members of the court agree, then it is unnecessary to consider whether, if he were permitted to advance it, Vaqar would be able to establish a claim to the flat by adverse possession. It is also unnecessary to consider the appeal against Bacon J's decision to lift the stay on the 1987 Action: if Iftikhar succeeds on his appeal in relation to the 2017 Action, there is no defence to his claim for possession of the flat, and thus no point in considering whether he might have been able to achieve the same result through lifting the stay on the 1987 Action.

Abuse of process/estoppel by conduct

The law

32. Before Bacon J, it was common ground that the question whether a person is precluded from advancing a position in one case, where they have advanced the opposite in an earlier case, is to be answered by reference to the principles set out by Sir Christopher Floyd in *LA Micro Group (UK) Ltd v LA Micro Group Inc* [2021] EWCA Civ 1429; [2022] 1 WLR 336, at §19-26. As he concluded at §26:

> "…this form of estoppel by conduct is one which is approached by means of a broad, merits-based assessment, and is not constrained by strict rules (as, for example, issue estoppel). The matters to consider include, but are not limited to, those enumerated by Ginsburg J in the *New Hampshire* case. It is material to ask the question whether it is apparent that the earlier decision was obtained on the footing of, or because of, the stance taken by the party in the earlier proceedings. Absent that factor, whilst the change of position may affect the credibility of the party or the witness concerned, there will not be an impression that one or other court was misled into giving its decision, so that the administration of justice risks being brought into disrepute."

33. The *New Hampshire* case there referred to was *New Hampshire v Maine* 532 US 742, and the principles enumerated in it were:

> "First, a party's later position must be clearly inconsistent with its earlier position. Secondly, the court may enquire whether the party has succeeded in persuading a court to accept the party's earlier position, so that judicial acceptance of an inconsistent position in later proceedings would create the perception that either the first or the second court was misled. Thirdly, the court may ask whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

34. Mr Jourdan KC (who appeared for Vaqar) maintained that the issue is to be determined by reference to those principles. Mr Munby KC (who appeared with Mr Kinman for Iftikhar) relied before us on a number of earlier cases, which had not been cited in *LA Micro*, in which the question was answered, variously, by reference to the principle that a person cannot approbate and reprobate (e.g. *Express Newspapers Plc v News (UK) Ltd* [1990] 1 WLR 1320), or on the basis that it is a species of abuse of process, where adopting inconsistent positions was said not necessarily to be an abuse, absent some aggravating factor (e.g. *Bradford & Bingley Building Society v Seddon* [1999] 1 WLR 1482), or on each of those grounds, and estoppel (*Twinsectra Limited v Lloyds Bank plc* [2018] EWHC 672 (Ch)).

35. I do not think it necessary to consider those cases in detail. Given the variations in the circumstances in which the point has arisen it is unsurprising that the courts have expressed the applicable principles in different ways, and emphasised particular elements of a party's behaviour on different occasions. Nor do I think it likely that the result in the earlier cases would have been any different if approached on the basis of the broad-based approach adopted in *LA Micro*.

36. Ultimately, the label is unimportant. Although Sir Christopher Floyd did not use the phrase, the form of estoppel by conduct in issue can readily be seen as a species of abuse of process. Moreover, as Mr Jourdan pointed out, it is not suggested that the Court of Appeal's decision in *LA Micro* is not a binding authority on the point. Accordingly, I propose to apply the test, which it was agreed before Bacon J was the appropriate test, namely that set out in *LA Micro*.

37. Where the decision at first instance consists of an evaluative judgment based on the balancing of factors, then the approach to be adopted by an appeal court is that set out by Thomas LJ in *Aldi Stores Ltd v WAP Group Plc* [2007] EWCA Civ 1260; [2008] 1 WLR 749 (a case concerned with the question whether it was an abuse of process for a party to bring a claim that could and should have been brought in an earlier action), at §16:

> "The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take

> account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him."

38. Mr Jourdan submitted that HHJ Gerald reached his decision without balancing many factors, and that in a case which involves no great balancing of factors the appeal court is not constrained in the same way, but must make its own assessment. He cited in support the decision of this court in *Pickthall v Hill Dickinson* [2009] EWCA Civ 543, per Mann J at §13-14. In that case, the claimant brought proceedings in the knowledge that the cause of action (in respect of which the limitation period was about to expire) was not vested in him, but in the hope that he would acquire the cause of action by assignment. That involved a simple question: is it an abuse of process for a party to start an action, for the purposes of defeating a limitation defence, when that party knows it has no right to the cause of action? As is clear from the description of the applicable test (in *LA Micro*), as a broad, merits-based assessment, it necessarily involves a balancing exercise that is much broader in nature than that involved in *Pickthall*. Accordingly, I consider that the approach stated by Thomas LJ in *Aldi Stores* applies in this case.

The judgment of HHJ Gerald on the issue of abuse in more detail

39. In order to understand the issue that arises under this head, it is necessary to describe in greater detail both the relevant exchanges before Mr Jarvis QC and the findings made by HHJ Gerald.

40. At §93 of his judgment, HHJ Gerald set out the "critical exchange" between Vaqar and Mr Jarvis QC, which is worth repeating in full here:

> "Mr Malik: ... After 9 January 1992 [the agreement referred to above] nothing happens. Nothing happens. I think we made a mistake making this adverse possession application. We should not have listened to our solicitors and barristers. We were feeling insecure, you know. Saira and I said, "Okay let us see if we can secure our home". The reality is you cannot change facts. This is family property. It is brought with family funds. Everyone has agreed the whole thing belongs to the father because has been distributed.
>
> The Deputy Judge: Just so I understand the position because one of the elements is obviously a concern to this difficulty that you would want to assert a claim, or the trustee would but it would depend on what you say this claim, that you are saying there is not an adverse possession claim.
>
> Mr Malik: I want to be truthful and straightforward with you. How can you make an adverse possession claim on a property that you partly own?
>
> The Deputy Judge: You cannot.
>
> Mr Malik: Exactly. I mean, [in 1987] the property is partly owned by me. It is partly owned by the partnership. We have

> all decided [in 1992] everything belongs to the father so that he can settle it. I am saying that we have given up our rights in favour of the father. We do not have any more rights and that is the basis on which I tell the trustee that they are not entitled. They do not have an interest in that property. It is not because I am manipulating the situation. I cannot manipulate documents which are made in 1987.
>
> The Deputy Judge: Mr Malik this is a different version now you are telling me because what I understood was certainly that the trustee was saying on the basis of your evidence that your father had actually made a ruling in your favour and that is indeed the document that he claims is forged. So the property was yours entirely now?
>
> Mr Malik: No…"

41. Bacon J referred to two further passages in the transcript. The first related to the position of Vaqar's wife, Saira:

> "MR MALIK: … what Saira would submit is that it would be then therefore more fair and equitable if a fresh claim was filed.
>
> THE DEPUTY JUDGE: Why?
>
> MR MALIK: Because she is not certain, and we do not have at the moment access to legal advice. She is not certain as to what her then defences could be. Her defence at that time when these actions were filed is there, but now the situation has changed.
>
> …
>
> THE DEPUTY JUDGE: Why is she going to be in a better position to deal with a new claim? That is what I do not understand.
>
> MR MALIK: Well, she would be in a better position to deal with a new claim because if it is still claimed that Iftikhar is the owner and that he bought the funds from his personal, you know, then she would obviously, I suppose, have rights of adverse possession.
>
> THE DEPUTY JUDGE: But what will be claimed is we know what your brother Iftikhar's case is. He says he is the owner; he is a registered owner and he is entitled to possession. … It will then be up to your wife to plead her defence to it … She has not pleaded defence yet. So it will be exactly the same as it would be to the present action.
>
> MR MALIK: Yes; but there would be a slight difference, would there not? That difference would be (and I am not suggesting that she is) that because she was not a partner in the

> business, then it may well be possible that she then has a defence regarding adverse [possession], for the simple reason that … she has been in occupation for that many years and Iftikhar has done nothing about the claim that he filed earlier on. …
>
> …
>
> THE DEPUTY JUDGE: You cannot claim adverse possession when you have that sort of promise. You do not get title from that; you have been given a right to live there on certain terms.
>
> MR MALIK: Yes, but that would only apply if the file were to concede – and there is no bar in English law which says that the father had the authority to decide because --
>
> THE DEPUTY JUDGE: Her evidence is that Iftikhar agreed as well.
>
> MR MALIK: Yes. But then Ms Tipples says that even if they all did agree this is property law and this is not enlightening(?) and, therefore, it should not apply."

42. The second passage followed immediately after the judge asked Vaqar to confirm the basis on which he claimed to be entitled to the flat:

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

43. As Bacon J noted, some caution is required in reading the transcript in light of the fact that certain passages are marked "inaudible". Mr Jarvis QC's understanding of what he was being told is apparent, however, from §130 of his judgment:

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

> so I discount that as a prejudice. It seems to me that it is, as I have indicated, far cleaner for a new action to be started."

44. At §80 of his judgment, HHJ Gerald said that in considering Vaqar's statements to Mr Jarvis QC, it was necessary to have regard to his evidence as a whole. He said this showed "that he is adept at saying one thing but meaning another, or obfuscating sufficiently to satisfy the questioner but to avoid giving simple, straightforward answers". HHJ Gerald regarded statements made by Vaqar to his trustee in bankruptcy, one year before the hearing before Mr Jarvis QC, as an important part of the context. In a letter dated 18 April 2011, Vaqar had emphatically told his trustee in bankruptcy that he had no interest in the flat because it was owned by his father.

45. In a further letter to his trustee dated 25 May 2011, Vaqar had told his trustee, as regards an application to the Land Registry he had briefly pursued in 2000 to claim title to the flat by adverse possession, that it was not to protect an actual claim in adverse possession, but was to force Iftikhar to comply with the decision Vaqar alleged that their father had made to grant Vaqar the right to live in the flat (see §90 of HHJ Gerald's judgment).

46. Before HHJ Gerald, however, as noted at §91 of his judgment, Vaqar was *now* saying that, notwithstanding what he had said to his trustee in bankruptcy, he did believe, in 2011, that he was in possession of the flat as of right. That was important for two reasons. First, because in 2011 his trustee in bankruptcy alone would have been entitled to advance a claim to an interest in the flat on the basis of Vaqar's adverse possession, and the fruits of such a claim would have gone to Vaqar's creditors. It was clearly in Vaqar's interests (if he did believe that he had an interest in the flat) to tell his trustee in bankruptcy otherwise. Second, it was important because – as HHJ Gerald noted at §98 of his judgment – any claim that the trustee in bankruptcy might seek to make to the flat would be based on evidence provided by Vaqar.

47. As to what happened before Mr Jarvis QC, HHJ Gerald made the following findings of fact, having considered all of the evidence, including that given before him in person by Vaqar:

(1) Vaqar had read, and understood the full import, of the skeleton argument filed by Iftikhar's counsel in 2012, in which it was made clear that if the stay was lifted on the 1987 Action, Vaqar would have no adverse possession defence, but if the stay was not lifted, Vaqar could assert such a defence and Iftikhar would therefore be substantially prejudiced (see §92).

(2) As to what Vaqar intended to convey to Mr Jarvis QC, he found (at §94) as follows:

> "In my judgment, at the time of this exchange, Vaqar knew and well-understood that in making his application to lift the stays Iftikhar was concerned that he would be prejudiced because he would have to issue new proceedings in which an adverse possession claim could be run right back from 1987, which could not be done if the stay was lifted and that the reason he told Mr Jarvis QC that the adverse possession proceedings had been a mistake was to hinder Iftikhar's efforts to get the stays

> lifted. Contrary to what Mr Pettican submitted, it is of no materiality that Mr Jarvis QC did not ask Vaqar if adverse possession would be pursued if any claim to beneficial interest failed, because that he well understood and was self-evident to Vaqar, being the very reason for the exchange. Neither is it of any materiality that Vaqar was a lay person not formally representing anyone's interest: he was there and volunteered this information to the Deputy Judge to close down this potentially damaging objection. Before me, during cross-examination, he has demonstrated an ability to hijack counsel's cross-examination to deflect from the question in hand, putting forward his own agenda, so demonstrating his intelligence, sophistication and ability to manipulate and control scenarios to advance his own agenda and case."

(3) At §95, he rejected Vaqar's evidence that he was asking Mr Jarvis QC for advice. When properly understood and read with the letters Vaqar had provided to his trustee in bankruptcy:

> "it was merely part of an exchange in which he knew and understood full well that the adverse possession claim was an alternative to his partnership claim and also to Iftikhar's claim against him, and the reason why there was the exchange there was with the Deputy Judge was because he understood that a factor being taken into account in the decision to lift the stay was the issue of adverse possession as an alternative to the existing claims, and if the stay was lifted that would be damaging if not fatal to his ability to claim adverse possession."

(4) At §98 he concluded that "the above reveals a masterpiece of dissembling and manipulation. Having said his half-truth and denial of adverse possession to the trustee, he repeated his denial of adverse possession to the Deputy Judge", noting that Mr Jarvis QC properly recognised that the decision to pursue such a claim lay at that time with the trustee. He then concluded at §99:

> "Having already done his best to close off the trustee thereby doing his best to keep these possible claims out of the trustee's line of vision, Vaqar accepting in cross-examination that he knew that any rights he had vested in the trustee, he repeated the dissembling and mischaracterisation of what had been agreed in 1992 to the Deputy Judge and effectively repeated what he had said about adverse possession, that it was a mistake. As he said in cross-examination, he has fought "tooth and nail" to keep the flat, and these exchanges were part of that campaign or strategy, and that is precisely what he was doing here, to coin an old phrase, "by hook or by crook"."

(5) At §100, he concluded that "taking all these factors into account, in my judgment, it is an abuse of process and unfair for Vaqar to now seek to advance a case for adverse possession."

Bacon J's conclusion on the abuse of process point

48. At §51 of her judgment, Bacon J noted that Mr Jourdan, on behalf of Vaqar, did not take issue with the judge's findings "as to the credibility and character of Vaqar, or his related findings as to Vaqar's understanding of what had been said at the 2012 hearing."

49. Before us, Mr Jourdan submitted that he had not accepted that HHJ Gerald was entitled to find that Vaqar had said what he did about adverse possession with the subjective purpose of persuading Mr Jarvis QC to lift the stay. That, he submitted, made no sense in light of the fact that Vaqar went on to suggest that his wife, Saira, *could* run a case in adverse possession. As Mr Jourdan candidly accepted, however, that was not a finding of fact which was appealed to the High Court. The point taken on appeal was that what was said to Mr Jarvis QC as a whole did not amount to an objectively unequivocal statement that Vaqar would not assert an adverse possession claim in any new proceedings. The finding as to Vaqar's subjective intention was not appealed, because it was his contention that that was irrelevant.

50. In this court, therefore, there can be no challenge to HHJ Gerald's conclusion that Vaqar intended to convey to Mr Jarvis QC that he would not bring an adverse possession claim in any new proceedings, and that he did so for the purpose of persuading the judge not to lift the stay of the 1987 Action. In any event, having reviewed the evidence relied on by HHJ Gerald, and his reasoning in arriving at that conclusion, it is one which I consider he was entitled to reach.

51. Bacon J also concluded that it is apparent from Mr Jarvis QC's judgment (in particular at §130) that he understood that Vaqar (and his wife) were not and would not be asserting an adverse possession claim in any new proceedings. That is clearly correct. Although he did not say in terms that he understood Vaqar to have said that he *would not bring* a claim for adverse possession, that is the only sensible reading of his judgment, given that he was considering the potential prejudice to Iftikhar *in the event that* he was required to bring a new claim for possession.

52. Bacon J nevertheless held that Vaqar was not precluded on the grounds of abuse of process from bringing his claim for adverse possession, because it was not possible to identify, from his exchanges with Mr Jarvis QC in 2012, a clear representation by Vaqar that neither he nor his wife would in future proceedings advance any defence of adverse possession. HHJ Gerald was therefore wrong to find that Vaqar had disavowed an intention to claim adverse possession in any new proceedings, so as to make it an abuse of process for the point to be advanced as a defence to the 2017 Action.

53. In reaching that conclusion, Bacon J accepted Mr Jourdan's submission that in order to engage the principle, by analogy with the requirements of a promissory estoppel, there must be a clear and unequivocal representation of the relevant party's position, which a reasonable person would understand was intended to be relied on by the court, and which was indeed relied on by the court. She noted (at §44) that Mr Munby, while disputing the analogy with promissory estoppel, ultimately accepted that it must be shown that there had been a clear statement of position, viewed objectively, and that the court did rely on that position. She rejected his contention

that it was relevant to look at the subjective intent of the person making the representation.

54. Bacon J concluded that the clarity of Vaqar's statements at the hearing was a matter to be determined by reference to the material before the court at that hearing and the transcript of what was said. She was in as good a position to undertake that exercise as HHJ Gerald.

Discussion and conclusions on this ground of appeal

55. Mr Munby submitted that Bacon J was wrong to conclude that it is necessary to establish, objectively, whether what Vaqar said at the 2012 hearing amounted to a clear and unambiguous representation that he would not advance an adverse possession claim in any new proceedings. That, he said, is an overly formalistic approach in an area of law which, according to the Court of Appeal in *LA Micro*, is "not to be constrained by strict rules." While he accepted it is necessary to show that there is a clear inconsistency between a party's prior position and the position they now take, it is a mistake to think that this requires the previous position to have been the subject of an objectively clear and unambiguous statement at the time.

56. He further submitted that HHJ Gerald had in any event concluded that Vaqar had made an unequivocal statement to Mr Jarvis QC, and it was impermissible for Bacon J to interfere with that finding.

57. Mr Munby said that he did not believe he had made the concession recorded by the judge at §44 of her judgment. Alternatively, he sought permission to withdraw any such concession he made below.

58. He acknowledged that no point had been taken in relation to paragraph §44 of the judgment upon its receipt in draft. For his part, Mr Jourdan did not suggest, in his skeleton argument for this appeal, that Iftikhar could not run this point because of a concession below. At the hearing, Mr Jourdan fairly accepted that unless he was able to point to some prejudice, it was open to this Court to allow Mr Munby to withdraw that concession, and that he could not point to any such prejudice. That is evident from the fact that the point has been fully argued, in writing and orally at the appeal.

59. It is accordingly open to us to decide this point, irrespective of whether Mr Munby did in fact make the concession which the judge understood him to have made.

60. Mr Jourdan submitted that the need for a clear statement of Vaqar's position arises from the requirement (set out in *LA Micro*) that a party's later position must be "clearly inconsistent" with its earlier position. That is bolstered by the close analogy with promissory estoppel – another form of estoppel which precludes someone from relying on a right because of something they have said. Mr Jourdan cited Snell's Equity (34th ed., at §12-04) where the first requirement for establishing a promissory estoppel is stated as: "The promise, or encouragement must be "clear and unequivocal" in the sense that, objectively understood, it makes apparent to B that A's right will not be enforced. If A's conduct is instead capable of a number of different reasonable interpretations, at least one of which is inconsistent with A's right not being enforced, no promissory estoppel may arise."

61. I do not accept this submission. As Mr Munby submitted, it was made clear in *LA Micro* that this form of estoppel by conduct is approached by means of a broad, merits-based assessment, and is not constrained by strict rules.

62. The key questions in this case are whether Vaqar has adopted clearly inconsistent positions, and whether Mr Jarvis QC on the prior occasion acted on the footing of the position that Vaqar then adopted.

63. As a matter of principle, there is no reason to impose a further requirement, that Vaqar expressed his earlier position by way of an objectively unequivocal statement. If a party sets out to persuade the court that it holds a certain position, the court is so persuaded, and the court acts on the footing that the party holds that position, then that creates the risks of unfairness and of bringing the administration of justice into disrepute which underpin the estoppel by conduct principle, if that party subsequently adopts the opposite position. This is sufficient to demonstrate "clearly inconsistent" positions, without the need for an objectively unequivocal statement on the earlier occasion.

64. Accordingly, I consider that Bacon J's conclusion on this point, albeit understandable in light of the concession she understood to have been made, was wrong.

65. In light of this conclusion, it is unnecessary to consider Mr Munby's alternative submission, that HHJ Gerald had concluded that Vaqar had made a clear statement, and that it was not open to Bacon J to interfere with that conclusion of fact. Subject to the points made in Vaqar's respondent's notice, to which I now turn, HHJ Gerald was entitled to conclude that Vaqar had adopted clearly inconsistent positions, based on his finding that he intended to convey, and did convey, to Mr Jarvis QC that he would not make a claim in adverse possession as part of his strategy to dissuade the court on that occasion from lifting the stay on the 1987 Action.

Did Vaqar's statements secure a result which otherwise might not have been achieved?

66. HHJ Gerald found (at §100) that Vaqar's statements "brought about or strongly influenced" Mr Jarvis QC's decision.

67. Bacon J held (at §58) that Mr Jarvis QC's understanding of Vaqar's position was "undoubtedly a material reason for his decision", and this was sufficient to engage the principle. She rejected the contention that the statement must be a "but for" cause of the decision, noting that according to the Court of Appeal in *LA Micro* it is sufficient that the position taken by the relevant party was "a reason" for the decision. She noted (at §56) that "where the decision is a balancing exercise reached on the basis of an assessment of a number of different factors, it may be impossible to isolate any one of those factors as playing a decisive role. In such cases what is required, in my judgment, is that the statement was a material factor in the decision".

68. Mr Jourdan submitted that if it could be shown that Mr Jarvis QC would have refused to lift the stay on the 1987 Action even if Vaqar had said that he *would* rely on a defence of adverse possession to new proceedings, then an abuse of process could not be made out. That was on the basis that it is a requirement, *per* Sir Christopher Floyd in *LA Micro*, that Mr Jarvis QC's decision was obtained "on the ground" or "on the footing" of the position then adopted by Vaqar.

69. He accepted that if it was unclear what the outcome would have been, then the court cannot go back and remake the earlier decision. He submitted, however, that where there is a "right" answer, then that answer should be applied. In this case, he said, had Vaqar indicated he would claim a right to adverse possession in any fresh claim, the only decision Mr Jarvis QC could have made was to refuse to lift the stay.

70. That was based principally on the comment by Mr Jarvis QC (at §133 of his judgment) that "a case that is so old as this where there is such a dispute as to the facts, where oral evidence will have to be tested, seems to me to be a paradigm case where it would have been struck out under the old jurisdiction."

71. That was a reference to the jurisdiction examined in *Birkett v James* [1978] AC 297, where an action could be dismissed for want of prosecution where the claimant's default had been intentional and contumelious (not said to be relevant here) or where there had been inordinate and inexcusable delay on his or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or to serious prejudice to the defendant. Where, however, the limitation period had not expired, an action would not normally be dismissed for inordinate and inexcusable delay, because fresh proceedings for the same cause of action could be initiated.

72. The interaction between this jurisdiction and limitation was further explored in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd* [1998] 1 WLR 1426. Lord Woolf MR explained (at pp.1431-1432) that, in the absence of some conduct which means that a second action could be stayed, it would not benefit the defendant to strike out the claim, because this would inevitably lead to further proceedings, which could cause more expense and delay. He went on:

> "If however the limitation period has expired, the same logic does not apply. It also does not apply where the defendant to the fresh action is able to show that it is "open to doubt and serious argument whether the cause of action asserted ... would be time-barred if fresh proceedings were issued." In such circumstances the interests of justice may be best served by dismissing the action and leaving the party whose action has been struck out to bring fresh proceedings if he chooses to do so."

73. Mr Jourdan submitted that, in view of the inordinate delay between 1987 and 2011, and in view of the fact that it was open to serious argument (if Vaqar had asserted a claim in adverse possession) whether the cause of action was time-barred, it was indeed a paradigm case to strike out, from which it follows that Mr Jarvis QC could only have refused to lift the stay.

74. I disagree. It is evident from the careful consideration which Mr Jarvis QC gave to all the circumstances of the case that his decision was reached after balancing numerous factors, of which the fact that Vaqar had disavowed bringing a claim in adverse possession was clearly of some importance. Although he said he was "more and more convinced it would be wrong to lift the stay", and that it was "fundamentally unjust" to allow a case that was so stale to be brought back before the court, those conclusions were themselves the product of balancing all relevant factors.

75. The fact that Iftikhar could bring a new claim seeking possession, without prejudice to himself *because such a claim would not be faced with an adverse possession claim*, was a pertinent factor in at least three respects. First, it was a reason to give the merits of Iftikhar's case very little weight (see §116 of Mr Jarvis QC's judgment). Second, it was a factor in concluding that considerations of the administration of justice favoured issuing new proceedings (see §120). Third, it was an important factor in considering the effect of granting relief on each party (see §130). Specifically, Mr Jarvis QC considered that it was "far cleaner" for a new action to be started rather than lifting the stay on the 1987 Action.

76. It is impossible to tell how that balancing exercise would have been carried out had Vaqar adopted the opposite position in 2012. Mr Jarvis QC's reference to the old jurisdiction was a passing comment. There had been no application to strike out the claim, and therefore no argument presented to him on that issue. It does not necessarily follow from the fact that, in considering one of the nine factors mandated by the version of CPR 3.9 then in force, he concluded that he was not "sufficiently satisfied on the evidence" that there had been a good reason for the delay since 1987, that had the question of strike out on the basis of *Birkett v James* been raised, the evidence and arguments before him – on the question of inordinate and inexcusable delay – would have been the same, or that his conclusion would have been the same. Nor can it be known what arguments would have been presented to him about the interplay between that delay and the potential expiry of the limitation period (in circumstances where the consequence of the limitation period would have been to give rise to an entitlement to the flat through adverse possession), or what conclusion he would have reached on that question.

77. As to whether the delay gave rise to a substantial risk that a fair trial would not be possible, that was not a question addressed directly by Mr Jarvis QC (because it did not need to be), albeit he said – in considering the effect of Iftikhar's failures on each party – that the delay would make a fair trial "extremely difficult". In the event, in 2019 Vaqar applied to strike out the 2017 Action on the basis that it was not possible to have a fair trial, but that application was dismissed by HHJ Gerald.

78. For these reasons, I am not satisfied that the only decision Mr Jarvis QC could have reached, even without Vaqar having taken the position he did, was to refuse to lift the stay.

Was HHJ Gerald wrong to base his decision on a highly critical assessment of Vaqar's character?

79. Where dishonesty forms an element in a cause of action, then it must be pleaded, and in the absence of the point being pleaded it is not open to the court to make such a finding of dishonesty: see *Three Rivers District Council v Governor and Company of the Bank of England (No.3)* [2003] 2 AC 1 (HL), per Lord Millett at §183-190. A court may, on the other hand, make adverse findings as to a witness' character notwithstanding the absence of a pleading (a point illustrated, for example, by *ATB Sales Limited v Rich Energy Limited* [2019] EWHC 1207 (IPEC), at §23 to §27).

80. Mr Jourdan submitted that HHJ Gerald had impermissibly found that Vaqar had lied to his trustee in bankruptcy and lied to Mr Jarvis QC, when that had not been pleaded.

81. It is not a requirement of this kind of abuse of process or estoppel by conduct that the party deceived the court as to its intentions on the prior occasion. But in considering all the circumstances so as to consider whether the party's conduct is sufficiently abusive to preclude it from now asserting an inconsistent claim, it is relevant to enquire both what was said on the previous occasion and with what purpose.

82. The judge based his findings on these points, as he was entitled to do, on the totality of the evidence, which included the transcript of the proceedings before Mr Jarvis QC, the broader approach being taken by Vaqar at that time, as evidenced by his letters to his trustee in bankruptcy, and his assessment of Vaqar's live evidence before him.

83. His conclusions (particularly at §80 and §98) that Vaqar was adept, in relation to what he said both to his trustee and the court, at saying one thing but meaning another, or obfuscating sufficiently to satisfy the questioner, while avoiding giving simple, straightforward answers, and that "the above reveals a masterpiece of dissembling, and manipulation", fall in my judgment into the category of adverse findings about a witness' character, which the judge was entitled to make irrespective of whether the particular matters were pleaded.

84. Moreover, these matters are clearly relevant to determining what Vaqar had communicated to Mr Jarvis QC, and with what purpose, and HHJ Gerald was entitled to take them into account in reaching his conclusions on those points.

Did HHJ Gerald fail to take into account the serious consequences of his decision?

85. Mr Jourdan submitted that HHJ Gerald failed to mention – and thus it is to be inferred that he failed to take into account – the fact that his decision deprived Vaqar (and his family) of a home and a valuable property. Bacon J regarded the suggestion that a judge as experienced as HHJ Gerald did not appreciate the serious consequences of his decision as fanciful. I agree. His decision can only have been on the premise that Vaqar might have a claim in adverse possession (because it would otherwise have been unnecessary to deal with the abuse of process issue at all). He was clearly aware, having recited it at §5 of his judgment, that Vaqar and his sons were in occupation, and so must have appreciated that the consequence of his conclusion was that they would be forced out of occupation and have no rights to the flat.

Was HHJ Gerald's decision outside the ambit within which reasonable disagreement is possible?

86. Mr Jourdan submitted that, even if this court was against him on the individual alleged errors in HHJ Gerald's decision, nevertheless taking everything into account, that decision was perverse.

87. There was little support offered, in written or oral submissions, for this bald contention. It was suggested that at an earlier stage in the proceedings, Falk J (as she then was) had not been overly impressed with the abuse argument. As she acknowledged, however, the merits of the abuse argument could only be tested after an investigation at trial. Her comments on that occasion lend no support to the contention that HHJ Gerald, having conducted an investigation at trial, reached a decision that no reasonable judge could have reached.

88. Mr Jourdan had submitted, in a different context, that it would be perverse to conclude that anything said by Vaqar amounted to an objectively unequivocal statement, given what Vaqar said to Mr Jarvis QC about his wife's position, at least in one part of his exchanges with the judge at the 2012 hearing. It was unnecessary to deal with that point (given my conclusion that no objectively unequivocal statement is required). To the extent that the same point is relied on to challenge HHJ Gerald's overall conclusion, I would reject it. What Vaqar said about his wife's position is part and parcel of the various things said by him, which led HHJ Gerald to characterise his evidence, among other things, as a "masterpiece in dissembling". Identifying a piece of evidence that points in the opposite direction is far from sufficient to undermine HHJ Gerald's evaluative judgment.

89. Having rejected the submissions based on specific alleged errors, I reject the unsupported contention that HHJ Gerald's decision fell outside the broad ambit within which reasonable disagreement is possible. There is no basis, applying the test in the *Aldi Stores* case, for interfering with his evaluative judgment.

Conclusion

90. For the above reasons, I would allow the appeal against Bacon J's decision on the question of abuse of process, and restore the order made by HHJ Gerald in the 2017 Action. As noted above, that renders it either otiose or academic to address the remaining points raised on these combined appeals.

Lady Justice Asplin

91. I agree.

Lady Justice King

92. I also agree.