Neutral Citation Number: [2021] EWHC 2960 (Ch)

Case No: CH-2021-000143

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 05/11/2021

Before :

THE HON. MR JUSTICE FANCOURT

- -

Between :

(1) DR. VIKRAM BHAT **(2) MRS. GEETHA BHAT**	**Appellants/ Defendants**
- and –	
(1) MRS. SMRUTI PATEL **(2) DR. PRASHANT J. PATEL**	**Respondents/ Claimants**

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- -

Oluwaseyi Ojo (solicitor advocate of **Taylor Wood Solicitors**) for the **Appellants**
Antonia Halker (instructed by **Rainer Hughes Solicitors**) for the **Respondents**

Hearing date: 26 October 2021

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Approved Judgment

MR JUSTICE FANCOURT:

Introduction

1. This is an appeal by the defendants, Dr and Mrs Bhat, against an order of Recorder Geraint Jones QC made in the County Court at Basildon on 11 June 2021, following the trial of two actions. The first action was a claim by Dr and Mrs Patel for possession and arrears of rent in respect of 105 Calcutta Rd, Tilbury, Essex. That property is registered at the Land Registry under title EX 857254 and I will refer to it as "the Property". The second action – which was consolidated as a counterclaim at trial – was a claim by Dr and Mrs Bhat claiming a beneficial interest in land adjoining the property and damages. The "Adjoining Land", as I will refer to it, was purchased in the names of the Patels in August 2017. The Adjoining Land has since been developed by the construction of a building, which is an extension of the building on the Property.

2. The building on the Property is the original surgery premises from which Mrs Patel and Dr and Mrs Bhat practised for a time as partners under the name Sai Medical Centre. Dr Patel had previously been a partner, but he retired from practice in 2014. Mrs Patel remained a salaried partner. Dr and Mrs Bhat were from 2017 the only equity partners. Although Dr and Mrs Patel bought the adjoining land from Thurrock Borough Council ("the Council") for £100,000, the extension that was built on it was funded as to one-third by the Bhats and as to two-thirds by a grant from NHS England. The grant was repayable in defined circumstances, in particular, proportionately, if the development was not used for the purposes of general medical services for 15 years from completion of the works.

3. The Recorder held that an agreement for occupation of the Property by the partnership created a lease, not a licence, and that there were substantial arrears of rent. He held that the lease was validly forfeited by the issue of the first action. In the exercise of a general discretion, he refused the Bhats relief against forfeiture. The Recorder also dismissed the Bhats' claim to a beneficial interest in the Adjoining Land. Accordingly, he ordered the Bhats to give the Patels possession of the Property and the Adjoining Land by 28 August 2021 and to pay arrears of rent amounting to £98,000 plus interest of £2,430.26 by 25 June 2021. He ordered the Bhats to pay the Patels' costs of claim and counterclaim and ordered a payment on account of £40,000 within 14 days.

4. The Bhats appeal against all the above conclusions (other than the quantum of the arrears of rent and interest) with permission granted by Mellor J on 25 June 2021.

5. The trial in the lower court proceeded, by agreement of the parties and the Recorder, by reference to a list of issues needing to be decided, rather than the pleaded cases of the parties. It will be necessary to refer to that list at a later stage in this judgment.

The Grounds of Appeal

6. The grounds of appeal of the Bhats are, regrettably, not a model of clarity. Like too many so-called grounds of appeal these days, they are a narrative of complaint about the outcome of the

trial rather than properly drafted grounds for saying that the judge was wrong, in law or in making findings of fact, or that the process of the trial was unfair.

7. For example, although Ground 1 starts by contending that the Recorder erred in law, the true ground that emerges is (principally) that the Recorder was wrong to find that there was no representation or assurance given to the Bhats by the Patels as to the Bhats having a beneficial interest in the Adjoining Land, on which the Bhats relied by spending their money on the building works. Although the basis for saying that the Recorder was wrong in that respect is not clearly identified, the essence of the criticism gradually emerged in the course of submissions at the hearing of the appeal and was in reality in two parts:

    a. There was no evidence capable of supporting the Recorder's finding that the Bhats incurred expenditure on the Adjoining Land in reliance on an understanding that they would have the ability to buy the Property and the Adjoining Land from the Patels at some future time;
    b. The Recorder should have inferred that in all the circumstances there was a common intention or understanding that the Bhats would own a beneficial share in the Adjoining Land, as a result of the agreement to acquire it and the Bhats' expenditure on the building of the extension.

8. In answer to the question from the court: "what beneficial share?", Mr Oluwaseyi Ojo, who appeared for the Bhats, asserted for the first time in this case that the share was to be calculated taking into account the £100,000 purchase price paid by the Patels, the 34% of the build costs contributed by the Bhats and a rateable share of the funds granted by NHS England, for which, he said, all partners were responsible. Neither the statements of case nor the List of Issues prepared for the trial had identified any particular share for which the Bhats contended, and Mr Ojo, who did not appear at the trial, suggested that it had effectively been left to the Recorder to form a view about the extent of beneficial ownership, if any. Since the only case advanced in the Bhats' skeleton argument for the trial was that the Adjoining Land was held on resulting trust for them, I am not sure that this is quite right. The Bhats argued at trial that, in so far as the extension was not in some way incorporated into the lease of the Property, they were the beneficial owners or joint owners with the Patels of the Adjoining Land, but there was no submission made about the extent of ownership.

9. Mr Ojo's late supplementary skeleton argument for the appeal advanced a case based on proprietary estoppel. This had been raised at trial and was dismissed by the Recorder in short order, in paragraph 83 of his judgment, on the basis that there was no representation or assurance about ownership of the Adjoining Land or reliance on any such matter, in view of Dr Bhat's evidence that he believed he would have the opportunity to buy the Property and the Adjoining Land at a later time. I asked Mr Ojo to clarify the basis on which he sought to rely on proprietary estoppel and he said that he sought to rely on the "owner stands by with knowledge that a third party is expending money on the land in the belief that they have or will obtain a proprietary interest" type of proprietary estoppel. There was no ground of appeal raising any such argument, nor was it advanced at the trial. After hearing argument, I refused permission for the Bhats to add it as a ground of appeal because no such case had been put to Mrs Patel in cross-examination and it was now too late to raise it. Mr Ojo was therefore left

advancing his challenge to the Recorder's factual findings and the argument that a common intention or understanding about shared ownership should have been inferred, as summarised in paragraph 7b above.

10. Ground 2 of the grounds of appeal asserts that the Recorder erred in law by concluding that representations or assurances cannot be imputed to parties. The ground recognises that inferences can be drawn about what was said or agreed, and contends nevertheless that representations or assurances can be imputed as well as inferred. That ground of appeal was not pursued and was in any event hopeless. The law is now clear that, in the absence of evidence of what was said or intended, a court can only infer that a statement was made or that a common intention existed, not impute to the parties something that did not in fact exist: see Megarry & Wade's *The Law of Real Property* (9th ed.) at para 10-026, citing *Capehorn v Harris* [2016] 2 FLR 1026 and *Barnes v Phillips* [2016] 2 FLR 1292. There may be a residual role for imputing an intention where the issue is the quantum or extent of a beneficial share that has already been established: *ibid*
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11. Those are the only two grounds of appeal advanced in relation to the dismissal of the claim to a beneficial interest in the Adjoining Land.

12. Ground 3 of the Grounds of Appeal contends, first, that the Recorder erred in law by refusing to grant the Bhats relief against forfeiture. Various errors in this regard are spelt out, but the sub-paragraphs of this Ground also raise additional points, ostensibly as particulars of the judge's error in refusing to grant relief, but which are really different points. These include that the Patels should not have been permitted to advance a case of forfeiture because they had contended that the partnership deed created a licence and not a lease. There is also a contention that the Patels have not complied with the notice requirement of the forfeiture provision in the lease and that they had waived their right to forfeit.

13. At all events, the Bhats claim that the Recorder was wrong to order possession of the Property consequential on a forfeiture of the lease.

14. Ground 4 relates to the costs of the beneficial interest counterclaim. I will deal with that ground separately at the end of this judgment.

15. The Recorder described the statements of case as "fairly lamentable" and considered that the issues identified on the agreed List of Issues and dealt with in the skeleton arguments bore little resemblance to them. I am sympathetic to the difficulty that the Recorder faced and his expressed objective of seeking to decide all outstanding issues between the parties, to avoid the risk of further expensive litigation. What is clear is that neither party to this appeal is entitled, in the circumstances, to complain that the Recorder decided matters that were not adequately pleaded. But that does not give them free rein to raise other unpleaded issues on appeal.

<u>The Beneficial Interest Counterclaim</u>

16. The Bhats' case, in essence, is that the Recorder erred in not finding or inferring some representation or assurance on the part of the Patels, or a common intention, that the Bhats would have a beneficial interest in the Adjoining Land, and in finding that there was no reliance on any such representation or assurance. The difficulty that the Bhats have on this appeal, in seeking to rely on Dr Bhat's evidence, is that the Recorder reached a clear conclusion, supported by detailed reasons, that he found Dr Bhat's evidence to be unreliable, inaccurate and sometimes untruthful. On the other side, Mrs Patel was found by the Recorder to be a careful and honest witness, despite the fact that he concluded that she knew that various misrepresentations were being made to NHS England about the extent of the partnership's interest in the Property and the Additional Land. The Recorder accepted Mrs Patel's evidence that no representation or assurance was ever made by her or her husband that the Bhats or the partnership would have a beneficial ownership interest in the Adjoining Land. In those circumstances, an appeal based on an argument that the Recorder ought to have accepted Dr Bhat's evidence as to what passed between the Patels and the Bhats is doomed to fail.

17. The argument that the Recorder was wrong to find that the Bhats expended money on the extension in the belief that they would get the chance to buy the Adjoining Land in future, possibly when Mrs Patel retired, is instructive in this regard. The Recorder made clear in argument at trial that he was struggling with the Bhats' case that they acted in reliance on a representation or understanding that they were obtaining ownership of the Adjoining Land, in view of the clear and repeated evidence of Dr Bhat that he understood that he would have the opportunity to buy the Property and the Adjoining Land later, when Mrs Patel retired. (In fact, the Recorder found that no such assurance or representation was made by Mrs Patel.) Yet the Bhats' case on appeal is that there was no evidence capable of justifying the Recorder's conclusion. Mr Ojo relied exclusively on a short passage in re-examination of Dr Bhat where the following exchange took place:

> "Q. In answer to a question you told the court that you had hoped that Mrs Patel and Dr Patel would sell the building when they retired.
>
> A. Yes, and that's the old building.
>
> Q. Right, my question was: when you say they would sell the building when they retired, what were you referring to?
>
> A. This was even before the applications for the grant came into play, and I was referring to the old building, and the plan, initial plan, was when they retired, then I will buy the surgery from them.
>
> Q. Right.
>
> A. The old part of the surgery."

18. However, when one looks at the cross-examination of Dr Bhat to which this exchange relates, there are several passages in which he says, very clearly, that his expectation of a

right to buy in future related to the Property and the Additional Land. The passages relied on by Ms Halker, who appeared on behalf of the Patels, are at pages 199, 211, 212 and 219-220 of the transcript. The following extracts from those passages are sufficient to defeat the argument that there was no evidence on the basis of which the Recorder could have reached his finding of fact:

> "RECORDER JONES: I want to understand this very clearly, Dr Bhat. What did you believe would happen with the newly acquired land, for which £100,000 was paid, after the sale from the Council to the Patels had been completed?
>
> A. (*Pause*) What I thought was because they were planning to retire and sell me the property, they would … sell it to me, the whole lot, with the … this would add value to their existing building as well, because there was – the building was dilapidated, and we were doing a lot of refurbishment." (p.212)
>
> ……..
>
> "Q. …. it was the hope that in the future that [the sale of the premises] might be able to be agreed?
>
> A. Yes, and with that hope, I entered into this extension project, with the assurances from them. If they had said, 'No, we do not have any intention of selling it to you', I wouldn't have gone into this, I'd say, 'Okay, I'll look for another nice place where I can build my own surgery, and move my patient list there.'
>
> Q. So, the main reason you agreed to the improvement grant is that you thought that you were going to be buying this off them in the future?
>
> A. Yes, because the responsibility of running a service from there (*inaudible*) lies on me." (pp.220-1)

19. It may well be that before the application for a grant to extend the surgery premises was considered, Dr Bhat believed that he would have the chance to buy the Property when Mrs Patel retired. But things did not stop there. As a result of the purchase of the Additional Land and the grant application and development works, the surgery premises were extended, and Dr Bhat's aspiration by the time that he and his wife were spending money on the works related to the extended premises, i.e. the Property and the Adjoining Land, not just the Property, as his own evidence makes clear. The Recorder rejected much of Dr Bhat's evidence as being unreliable – and he did not accept the evidence about an assurance having been made by Mrs Patel – but he was obviously entitled to accept the admission by Dr Bhat that he funded the building works because he believed he would have the chance to buy the Property and the Additional Land at a future time, not because he thought he was acquiring one straight away.

20. I therefore reject the argument that the Recorder's conclusion was wrong in law because there was no evidence capable of supporting it.

21. What the Recorder's conclusions do not address is the question of rights to occupy the extended surgery premises in the meantime, before the opportunity to buy arose. At trial, the Bhats' Counsel sought to advance an argument that the lease of the property had been varied, so as to add in the Adjoining Land or at least the building on it, but the Recorder expressed doubt about whether that argument was sustainable in law, and Counsel then acting for the Bhats seemed to agree and abandoned reliance on it. I will return to the question of temporary rights to use the Additional Land.

22. By whichever route the Bhats seek to advance their appeal - estoppel by representation, constructive trust and proprietary estoppel are variously invoked, and the *Pallant v Morgan* sub-species of constructive trust appeared as something of an afterthought in Mr Ojo's supplementary skeleton argument - it can only be on the basis that an equitable interest for the Bhats must be inferred from the undisputed facts and documentary evidence. The contention that there was an express representation or assurance was rejected by the Recorder. But was a common intention about shared ownership of the Additional Land nevertheless implicit in the way that the parties conducted themselves?

23. The undisputed facts (many of which are established by contemporaneous documents) are the following:

    a. There was a partnership agreement made in writing on 19 March 2014 between Mrs Patel, as a salaried partner, and Dr Bhat and Dr Jagadish as equity partners.
    b. A new partnership came into existence under a document titled "Amendment of partnership agreement by adding new partner" dated 1 April 2016, when Mrs Bhat became a 10% equity partner.
    c. A lease dated 15 April 2016 was signed, by which the Property was let by the Patels to the Bhats only, for a term said to be "a periodic tenancy commencing on 31 March 2014 to 31/3/2018 and then further extension on a year-to-year basis until 2028". However, in the basic terms in clause 1, the term is defined as 4 years commencing on 1 April 2016, with an initial rent review on 1 April 2020. The terms of the rent review provision, which have been curtailed, make no sense. The lease records that the parties had agreed that security of tenure would be excluded but that the lease was renewable. A rent of £3500 per month was reserved. The only permitted use under the lease was as a medical practice, to be carried on under the name Sai Medical Centre, and the Property was required to be kept continually in use.
    d. Dr Jagadish then resigned as a partner and there was a further "Amendment of Partnership agreement" made in writing between Mrs Patel and the Bhats. The Recorder did not resolve whether that was operative or a partnership at will existed, but in either case the Bhats were the sole equity partners of the partnership from 1 April 2017.
    e. The opportunity to buy the adjoining land arose as a result of an approach by the partnership to the Council. The Council decided to sell the land to

the partnership for £100,000, by a decision report dated 27 January 2017. It wanted confirmation that the purchasers would be the owners of the property on which the medical centre stood, and Mrs Patel, who was dealing with matters on behalf of the partnership, provided proof of her and Dr Patel's ownership of the property. The Patels' solicitors informed the Council that the purchase had to proceed by 27 July 2017, so that the contract could be shown to NHS England to enable development to commence.

f. The deed of transfer of the Adjoining Land was in fact dated 8 August 2017 and the transferees were Dr and Mrs Patel, who paid the purchase price.

g. On 27 October 2017, NHS England wrote to Mrs Patel as practice manager of the medical centre, indicating support in principle for a grant for improvements to the medical centre. A full business case was required. As the Recorder found, Mrs Patel was instrumental in preparing this, as practice manager. The business case that she prepared was for expansion of the medical centre at an estimated cost of over £828,000, of which 66% was to be the subject of a grant. The legal fees, professional fees and IT costs were to be fully funded by NHS England.

h. NHS England's appraisal of the Business Case is contained in a document signed off on 27 October 2017. This is an important document because it shows what NHS England was told by Mrs Patel about the proposed development and the basis on which the grant for the works was made. It records that the existing premises were significantly undersized, at 185m^2, and that the proposed project was an extension to those premises of slightly greater area. It records:

"The asset will therefore be existing premises, redeveloped to provide additional space, capable of serving the current list size and enabling delivery of new service models and increased local provision. The proposed footprint extensions are 192m^2 in size, comprising of land purchased from the Local Authority. Please note confirmation of the sale and related price has been sent to the CCG, and has been included for reference. £100K and VAT was not charged on the disposal. This costing was not included within the original PID as this was not being claimed for under funding provided by the NHS, this cost has been covered by the practice."

i. The Business Case also confirmed that the details of whole life costs of lease were inapplicable because the proposal "relates to a partner owned practice and all expansion will remain under the ownership of the partner".

j. It is clear therefore that the proposal for funding was made through Mrs Patel on the basis that the practice was the owner of the existing premises and the new development would be similarly owned. There was no evidence that Dr or Mrs Bhat saw or relied on that statement at the time or at any time before the litigation.

k. Funding was in due course confirmed (as late as 22 August 2018) and was conditional on the practice contributing the remaining funds and the practice being operational in the new premises by 31 March 2020 at the latest.

l. There was then an improvement grant scheme agreement made between Dr Bhat and NHS England, signed on 4 October 2018. In that agreement, Dr

Bhat covenanted that for a period of 15 years from completion of the improvements the premises would not be used otherwise than for the provision of general medical services; that, in the case of leased premises only, the practice had consent from their landlord to undertake the works and had security of tenure for at least as long as that period; and that if the practice parted with possession of the premises, or any part, or used the premises for other purposes, they would repay a proportionate amount of the total grant.

m. The extension was built and the Recorder found the new premises stood as to approximately one-eighth on the Property and about seven-eighths on the Adjoining Land. The old premises and the new premises interconnect. There is no separation between them.
n. It is not in dispute that partnership funds (and therefore the monies of Dr and Mrs Bhat, the equity partners) were used to pay the 34% of the build costs for which the partnership was liable.
o. There is no finding about when the construction was completed. The possession claim was issued as early as 7 August 2019. The Recorder notes in his judgment that the new premises had come into occupation and use, but relatively recently.

24. It is evident from those facts that the Adjoining Land was put into the ownership of the Patels because the Council would only sell it to the owners of the Property, in order to ensure (as its officers must have assumed) that the land was used with the Sai medical practice, though in fact Dr Patel was not a partner by that stage and the Bhats were partners. It was not suggested by the Bhats that any part of the purchase price was paid by the partnership. The claim based on resulting trust, which was the primary basis of the claim in the lower court, was therefore hopeless, as the Recorder held.

25. Both Mrs Patel and the Bhats knew and understood that the land was being acquired for the purpose of extending the medical centre premises: they had sought to buy the land on that basis and had already identified that in principle a grant of two-thirds of the cost of the works would be available. Dr Patel did not give oral evidence at the trial. His relatively short witness statement was put in under a Civil Evidence Act notice, on the basis that he was too unwell to attend. His statement did not address these matters. Although the Recorder made no finding about it, it is an obvious inference that Dr Patel knew and understood what Mrs Patel knew and understood about the purpose of acquiring the Additional Land and its intended use. Dr and Mrs Patel must have known that it was on the basis of use of the new premises for the purpose of the Sai Medical Centre that the grant would be sought and made. The application for the grant was made by Mrs Patel on behalf of the practice on the basis that there would be security of at least 15 years for such use.

26. In the course of argument, Ms Halker sensibly accepted the proposition that there was obviously a common intention that the new premises to be built on the Additional Land were to be used by the Sai Medical Centre. That is self-evidently the case. Where then does that leave the appellants' contention that the Recorder should have held that they were entitled to

an equitable interest in the Adjoining Land, of significantly in excess of 50% on the basis that their case on extent is now put?

27. Ms Halker submitted that the issue of entitlement to use the new premises was something quite different in principle from ownership of the Additional Land, and that the question of what kind of occupation right (and, in particular, its duration) might have been conferred on the partnership was never raised or explored at trial, except for Counsel's short-lived attempt to argue that the lease of the Property had been extended to include the Additional Land. In response to an indication that the principles of constructive trust and proprietary estoppel can accommodate contractual licences and other time-limited interests as well as shares in freehold ownership, Ms Halker accepted that that was so but stressed that a case of contractual or irrevocable licence had never been advanced at trial (nor even on appeal by Mr Ojo until the Court raised it) and that the Court would be exceeding its proper function as an appeal court if it sought to overturn the decision of the lower court on that basis, when the issue had not been tried.

28. The answer that the Recorder gave to the question whether there was a common intention or understanding that the Bhats would have at least a beneficial share of the ownership of the Additional Land, if not entire beneficial ownership, was that there was no such intention or understanding, just as there was no representation or assurance to that effect made by the Patels. He accepted Mrs Patel's evidence in that regard that nothing was said between the parties, and he decided that Dr Bhat's evidence was unreliable.

29. In any event, he found that the Bhats paid towards the building works because they and Mrs Patel got on well at that stage and Dr Bhat "expected that when the first named claimant [Mrs Patel] retired from the partnership, the premises would be sold to the Defendants". That, he found, was inconsistent with an intention that the Bhats would immediately acquire a beneficial share. He referred to Dr Bhat's own evidence, when cross-examined, when he said on more than one occasion that he had a hope of buying the premises at a later time and that was why he was willing to contribute to the cost of the works. The Bhats therefore did not rely on any common intention that they should have a share of ownership at the outset in expending their money on the extension.

30. The Recorder also found that emails written by Dr Bhat in June 2019 were consistent with the absence of a common intention that the Bhats owned an interest in the Adjoining Land: these sought to hold Mrs Patel alone liable for the 34% contribution to the cost of the works because she was the owner of the land and building. He found that no common intention about ownership was to be implied from the circumstances of the purchase of the Adjoining Land and the grant application and funding of the works, and that in law a common intention could not be imputed to parties when they did not have one in order to achieve a fair result.

31. In so far as the Recorder was addressing whether there was a common intention shared by the Patels and the Bhats that the Bhats should immediately have a share of ownership of the Additional Land, I can find no fault with his conclusions, based on his factual findings. The best point for the Bhats is the record on the Business Case for the grant that "the new premises would remain under the ownership of the partner". But the purpose of this observation on the form was that the new premises were not to be leased and therefore the whole life costs of the

lease did not have to be provided in the grant application. Even if this can be taken as evidence of the Bhats' and Mrs Patel's intentions, the application was made by Mrs Patel as a partner of the practice, which Dr Patel was not. There is no reason to hold Dr Patel to the statement made in the Business Plan, which was a matter between the partners and NHS England. That statement therefore cannot be used as evidence of any intention on the part of Dr Patel that the Bhats would own the Adjoining Land or the new premises.

32. The reality of this case is that, although as the Recorder found there were misleading statements in the Business Case prepared for the grant application, the common intention of the Patels and the Bhats related to the partnership's occupation and use of the new premises, not the ownership of the Additional Land. There may originally have been an intention that the partnership would acquire the Additional Land, at the time when negotiations were being conducted with the Council, but that was overtaken by events, when the Council required the transfer to be taken by the Patels and the Patels paid all the purchase price.

33. There was, however, a common intention and understanding that the new premises would be occupied by the partners for the purposes of the Sai Medical Practice for some time. It seems to me to be implicit in the evidence of Dr Bhat that the Recorder accepted, relating to the opportunity to purchase the Property *and* the Additional Land at a future time, that Dr Bhat understood that until that time arrived the practice would be occupying the extended premises. Whether that intention was shared by Mrs Patel, given that she envisaged retiring in the not too distant future, was not established because the question was never put to her, and the Recorder found that she made no representation or assurance about the future sale of the Property or the Additional Land. Nor is it clear what Dr Patel's intentions in that regard were. In my judgment, it is also unclear (because there was no evidence about it) what the Bhats understood about their entitlement to continue to occupy if the Property and the Additional Land were not sold by the Patels when Mrs Patel retired, or if the Bhats were unable or unwilling to buy them at the time when they were offered for sale.

34. The reason all these matters are unclear is that the counterclaim was never advanced at trial on the basis that there was a common intention that the partnership would be entitled, in return for contributing towards the cost of the new premises, to occupy the new premises for any particular period of time. That period of time might have been until Mrs Patel retired or the Patels decided to offer the premises for sale, or until the fixed term of the lease of the Property terminated, until 2028, or until 15 years from completion of the works. It is easy to see how the counterclaim could have been advanced on the basis of a contractual licence for a period of time, enforceable in equity under constructive trust or proprietary estoppel principles on the basis of the Bhats' expenditure in improving the land, but it never was advanced on that basis. Any argument that there was obviously and necessarily a right to use the new premises for 15 years from completion, by virtue of the terms of the grant and the covenants made by Dr Bhat, runs into the difficulty that NHS England's terms did not require the Sai Medical Centre, much less the Bhats as partners of it, to continue to occupy the new premises. The new premises only had to be used for general medical purposes for 15 years, with Dr Bhat not being entitled to dispose of any proprietary interest that he had. There is the further difficulty that it would not have been obvious to Dr Patel, who was not concerned with the grant application.

35. I do not consider that it is so obvious what the common intention of the Patels or the Bhats was in relation to occupation of the Additional Land that the Bhats can be permitted to run a case on appeal that was not the subject of a trial. That could only begin to be permissible if the answer, based on incontrovertible evidence, was so clear that any evidence that might have been given by the respondents could not have affected the outcome. Even then it might be unjust to allow a different case to be run on appeal. But that is not this case, for the reasons that I have given. Although it is clear that the parties had a common intention that the Sai Medical Centre would occupy the extended premises, it is not clear what common intention, if any, they had about the terms on which such occupation would take place, and in particular whether the partners had an enforceable right against the Patels and their successors in title to the Adjoining Land to occupy the extended premises for a defined period of time, and if so what period of time.

36. The conclusion that the Bhats cannot now seek to assert an irrevocable licence for a defined period of time is not a conclusion that I reach with enthusiasm because I can see that, if the case had been argued at trial on the basis of an implied common intention of use and occupation for a defined period, it might have succeeded. But the case cannot be argued on appeal without the factual issues relevant to it having been tried.

37. I therefore dismiss the appeal on the counterclaim.

<u>The forfeiture claim</u>

38. Turning to the appeal against the order for possession, the position here is more promising for the Bhats. The Recorder was entitled and right, having found that there was a lease of the Property, to treat the possession claim as a forfeiture claim. The relevant clause of the lease is clearly a proviso for re-entry in the case of non-payment of sums of money including rent. It is however non-standard, hence the issue about whether sufficient notice prior to forfeiture had been given. There is, however, no doubt that the arrears for which the lease was forfeited were rent arrears, which means that well developed equitable principles for relieving against forfeiture apply. Indeed, since the claim for possession by enforcing a right of forfeiture was brought in the County Court, section 138 of the County Courts Act 1984 applies and confers on a lessee both a right to avoid the proceedings, by paying the rent and interest at least 5 clear days before the trial, and a right to have relief against forfeiture if the arrears of rent and costs are paid within a specified period of time after judgment, which must not be less than 4 weeks.

39. Dealing first with the issue about the forfeiture notice, clause 21 of the lease provides:

> "If the Tenant is in default in the payment of any money, whether hereby expressly reserved or deemed as rent, or any part of the rent, and such default continues following any specific due date on which the Tenant is to make such payment, or in the absence of such specific date, for the 10 days following written notice by the Landlord requiring the Tenant to pay the same then, at the option of the Landlord, this Lease may be terminated upon 30 days' notice and the term will then immediately become

> forfeited and void, and the Landlord may without further notice or any form of legal process immediately re-enter the Premises or any part of the Premises and in the name of the whole repossess and enjoy the same as of its former state anything in this Lease or in any statute or law to the contrary notwithstanding"

40. The Recorder held that the issue of the claim form served the function of giving the notice required by the lease and that no prior notice was required in the case of rent payable on a specific date, as the monthly rent was. Despite having raised in writing the issue of whether this was a correct interpretation of clause 21, the argument was not developed by Mr Ojo and the Court was left with the rather bare assertion that this was wrong, and that notice was required and so the forfeiture claim was invalid.

41. In my judgment, the Recorder was probably right to interpret the lease in the way that he did. Clause 21 distinguishes between sums due on a specific date under the terms of the lease and sums that were not due on a specific date. For the latter, 10 days' written notice requiring payment was required before the landlord had the option to terminate the lease. The option to terminate upon 30 days' notice applies in the case of both types of sum due, not only to sums due on a specific date. Accordingly, if 30 days' separate notice before the election to forfeit were required, the lease would require 10 days' notice followed by a further 30 days' notice separately given, followed by a claim form, in the case of sums that were not due on a specific date. This seems most improbable as an intention to impute to the parties. The clause is capable of being construed as entitling the landlord to elect to forfeit – by issuing a claim form or otherwise – and for the forfeiture not to take effect until 30 days have expired. That appears to be the sense of the words used, which speak of the landlord's election to terminate upon 30 days' notice, not 30 days' notice preceding the election to terminate. Thus if the arrears due were paid before the expiry of the 30 days, there would be no effective forfeiture. In the absence of a cogent argument why the Recorder was wrong to interpret the lease in this way, I am not persuaded that he was.

42. In dealing with relief against forfeiture, the Recorder did not refer and evidently was not referred by Counsel to section 138 of the County Courts Act 1984, or to cases such as *Gill v Lewis* [1956] 2 QB 1, which explain that equity treats a proviso for re-entry for non-payment of rent as a security for payment of the rent, such that relief will be granted if the arrears, any interest and costs are duly paid. The statutory provision in the County Court reflects that authority. It provides, so far as material:

> "(1) This section has effect where a lessor is proceeding by action in the county court (being an action in which the county court has jurisdiction) to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent.
> (2) If the lessee pays into court or to the lessor not less than 5 clear days before the return day all the rent in arrear and the costs of the action, the action shall cease, and the lessee shall hold the land according to the lease without any new lease.
> (3) If –

> (a) the action does not cease under subsection (2); and
> (b) the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture,
>
> the court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court or to the lessor all the rent in arrears and the costs of the action.
>
> (4) The court may extend the period specified under subsection (3) at any time before possession of the land is recovered in pursuance of the order under that subsection.
>
> (5) …. If
> (a) within the period specified in the order; or
> (b) within the period as extended under subsection (4)
>
> the lessee pays into court or to the lessor –
> (i) all the rent in arrear; and
> (ii) the costs of the action,
>
> he shall hold the land according to the lease without any new lease."

43. Instead of making an order in pursuance of this section, the Recorder proceeded as if he had a broad discretion to grant or refuse relief according to the justice of the case, as it appeared to him to be. He held that relief should be refused for three main reasons: the difficulty of separating the old premises on the Property from the new premises on the Adjoining Land, given the way that the new premises had been built as an extension of the old premises; the prolonged non-payment of rent and absence of evidence of when the arrears would be paid; and the undesirability of continuing a fractious relationship between the Bhats and the Patels by leaving them in the positions of landlord and tenant for many more years.

44. In my judgment, the Recorder was wrong to treat himself as having a broad discretion about the matter. Section 138 applied and therefore the Bhats were entitled to an order giving them relief against forfeiture on payment of the arrears and the costs of the forfeiture proceedings within a period no shorter than 4 weeks, regardless of evidence of ability to pay the arrears. The court does not have a discretion save as to the length of the period of time: *Golding v Martin* [2019] Ch 489.

45. The arrears and interest have since been paid but the costs have not. The Recorder made an order for detailed assessment of costs and a payment of £40,000 on account of those costs within 14 days, but that sum related to the Patels' costs of the counterclaim as well as the costs of the possession claim. The difficulty arising from the conjoined premises on the Property and the Additional Land is as much of the Patels' making as the Bhats' making, and the matter will have to be resolved between them in a sensible way. I shall make some further observations about that at the end of this judgment.

46. The appeal is therefore allowed on Ground 3. By analogy with section 138(3), the order that this court should now make in the circumstances is for the Bhats to be granted relief against

forfeiture contingently on their paying the appropriate costs of the possession claim to the Patels within 4 weeks of the date of the order.

47. What are the appropriate costs? By a costs and case management order made on 23 April 2020, the Patels' costs budget for the possession claim was approved in the sum of £39,520. If the lower court had been making an order for an interim payment of the Patels' costs of that claim alone, it should have been in an amount no less than 90% of the approved budget: see *MacInnes v Gross* [2017] 4 WLR 49 at [25] – [28] and *Puharic v Silverbond Enterprises Ltd* [2021] EWHC 389 (QB) at [11], [12]. It was not suggested by the Patels that any costs incurred prior to the date of the CCMC should be taken into account in fixing the interim payment.

48. The appropriate order today, therefore, is for there to be relief against forfeiture of the lease of the Property if the sum of £35,568 by way of costs is paid by the Bhats to the Patels or paid into court within 28 days of the date of the order following the handing down of this judgment. Any adjustment to the amount of the interim costs, if any, can be made by agreement or on detailed assessment at a later stage. Since the amount of any additional liability, if any, will not be likely to be known within the period of 28 days, any such adjustment will not affect the terms on which relief against forfeiture is obtained.

Costs appeal

49. The final ground of appeal was that the Recorder had erred in awarding the Patels their costs of the counterclaim, to be assessed. The reason given was that the Patels were in default of a case management order dated 25 September 2020 ("the Order") requiring them to submit any budget for the costs of the counterclaim by 12 October 2020, and accordingly, subject to any later court order, they are to be taken as having filed a budget comprising only the applicable court fees of the counterclaim: CPR rule 3.14. No such costs budget was submitted and relief against sanctions was not sought.

50. The Recorder held that the Patels were not in default of a mandatory order to file a costs budget, so that relief against sanctions was not required. In the exercise of his discretion, he allowed the Patels to recover their costs of the counterclaim.

51. The Bhats appeal on the basis that the Recorder was wrong to interpret the Order as not requiring a costs budget to be filed; that he should have required the Patels to seek relief against sanctions, not merely exercise a broad discretion on whether to award the Patels their costs of successfully defending the counterclaim; and that in any event he was wrong to exercise his discretion to allow the costs of the counterclaim to be recovered.

52. By the Order, the possession claim and the separate beneficial ownership claim were consolidated, with the possession claim ordered to be the lead claim. The Order was made before the first CMC on the beneficial ownership claim. Directions were given in the Order up to and including listing the trial of the consolidated claim in a trial window. The Court had previously approved costs budgets for the possession claim. Paragraph 9 of the Order states:

> "The parties have permission to file and serve updated costs budgets by 12 October 2020 if so advised, to reflect the

> consolidation of the proceedings. The parties will endeavour to agree their updated budgets and any points of disagreement will be dealt with by the Trial judge."

53. In context, that is clearly an order giving the parties the opportunity to file an amended costs budget, to add additional budgeted costs of the beneficial ownership claim, and requiring them to file one by 12 October 2020 if they wished to do so. Otherwise, the parties would be limited to the costs budgets already filed on the possession claim. That is clearly so because, by virtue of the consolidation order, there was to be a costs budget for the consolidated action – an "updated budget". If no updated budget was filed, the existing budget would be the only applicable budget. To interpret the order in the way contended for by the Patels would have given the parties an option whether to file updated budgets or not, and, if not, the ability to seek to recover costs of the counterclaim without a budget. That is not what the Order means, though I accept that it could have been better expressed.

54. Since updated costs budgets were not filed within the specified time, the attempt to recover additional costs of the counterclaim should in principle have been held to require the Patels to seek relief against sanctions. There was, regrettably, disagreement between the parties' solicitors as to whether on 7 June 2021, the day before the start of the trial, they had reached oral agreement to dispense with costs budgets for the counterclaim. That issue was not resolved by the Recorder and, given the terms of the witness statements provided by each side shortly before and even during the consequentials hearing, it could not easily have been resolved on that occasion.

55. The issues that needed to be addressed were therefore:

    a. Did the parties through their respective solicitors agree mutually to waive default in filing costs budgets that included costs of the counterclaim, so that the quantum of any costs of the counterclaim awarded following the trial would be dealt with on an unbudgeted basis?
    b. If not, should relief against sanctions be granted to the Patels to allow them to seek to recover costs in excess of the applicable court fees.

    If issue (a) were to be decided in favour of the Patels, the Recorder's decision to award them their costs of the counterclaim cannot be criticised and an award of costs should follow. If Issue (b) were decided in favour of the Patels, the court will have to consider in those circumstances what award of costs should be made.

56. The Recorder was in my judgment in error in exercising a broader discretion, as if the parties had waived non-compliance with the Order, without making a finding that they had done so. It is not possible for this Court to resolve the issues set out in paragraph 55 above. I will therefore allow the appeal on Ground 4 and substitute an order that the Defendants must pay the Claimants' costs of the possession claim. An interim payment of £35,568 will be paid within 28 days. The issues in paragraph 55 will be heard by the County Court if the Patels notify that court within 14 days of the order following this appeal that they wish to pursue the costs of the counterclaim.

Resolution

57. The result is that the Bhats have no continuing right to occupy the Adjoining Land but will have their lease of the Property for the remainder of its duration, if the sum of £35,568 is paid in time. That causes practical difficulties for both parties, because a small part of the new premises sits on the Property and so falls within the lease, but the larger part is on the Adjoining Land.

58. As demonstrated by the correspondence with NHS England following the decision of the Recorder, the Sai Medical Practice satisfies an important local need for medical services, and the public interest would be likely to be harmed if the Patels resume possession of the Adjoining Land. That will also be likely to cause financial difficulty for Dr Bhat (and potentially for Mrs Patel and Mrs Bhat too) under the terms of the grant that was made by NHS England if the new premises are no longer used for general medical purposes. An obvious solution to the problem in these circumstances is for the Adjoining Land to be leased to the Bhats at a rent that makes allowance for the contribution that they have made to its improvement. It is very much to be hoped that the parties are able to reach a reasonable solution, rather than spending more time and money litigating further the consequences of what they have done.