



Neutral Citation Number: [2023] EWCA Civ 214

Case Nos: CA-2022-001212
CA-2022-001213

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
His Honour Judge Jarman QC (sitting as a Judge of the High Court)
[2022] EWHC 1304 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2023

Before :

LORD JUSTICE MALES
LORD JUSTICE ARNOLD
and
LORD JUSTICE NUGEE

Between :

(1) LA MICRO GROUP (UK) LTD
(2) DAVID BELL

Claimants /
Respondents

- and -

(1) LA MICRO GROUP, INC
(2) ROMAN FRENKEL

Defendants /
Appellants

(3) ARKADIY LYAMPERT

Defendant/
Respondent

William Buck and William Hooper (instructed by **Fladgate LLP**) for **LA Micro Group, Inc**

Alex Barden (instructed by **Schofield Sweeney LLP**) for **Mr Frenkel**

Andrew Twigger KC, Paul Strelitz and Oliver Hyams (instructed by **IBB Law LPP** trading as **IBB Owen White**) for **LA Micro Group (UK) Ltd and Mr Bell**

Hearing dates: 19 and 20 January 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 28 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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Lord Justice Nugee:

Introduction

1. This appeal concerns the ownership of an English company, LA Micro Group (UK) Ltd (“UK”). There are two issued shares, one in the name of Mr David Bell (issued in 2004) and the other in the name of Mr Arkadiy Lyampert (issued in 2008 or 2009), and it is not disputed that they are the legal owners of the shares. What is in issue is the beneficial ownership of the shares.
2. There are three individuals concerned. Two of them, Mr Lyampert and Mr Roman Frenkel, are Californians, of Russian and Ukrainian background respectively. They jointly owned and ran a Californian company called LA Micro Group, Inc (“Inc”). The third is Mr Bell, who is English and who has run UK since 2004 when it was acquired as a vehicle for a joint venture between him and the Californians. In 2010 however Mr Frenkel and Mr Lyampert fell out. Mr Frenkel told Mr Bell he was not interested in UK, and Mr Bell and Mr Lyampert then reached agreement on new arrangements.
3. The current proceedings are the second set of English proceedings concerning the ownership of UK. The first (“**the 2015 proceedings**”) was brought in 2015 by Mr Frenkel against Mr Lyampert, Mr Bell and UK. Mr Frenkel claimed that what had been agreed in 2004 was that he and Mr Lyampert personally should have a 25.5% interest each in UK (with the other 49% owned by Mr Bell). That claim was tried by Ms Amanda Tipples QC (as she then was) in 2017 and she handed down judgment on 13 September 2017 at [2017] EWHC 2223 (Ch). She dismissed Mr Frenkel’s claim, finding that it had been agreed in 2004 that UK should be owned 49% by Mr Bell and 51% by Inc.
4. The current proceedings were brought in 2020 by UK and Mr Bell against Inc, Mr Frenkel and Mr Lyampert. They took as their starting point Ms Tipples’ finding that it was agreed in 2004 that UK should be owned 49% by Mr Bell and 51% by Inc, but sought a declaration that as a result of what had happened in 2010, it had come to be owned equally by Mr Bell and Mr Lyampert.
5. The claim was initially tried by HHJ Jarman QC (sitting as a Judge of the High Court) in January 2021. He gave judgment on 29 January 2021 at [2021] EWHC 140 (Ch) in favour of UK and Mr Bell, finding that Mr Frenkel (acting on behalf of Inc) had disclaimed Inc’s interest in UK in 2010. I will refer to this judgment as his “**first judgment**” or “**J/1**”.
6. Inc and Mr Frenkel appealed to this Court, which on 5 October 2021 allowed an appeal for the reasons given by Sir Christopher Floyd (with whom Lewison and Newey LJ agreed) at [2021] EWCA Civ 1429. I will refer to his judgment as “**CA**”. In summary the appeal was allowed because it was too late in 2010 for Inc to have disclaimed an interest that it had accepted in 2004: CA at [39]. Sir Christopher Floyd went on to consider a number of alternative grounds put forward by UK and Mr Bell for upholding HHJ Jarman’s judgment, but concluded that there were insufficient factual findings to decide them. He therefore remitted the case to HHJ Jarman to consider these issues.

7. The hearing of the remitted issues took place before HHJ Jarman in March 2022. He did not hear any further evidence, but he did hear extensive submissions. He handed down his judgment on 27 May 2022 at [2022] EWHC 1304 (Ch). This is the judgment currently under appeal. I will refer to it as his “**second judgment**” or “**J/2**”.

Issues on appeal

8. The three issues remitted to HHJ Jarman were: (1) whether Inc had contractually surrendered its interest; (2) whether Inc was precluded by proprietary estoppel from asserting its claim; and (3) whether Inc was precluded by laches from asserting its claim.
9. On (1) contractual surrender, HHJ Jarman found that it was impliedly agreed in 2010 that the shares in UK would thereafter be held 50/50 for Mr Bell and Mr Lyampert: J/2 at [48]. But he held that the issued shares, both that issued to Mr Bell in 2004, and that issued to Mr Lyampert in 2008 or 2009, were held on express trust for Mr Bell and Inc in the proportions agreed in 2004: J/2 at [57]-[58]. It followed, he said, that any disposition of Inc’s beneficial interest in the shares would need to be in writing to comply with s. 53(1)(c) of the Law of Property Act 1925 (“**LPA 1925**”): J/2 at [59]. The lack of writing meant that such disposition was not valid and the claim to relief on the basis of contractual surrender therefore failed: J/2 at [59], [61].
10. On the present appeal UK and Mr Bell contend by way of Respondent’s notice that HHJ Jarman should have held that the agreement reached in 2010 was specifically enforceable, and hence gave rise to a constructive trust such that the case came within s. 53(2) LPA 1925 instead of s. 53(1)(c). In response Inc and Mr Frenkel contend that he was wrong to find that there was an implied term in relation to the ownership at all.
11. On (2) proprietary estoppel, HHJ Jarman held that UK and Mr Bell’s claim succeeded. He accepted Mr Bell’s evidence that Mr Frenkel in 2010 told him that UK was his to do what he liked with, and that if he had thought that UK would still be owned by two warring partners via Inc he would have resigned from UK and widened or restarted his other business operations. Instead he entered into the 2010 agreement with Mr Lyampert: J/2 at [73]. He and Mr Lyampert did so in reliance on what Mr Frenkel had said: J/2 at [75]. It was unconscionable of Inc now to assert a 51% beneficial ownership in UK, and the claim in proprietary estoppel was made out: J/2 at [77].
12. Inc and Mr Frenkel each appeal this decision. They challenge his conclusions (i) that Mr Bell and Mr Lyampert entered into the 2010 agreement in reliance on what Mr Frenkel said and (ii) that it would be unconscionable for Inc to assert a 51% beneficial interest.
13. On (3) laches, HHJ Jarman held that there were several difficulties in the submission that Inc should have acted in 2010 or within a reasonable time thereafter, and that the claim of UK and Mr Bell based on laches was not made out: J/2 at [83], [86]. There is no appeal against that conclusion.
14. The issues before us can therefore be summarised as follows:

- (1) Was HHJ Jarman wrong to find that Inc was estopped by proprietary estoppel from claiming a beneficial interest in the shares of UK?
- (2) Was HHJ Jarman wrong to find that it was a term of the 2010 agreement that the shares would be held both legally and beneficially by Mr Bell and Mr Lyampert?
- (3) If he was right to find such a term, was he wrong to hold that it was ineffective to operate as a contractual surrender by Inc because of non-compliance with s. 53(1)(c) LPA 1925?

Facts – (1) down to 2010

15. It is easiest to take the facts from the account given by Sir Christopher Floyd in his judgment: CA [3]ff. No-one took any issue with this, and I reproduce it below with some added reference to the factual findings of HHJ Jarman in his two judgments:

- “3. Mr Lyampert and Mr Frenkel met in California in 1998 and together ran a small business buying and selling computer equipment. That did not last, but in 2001 Mr Lyampert established a new company, namely Inc, got back in touch with Mr Frenkel, and agreed to go into business with him again through Inc. Mr Frenkel and Mr Lyampert each owned 50% of the shares in Inc. Inc’s business was the purchase and resale of high-end computer parts.
4. Shortly after Inc was set up in 2001, it started trading with an English company called Bstock, owned by Mr Bell. That led to discussions about a joint venture between Mr Bell on the one hand, and Mr Frenkel and Mr Lyampert (and also Mr Alex Gorban, a senior employee of Inc) on the other hand. By July 2004 there was an agreement in principle for the setting up of a new UK company, and on 1 July 2004 Mr Bell’s accountants acquired an off-the-shelf company for this purpose, which changed its name to LA Micro Group (UK) Ltd on 11 August 2004. This was UK. Mr Bell was appointed director and secretary and became the sole shareholder, holding the one issued share. On 3 August 2004 Mr Lyampert was appointed as a second director.
5. In August 2004 Mr Lyampert, accompanied by Mr Gorban (but not by Mr Frenkel), came to the UK to finalise matters. In the course of those discussions it was orally agreed that the company should be owned 49% by Mr Bell. The dispute in the 2015 proceedings was about who was to own the other 51%. Mr Frenkel’s case was that he and Mr Lyampert were each to own 25.5% personally; Mr Lyampert’s case was that the 51% was to be owned by him alone. Mr Bell’s case was that Inc was to hold 51% of the shares. Miss Tipples decided in the 2017 judgment that the agreement was that 51% of the share capital of UK was to be owned by Inc.”

16. In the present proceedings there was no dispute that this was the effect of the 2004 agreement. It was the pleaded position of UK and Mr Bell that it was agreed that Inc would own 51% and Mr Bell 49% of the share capital of UK. Inc was not bound by Ms Tipples' judgment, but unsurprisingly admitted that this was the case. Mr Frenkel's evidence to HHJ Jarman was that he had always believed that the shareholding was split 49% to Mr Bell, 25.5% to himself and 25.5% to Mr Lyampert personally, but he accepted that he was bound by Ms Tipples' judgment: J/1 at [25]. Mr Lyampert was also of course bound by it. In his second judgment HHJ Jarman proceeded on the basis that it was agreed orally between Mr Lyampert on behalf of Inc and Mr Bell in 2004 that Inc would own 51% of the shares in UK and Mr Bell the remainder (J/2 at [19]), and found that although it was common ground that no-one gave any thought to the practicalities of the shareholding, the 2004 agreement was clearly intended to give control of UK to Inc: J/2 at [20].
17. Reverting to Sir Christopher Floyd's narrative at CA [6]:
- “6. Agreement was also reached at the same time about trading arrangements between UK and Inc. In essence, each company would supply the other with equipment and hardware without any mark-up (i.e. at or near cost). If Inc sold hardware to UK at cost and UK made a profit, the profits would remain with UK; but it was agreed that UK's profits would be split between the parties, with 50% going to Mr Bell. There was a dispute in the 2015 proceedings as to who was to be entitled to the other 50% of the profits. Mr Frenkel's case was that it was agreed that they should be paid 50% to Mr Bell, and 25% each to him and Mr Lyampert or their nominees; Mr Bell's case was that it was agreed that dividends or profits should be split between himself and Inc. The 2017 judgment decided that it was agreed that the profits would be split equally between Mr Bell and Inc. In practice, although the first payments were made to Inc, thereafter 25% of profits were paid into an investment vehicle owned by Mr Frenkel and 25% into an investment vehicle owned by Mr Lyampert. I will refer to all the arrangements agreed at this time as “the 2004 agreement”.”
18. I add that it was also agreed as part of the 2004 agreement that UK would trade in Europe (including the United Kingdom), and Inc elsewhere, the reason why UK was formed being to promote Inc's access to the European and United Kingdom markets: J/1 at [5], J/2 at [46]. That explains the profit-sharing element of the 2004 agreement (which again was not disputed in the present proceedings). In effect Inc was using UK to sell its products in Europe and the UK, on terms that the profits would be divided equally between Inc, which was responsible for supplying the goods, and Mr Bell, who was responsible for selling them and running UK's operations. Ms Tipples had also found that it was agreed that when Inc purchased goods at cost from UK the profits, after deduction of local commissions on sales by Inc's staff, were to be transferred by Inc to UK; although this was supposed to happen it was rare for the repatriation of profit in fact to take place: see her judgment at [81a].
19. Sir Christopher Floyd continues at CA [7]:
- “7. In 2008 or 2009 a second share in UK was issued to Mr Lyampert.

Mr Bell's evidence was that he was told by his accountant that another share had to be issued; that he did not take any steps to issue shares in the proportion 49/51 as he simply did what was requested of him. He thought 50/50 would be close enough; and that he could not recall why it was issued to Mr Lyampert rather than Inc, although it appears that he thought it may have been something to do with the fact that Mr Lyampert was the other director of UK.

8. One of the many issues debated before us was how, as a result of the 2004 agreement, the shares in UK were intended to be held. One possibility is that the agreement provided that shares would be issued to Inc and Mr Bell so as to establish a shareholding in the agreed proportion (e.g. a total of 100 shares with 51 going to Inc and 49 going to Mr Bell). This never happened, but the agreement to issue shares in that proportion, being a specifically enforceable contract, could create a constructive trust of the shares of which Inc and Mr Bell were the beneficiaries. Another possibility is that the agreement created an express trust of the two individual shares which had been issued, so that each share was held by its respective owners in the proportions 51% for Inc and 49% for Mr Bell. Which of these analyses is correct is relevant to some of the arguments concerning the effect of the events of 2010.”
20. Sir Christopher Floyd reverted to this question at CA [69]-[84] where he considered the argument of Mr Andrew Twigger QC, who appeared for Mr Bell and UK, that there had been a contractual surrender by Inc of its beneficial interest in the shares. As he there explains, that gave rise to argument as to how the requirements of s. 53 LPA 1925 would affect any such surrender. The analysis in that respect would or might be affected by whether there was a constructive or express trust of the shares; and that was one of the issues remitted to HHJ Jarman.
21. Taking his two judgments together, HHJ Jarman's findings on this issue were as follows. It was accepted by the parties that the initial share held by Mr Bell was held on trust as to 49% for himself and 51% for Inc: J/1 at [46]. The issue of the second share to Mr Lyampert in 2008 or 2009 did not affect Inc's 51% beneficial ownership: J/1 at [48]. It was not a term of the 2004 agreement that further shares would be issued: no thought was given to the issue of more shares, the agreement was intended to deal with the ownership at the time, and an implied term for the issue of more shares was not necessary to make the agreement work: J/2 at [34]. In those circumstances, although the word “trust” was not used, the 2004 agreement was a sufficient declaration of trust in respect of the then only issued share, and an express trust arose from the words spoken as to ownership: J/2 at [55]-[57]. It was common ground that when the second share was issued to Mr Lyampert, he held it in trust for Inc (and Mr Bell) in the same proportions; and the parties were to be taken as intending that it should be held on the same basis as the first share, namely on express trust: J/2 at [58]. HHJ Jarman's conclusion therefore was that Mr Bell and Mr Lyampert each held their shares on express trust as to 49% for Mr Bell and 51% for Inc. That conclusion has not been challenged on this appeal.

22. Continuing with the narrative at CA [9]:

“9. In early 2010 Mr Frenkel and Mr Lyampert fell out. On 8 February 2010 Mr Frenkel took steps to dissolve Inc by giving notice to Mr Lyampert. The next day Mr Lyampert spoke to Mr Bell on the telephone and told him that Mr Frenkel had closed down Inc and taken the staff with him to a new company; he (Mr Lyampert) would try and carry on with Inc as best he could. Mr Frenkel also telephoned Mr Bell. Mr Bell’s evidence was that Mr Frenkel said to him (of UK): *“It’s your business and I want nothing to do with it”*. Mr Bell flew to California in March 2010 and met both Mr Lyampert and Mr Frenkel. Mr Lyampert told him that Inc would get over this damaging time and Mr Bell agreed that he would continue to trade with Inc. Mr Frenkel, according to Mr Bell, repeated to him *“The company [i.e. UK] is yours. I want nothing to do with it.”* Miss Tipples accepted that Mr Frenkel told Mr Bell that UK was “yours”; and that from then on Mr Bell understood and proceeded on the basis that Mr Frenkel was not interested in any way in UK. Mr Bell and UK contended before HHJ Jarman that these words (“the Frenkel disavowal” as I shall call them) amounted to an irrevocable disclaimer of Inc’s beneficial interest in the shares of UK. HHJ Jarman accepted that the Frenkel disavowal had been uttered and had this effect.”

23. It is worth noting precisely what factual findings HHJ Jarman made in his two judgments on what Mr Frenkel said to Mr Bell. In his first judgment, he said that there was no dispute that there was a telephone conversation between Mr Frenkel and Mr Bell in February 2010, and that there was another conversation between the two men in March 2010 when Mr Bell visited Mr Frenkel at his home in California: J/1 at [8]. Nor was it disputed that Mr Bell was trying to find a way in which Mr Frenkel could work with Mr Lyampert, but Mr Frenkel made it clear he wanted nothing to do with the latter. He accepted that at the time he was on friendly terms with Mr Bell and apologised to him for the falling out: J/1 at [8]. HHJ Jarman then set out the two rival versions of what was said. Mr Bell’s was that Mr Frenkel made clear to him that he was dissolving Inc and wanted nothing to do with UK and that the latter was his to do with what he liked. The shareholding was not specifically mentioned but Mr Frenkel made it clear that he was walking away from UK. Mr Frenkel on the other hand denied saying these words, although he accepted that he made it clear to Mr Bell that he didn’t want to work with Mr Lyampert ever again: J/1 at [9]. Mr Bell’s account was supported by Mr Lyampert who said that when Mr Bell came back from speaking with Mr Frenkel in March 2010, Mr Bell told him that Mr Frenkel had said that he was terminating their relationships, closing Inc’s business, that he had no interest in UK and that Mr Bell could have that business: J/1 at [10].

24. HHJ Jarman then set out his assessment of the witnesses and some of the other factual background before turning to the inherent likelihoods regarding the disputed conversations in February and March 2010. At J/1 [55] he set out the factors in favour of accepting Mr Frenkel’s account; at J/1 [56] those in favour of accepting Mr Bell’s and Mr Lyampert’s accounts. He gave his conclusion at J/1 [57], which was that the balance of likelihood tipped in favour of Mr Bell’s account: it was clear

that Mr Frenkel wanted to dissolve Inc, and had set up a new company to compete with UK; the trading relationship between Inc and UK was at an end; Mr Frenkel was still friendly with Mr Bell and felt he needed to apologise to him for the situation between himself and Mr Lyampert. By disclaiming what he thought was his interest in UK, he would be handing the majority shareholding in it to Mr Bell; it was clear he wanted nothing further to do with Mr Lyampert. Although it did not necessarily follow that he was willing to give up his interest (direct or indirect) in UK or a share of the profits, having regard to its relatively modest financial position and Mr Frenkel's clear bitterness towards Mr Lyampert at the time, it was likely that he wanted to walk away from it all: J/1 at [58]. He then considered whether Mr Frenkel was only speaking in his personal capacity or on behalf of Inc, concluding that, objectively considered, he must have been speaking on behalf of Inc as he had no personal interest in UK, whatever he might have believed; he had authority, apparent if not actual, to speak on behalf of Inc: J/1 at [63].

25. In his second judgment, HHJ Jarman summarised the position as follows. In February 2010 Mr Frenkel told Mr Bell that he was dissolving Inc and wanted nothing to do with UK and that the business was his to do with what he liked. The following month he repeated that position and told Mr Bell the company was his. Mr Frenkel made clear that he was walking away from UK: J/2 at [3]. That was a clear enough assurance to Mr Bell that Mr Frenkel wanted nothing to do with UK and the company and business were his to with what he liked: J/2 at [69].
26. I will come back below to what HHJ Jarman found as to Mr Bell's understanding of what Mr Frenkel said, and his reliance on it, as this is at the heart of Inc's and Mr Frenkel's appeal.
27. Reverting to Sir Christopher Floyd's judgment at CA [10]:
 - “10. In 2010 Mr Bell and Mr Lyampert also set up new trading arrangements between the two companies. Instead of supplying each other at cost, they would apply the usual margins; they would also be free to compete with each other. So far as the profits of UK were concerned, there had never been any dispute that Mr Bell was entitled to 50% of the profits, but Mr Lyampert now pressed him to pay the other 50% to him. Mr Bell took advice from UK's then solicitors and was advised that he had to pay dividends to the legal shareholder, which was Mr Lyampert, and so felt comfortable paying 50% to him (although he clawed back from this 50% a significant debt owed by Inc to UK). I will refer to the parties' trading and profit-sharing arrangements after 2010 as “the 2010 arrangements”.
 11. Miss Tipples accepted (at [109] of the 2017 judgment) that from 2010 Mr Bell understood that Mr Lyampert was entitled to 50% of the profits of UK as he was a 50% shareholder, and that he (Mr Bell) was entitled to the other 50% as he owned the other 50% of the shares.”
28. HHJ Jarman made some findings about the 2010 arrangements (or 2010 agreement as he called it) as follows. In his first judgment, he found that in the aftermath of

Mr Frenkel's statements Mr Bell and Mr Lyampert agreed to work together to carry on UK's business, and that as part of that agreement Mr Lyampert agreed to assume responsibility for what Inc owed UK: J/1 at [50]. A reconciliation of what was owed was carried out later by Mr Frenkel and this showed the amount to be £284,000: J/2 [49]. (In fact the relevant e-mails show that Mr Frenkel calculated the sum, made up of the profit made by Inc on goods supplied by UK to Inc, as \$284,000).

29. In his second judgment, HHJ Jarman recorded that Mr Bell and Mr Lyampert said that they agreed to carry on the business of UK equally between them, and that UK would trade on ordinary commercial terms (and so be able to compete with Inc); Mr Lyampert also agreed to assume responsibility for a six figure debt which Inc owed to UK and Inc was released from the debt: J/2 at [37]. That evidence was not challenged before him: J/2 at [39]. He went on to consider whether it was expressly or impliedly agreed as part of the 2010 agreement that the shares in UK would thereafter be owned 50/50 by Mr Bell and Mr Lyampert. Having referred to various inconsistencies in what Mr Bell later said (as to which see below), he concluded that these inconsistencies caused him to doubt that, as part of the 2010 agreement, Mr Bell and Mr Lyampert discussed expressly the share ownership of UK. It was more likely that what they focussed on was the business of UK going forward and how the profits would be divided: J/2 at [45]. He then identified the next issue as being whether by agreeing to divide profits equally, it was implicit that they would also own UK equally: J/2 [46]. He concluded that it was a necessary implication of the 2010 agreement that the shares in UK would thenceforth be held in the same way as the profits were to be split, namely that each of the issued shares would be held beneficially for the person in whose name it was issued: J/2 at [48]. I come back below to his reasons for this conclusion, as the question whether there was such an implied term is one of the issues raised in this appeal.
30. Sir Christopher Floyd continued at CA [12]:
- “12. Mr Bell also gave evidence in the 2015 proceedings that he thought that, as Mr Frenkel had said that he did not want anything to do with UK, it was fine just to continue with the existing shareholders; and that if Mr Frenkel had asserted a claim in spring 2010, he would probably have folded the business because he would not want to have two warring parties as shareholders, UK not being at the time as big as it later became. Miss Tipples accepted that if Mr Bell had known that Mr Frenkel claimed an interest in UK, he would have wound the company up and set up a new one (see [123] of the 2017 judgment)...”
31. HHJ Jarman came to a similar conclusion on this last point as Ms Tipples. He did not deal with it in his first judgment but in his second judgment he referred to Mr Bell's evidence in cross-examination that the impression he had was that UK was his; and to his confirmation that if he thought UK would still be owned between himself and “the two warring parties ... via Inc” he would have resigned from UK and would have widened or restarted his other business operations “in order to avoid getting caught up”: J/2 at [73]. He said that that evidence had the ring of truth about it, and that he accepted it: J/2 at [74].

Facts – (2) since 2010

32. Those are the underlying facts relevant to the issues on appeal. But Inc's and Mr Frenkel's appeals are based to a significant extent on a number of acts and statements that have taken place since 2010 as shedding light on Mr Bell's understanding of, and reliance on, what Mr Frenkel had said to him, and it is helpful to set out this material in detail.
33. In the aftermath of Mr Frenkel and Mr Lyampert falling out in early 2010 various proceedings were brought in California. An account of these can be found in a judgment given (as it happens, by me) on a challenge to the jurisdiction at [2020] EWHC 1405 (Ch), but I do not think the details are relevant for present purposes beyond noting (i) that in March 2010 Mr Frenkel brought an action against Inc and Mr Lyampert requesting dissolution of Inc and making claims against Mr Lyampert for breach of fiduciary duty, conversion of corporate assets, fraud and unjust enrichment ("the Fiduciary Duty action"), the essential allegation being that Mr Lyampert had been using the company's money for his personal expenditure on a grand scale; and (ii) that in separate proceedings requesting judicial supervision of the winding up and dissolution of Inc, a US lawyer, Mr Vahan Yepremyan, was ultimately appointed independent provisional director of Inc. Mr Yepremyan is the individual who gives instructions on behalf of Inc in these proceedings.
34. After bringing the Fiduciary Duty action Mr Frenkel sent Mr Bell a draft declaration for him to sign and return. He appears to have initially sent it in May 2010 but Mr Bell's evidence was that he did not receive that e-mail: J/1 at [51]. Mr Frenkel e-mailed it again on 19 January 2011 and Mr Bell did receive this. The declaration, drafted for use in the California proceedings, included a statement that Mr Frenkel owned 25.5% of UK. Mr Bell did not sign it, telling HHJ Jarman that he did not do so as he did not think it was valid: J/1 at [51]. Instead he replied to Mr Frenkel on 26 January 2011 asking him to contact his (Mr Bell's) lawyer as the latter had a few questions about it. There are no findings as to whether Mr Frenkel did so, or what the lawyer's questions might have been.
35. Nevertheless in 2012 Mr Bell went to California and was deposed in Los Angeles on 17 February 2012 on behalf of Mr Frenkel in the Fiduciary Duty action. Among other things he was asked when UK was formed, and said he was pretty sure it was 2005. He then gave this answer:

“Q Who are the owners of LA Micro UK?

A The owners, as far as I understand it, are myself and Mr Lyampert and Mr Frenkel. The actual incorporation at Companies House in the UK, which is the legal body that holds – you file all accounts to, states that basically there are two shares allocated, one to Arie and one to myself.”

36. He was also asked about the distribution of profits since February 2010. He said he had made payments to Mr Lyampert but not to Mr Frenkel, and gave this answer:

“Q And is there a reason why you did not compensate Roman in dividends since February of 2010?

A Basically the reason was I didn't know what the hell was going on. It was – I won't swear. It was a pretty messy situation. It was very unclear what was happening with anybody, so –

Q Did anyone tell you not to distribute dividends to Roman?

A No.”

37. Mr Frenkel sent e-mails to Mr Bell asking for payments from UK. In response Mr Bell sent a text in April 2012 asking for Mr Frenkel's bank details. But he told HHJ Jarman that he did so as a stalling tactic, and no further payments were in fact made to Inc or Mr Frenkel from UK: J/1 at [51]. Mr Bell's explanation is consistent with an exchange of texts in September 2013 in which Mr Frenkel asked if Mr Bell could send “my portion of the money”, to which Mr Bell replied “Possibly but need to clarify what the situation is. Whats happening between you two”. Mr Frenkel's response was that the trial was still going on and fixed for December and asked again about payment. Mr Bell said he would speak with his lawyers and get instructions. But nothing further seems to have happened and in April 2014 Mr Frenkel asked Mr Bell if he had had a chance to talk to his lawyer, and then in August 2014 said that he had been patient enough and would see him in court.

38. The next relevant event was that Mr Frenkel brought the 2015 proceedings against Mr Lyampert, Mr Bell and UK. We have not seen all the pleadings, but we have seen Mr Bell's Defence, signed by him with a statement of truth on 21 March 2016. This pleaded his case that the 2004 agreement was to the effect that UK was to be owned 49% by him and 51% by Inc (paragraph 7(d)), and then pleaded that it was agreed from time to time that at the behest of Mr Bell payments would be made out of the profits accumulated by UK as to 50% to Mr Bell and 50% to Inc or Inc's nominees, the latter being defined as “Inc's Sum” (paragraph 7(e)). It did not plead any change in ownership in 2010, although it did plead that Mr Frenkel telephoned Mr Bell in March 2010 and apologised for the demise of Inc by reason of a falling out between him and Mr Lyampert (paragraph 15). It continued:

“16 As to paragraph 16 D1 [Mr Lyampert] indicated, on behalf of Inc. that Inc's Sum was no longer to be paid out as previously as set out in sub-paragraphs 7(e) and (f) above, but was instead to be paid *in toto* to D1. D2 [Mr Bell] was entitled to rely upon the same and did in fact rely upon it.”

The final paragraph pleaded:

“21 It is denied that the Claimant [Mr Frenkel] is entitled to the relief claimed or any relief at all; any relief could only be made in favour of Inc.”

39. Mr Bell and UK were represented by the same solicitors, Owen White. On 31 August 2016 Owen White wrote a letter to Mr Frenkel's solicitors, Blake Morgan, replying on behalf of UK to demands made by Mr Frenkel for payment of dividends. In the letter Owen White referred to the fact that the three individuals involved in the litigation had set out in their statements of case three different interpretations as to the agreement between the parties, summarising them as follows:

“Mr Frenkel believes that he is the correct legal and beneficial owner of 25.5% of the shares.

Mr Lyampert believes that he is the legal and beneficial owner of 50% of the shares.

Mr Bell believes that LA Micro Inc is the correct legal and beneficial owner of 51% of the shares and entitled to 50% of the dividends.”

It then went on to explain that in those circumstances the directors of UK (Mr Bell and Mr Lyampert) could not resolve to pay dividends to Mr Frenkel but that UK and Mr Bell were making an open offer, which was in summary to hold back 50% of Mr Lyampert’s dividends to await the outcome of the litigation.

40. The trial of the 2015 proceedings took place over 6 days in June 2017 before Ms Tipples. We were shown a part of the transcript of the cross-examination of Mr Bell on Day 5 (26 June 2017). Mr Alex Barden, who appeared for Mr Frenkel, referred him to what he had said when he was deposed in 2012, and asked him about it as follows:

“Q That reflects, doesn’t it, the fact that in February 2012 you still considered Mr Frenkel to be an owner of LA Micro (UK)?

A As far as I’m concerned, he was the owner of LA Micro (UK) and unfortunately in March – February and March of 2010, two conversations took place between myself and Roman, one on the phone, one in person, where he actually said that he didn’t want anything to do with the UK office and it was my company to deal with or words to that effect.

Q Well, I’ll ask you about that later.

A Ok

Q But it’s clear from this, isn’t it, that whatever you thought the effect of those discussions was, you didn’t regard it as having the effect of stopping him being an – inverted commas – “owner” of the UK company?

A Via Inc, correct

Q So you didn’t say, “It was the three of us, but it’s now just me and Arie”?

A I think the answer shows that itself.

...

Q You regard Mr Frenkel as the actual owner, don’t you, or part-owner?

A Via Inc, correct.

...

A I'm not trying to be ambiguous. I was just saying it as I believed it. As far as I understand it, myself, Mr Lyampert and Mr Frenkel are the owners, but via – well I should have said via the LA Micro, Inc.”

41. At another stage in his cross-examination however Mr Bell referred to Mr Frenkel having disavowed his ownership, as follows:

“Q So, consistently with that, you didn't understand the ownership on the US side to have changed?

A As I said previously, in March 2010 Roman, at his house, disavowed any ownership in the UK company.

...

Q The reality is you're carrying on trading in the UK company, aren't you, and it didn't matter to you in the end whether the 50 per cent or 51 per cent was owned by Inc or by Frenkel or by Lyampert?

A The issue I would have had at the time was – and obviously this has transpired over the years – is these two have basically been at war with each other. I have literally tried to stay out of it. As Roman had disavowed any ownership in the share, I thought it was fine just to continue as the existing shareholders.

...

Q Let me suggest that what he was really saying to you in the spring of 2010 was not about a shareholding interest in the UK company at all; he was actually saying that he simply couldn't be part of the management of Inc anymore?

A No, that's not how it came across to me. The thing is, you've got to look at it in perspective. LA (UK) at the time was beer change to these guys. They're very very wealthy individuals and the money they were getting out of the UK office was literally beer money. So I don't think he had – he certainly didn't have any visions the company would be the size it is today. I don't think he had any vision of the company being, you know, that in 2010, so he was not interested.

...

Q The logic of that would be that he [Mr Frenkel] wasn't going to give up any interest in the UK business either.

A That's not what he relayed to me in March 2010.”

42. The final document we were referred to in this run of material was a written speaking note for closing submissions prepared by Mr Paul Strelitz, who appeared in the 2015 proceedings for Mr Bell and UK. In that Mr Strelitz pointed out that the claim that had *not* been advanced was one that gave rise to the relief of Inc’s registration as a 51% shareholder of UK, adding:

“such a finding is of course aligned with DB’s [Mr Bell’s] evidence in respect of which he has been steadfast...”

He also referred to the evidence given by Mr Bell in his deposition and said:

“... his answer as to ownership of D3 [UK] was entirely consistent with the manner in which he referred to C [Mr Frenkel] and AL [Mr Lyampert] as being his business partners for the past 7 years. They were both at that point still the owners of Inc and as a result it was arguably quite correct to say that the owners of D3 were DB, AL and RF, since ultimately that was the case albeit through their corporate vehicle of Inc.”

Proprietary estoppel – Ground 2: unconscionability

43. Two grounds of appeal were advanced by Mr William Buck, who appeared with Mr William Hooper for Inc, and by Mr Barden, who appeared for Mr Frenkel, against HHJ Jarman’s decision that Inc was estopped by proprietary estoppel from claiming an interest in UK. The first was that he had erred in finding that Mr Bell relied on what Mr Frenkel said to him. The second was that he had erred in finding that it would be unconscionable for Inc to assert an interest in Inc.
44. I will take the second of these grounds first. The argument in support of it was developed quite briefly by Mr Buck. He submitted that both laches and proprietary estoppel required a finding that it would be unconscionable for Inc to assert its claim, and relied on what HHJ Jarman said about the laches defence at J/2 [78]-[86]. His overall submission was that since HHJ Jarman had found that it would *not* be unconscionable, for the purposes of laches, for Inc now to assert a claim, it was inconsistent for him to find that it *would* be unconscionable, for the purposes of proprietary estoppel, for Inc to assert a claim.
45. I do not accept this argument. It is true that both laches and proprietary estoppel share the feature that what enables the defence of laches to be made out on the one hand, or a proprietary estoppel to be established on the other, is the conclusion that it would be unconscionable for a claim to be asserted. But this is not a finding of primary fact. It is a conclusion from the relevant circumstances, and the relevant circumstances are different because the context is different. What makes it unconscionable, for the purposes of the defence of laches, for a claim to be brought, is that the claimant has delayed asserting a claim in circumstances such that it would be inequitable for him belatedly to assert it. As explained by Sir Christopher Floyd in his judgment at [85]:

“In *Fisher v Brooker* [2009] UKHL 4; [2009] 1 WLR 1764 Lord Neuberger described laches as “an equitable doctrine, under which delay can bar a claim to equitable relief”. He went on to hold that, whilst it was not an immutable requirement, “some sort of detrimental

reliance is usually an ingredient of laches”.

Delay is therefore an essential element, indeed the foundation, of a defence of laches. This is different from proprietary estoppel where it is the representation or assurance, relied on by the representee to his detriment, that gives rise to the estoppel and makes it unconscionable for the owner to assert his rights.

46. In the present case HHJ Jarman dealt with the question of laches after he had already dealt with proprietary estoppel. He referred to the principle as set out by Lord Neuberger in *Fisher v Brooker*, and accepted that the element of detrimental reliance was present for similar reasons to those he had given in relation to proprietary estoppel: J/2 at [78], [80]. But he went on to say, correctly, that “the conduct underlying the latter principle [of laches] is delay” and then considered whether Inc could be said to have delayed in asserting a claim.
47. At J/2 [83]-[85] he gave three reasons why there were difficulties in the submission that Inc should have acted in 2010 or a reasonable time thereafter. First it was deadlocked, and although the appointment of a court appointed administrator could have been sought earlier, that was not a straightforward exercise and not one to be taken lightly unless there was a clear need to do so [83]. Second, Inc was beneficially entitled to a 51% share until 2010 and “UK and Mr Bell did not make it very clear then or for some years afterwards that they regarded that interest [as having] ceased” [84]. Third, in the 2015 proceedings Mr Bell’s position remained confused; even if Inc should have asserted a claim in 2017 or within a reasonable time thereafter, “the delay since then has not in my judgment added to any significant extent to detrimental reliance and should not bar equitable relief” [85]. In those circumstances he was not satisfied that UK and Mr Bell could rely on laches: [86].
48. It can be seen that what HHJ Jarman is doing in this passage is considering the question whether there was a defence to Inc’s claim on the ground that it had unreasonably delayed in asserting it. He answered that question No: Inc had not unreasonably delayed up to at least 2017, and any delay since then had not significantly changed the position.
49. I do not see that this conclusion is in any way inconsistent with HHJ Jarman’s conclusion on proprietary estoppel. If there was no relevant delay, the defence of laches was not made out. That conclusion could no doubt be expressed by saying that Inc had not delayed so as to make it unconscionable for it to assert its claim. But there is nothing inconsistent between holding that this was the case, and yet finding that Inc had (through Mr Frenkel) made such an assurance or representation as to be estopped from asserting its claim. There may not have been any such delay as to make it unconscionable for Inc to assert its claim, but this did not mean that the assurance or representation could not do so. Whether it did so or not depends on whether Mr Bell relied on the assurance or representation to his detriment, which is a quite different question, and is the subject of Ground 1 of the appeal.
50. I would therefore reject this ground of appeal.

Proprietary estoppel – Ground 1: reliance

51. Two arguments were advanced in support of the contention that HHJ Jarman had

erred in finding that Mr Bell had relied on what Mr Frenkel had said to him. One, argued by Mr Buck, was a further inconsistency argument, based on what was said to be an inconsistency between HHJ Jarman's findings of fact when considering the question of contractual surrender and his findings of fact when considering the question of reliance for the purposes of proprietary estoppel. The other, developed by Mr Barden, was that Mr Bell's conduct and statements after 2010 made it impossible to find that he believed the effect of what Mr Frenkel said to have been that Inc was giving up its ownership interest in UK.

52. Both arguments are concerned with what Mr Bell understood the position to be in 2010 and subsequently. It is therefore helpful to start with HHJ Jarman's findings on this question. These are found in both his judgments and they need to be read together.
53. In his first judgment HHJ Jarman began his consideration of the facts by noting that nothing was reduced to writing in 2004 or 2010, that no lawyers were involved and that each of the main witnesses (Messrs Frenkel, Bell and Lyampert) were at pains to emphasise that they were businessmen and not lawyers: J/1 at [19]. He then considered the credibility of the witnesses, noting that in each case there were a number of inconsistencies between the evidence they gave before him and what they had said in the hearing in 2017 or earlier hearings or documents: J/1 at [26]. Some were explicable by the lapse of time, the absence of documents, the complexity of their dealings and the number of previous hearings, but others were such as to cause him to be more cautious: J/1 at [26]-[27].
54. So far as Mr Bell in particular was concerned, he referred to the deposition he made in 2012 (see paragraph 35 above), the answers he gave to Mr Barden in cross-examination in the trial in 2017 (see paragraph 40 above), and to answers that he gave in cross-examination in the hearing before himself to the effect that from 2010 he understood that Mr Frenkel had left Inc, wanted nothing further to do with Inc and was doing his best to shut it down, and his agreement that he was dealing with Mr Lyampert on behalf of Inc and regarded the two as interchangeable: J/1 at [28]-[30].
55. He continued:
 - “31. Before me Mr Bell sought to explain his earlier evidence by saying he was confused during that cross examination and that he was referring to the pre 2010 position. He sought to explain the deposition by saying that its focus was upon the incorporation of UK in 2004 and was taken in stressful conditions in California in a room full of lawyers as well as Mr Frenkel and Mr Lyampert.
 32. I accept that the main (but not sole) focus of his 2012 deposition was the formation of UK and that the main (but not sole) focus in the 2017 hearing was the 2004 agreement and that some of his answers in both were in such contexts. In the exchanges summarised above, the use of the present tense in both the question and the answer seems clear when taken in isolation.
 33. However, his answers regarding the conversations which he had

with Mr Frenkel in early 2010 are broadly consistent with what he told me about them. Moreover in other passages, he referred to UK after 2010 as his and to his taking it forward. The confusion arises in respect of the legal consequences rather than what Mr Frenkel told him. As the submissions of the parties in these proceedings show, there is a stark dispute as to what is the effect in law of the words which Mr Bell ascribes to Mr Frenkel in 2010, even if they were said.

34. I take into account that Mr Bell is not a lawyer and the position regarding the two companies on the breakdown of relations between Mr Frenkel and Mr Lyampert in 2010 was not straightforward. In my judgment, the evidence of Mr Bell before me and before Judge Tipples and in the deposition, emails and letters put to him, show a high degree of confusion in his own mind as to the legal position relating to the ownership and profit distribution of UK and the control of Inc after his conversations with Mr Frenkel in 2010.
35. In my judgment there is no sufficient justification to infer that he was deliberately setting out to mislead the court, then or now. Even on the basis of confusion, however, that is sufficient for me to adopt the cautious approach to Mr Bell's evidence set out above."
56. HHJ Jarman reverted to this description of Mr Bell being confused in a later passage when considering the submission that he (and UK) were barred from bringing the claim because it was inconsistent with the position adopted by them in the 2015 proceedings. He said:
- "72. As I have already indicated, in my judgment the conduct of Mr Bell as outlined above does not amount to a clear and consistent position in previous legal proceedings so as now to estop him or UK from asserting a disclaimer by Inc in 2010. His evidence in 2017 and before me as to what Mr Frenkel told him in early 2010 was broadly consistent. Some passages in his evidence before Judge Tipples, in his solicitors correspondence in 2016 and in his 2012 deposition, in the circumstances summarised in paragraph 17 above as to the legal consequences may be taken as inconsistent with his position in these proceedings, whereas other passages may not. The overall impression is one of confusion which is why I have not found his evidence before me to be reliable. But that is not sufficient to found the claimed estoppel."
57. In his second judgment, HHJ Jarman dealt with the remitted issues by first considering the question of contractual surrender. Mr Bell's case was that as part of the 2010 arrangements it was expressly or impliedly agreed that the 49% / 51% split between himself and Inc was replaced by an equal split between him and Mr Lyampert, and he gave evidence that the issued shareholding would be the "new relationship": J/2 at [40].

58. HHJ Jarman pointed out however that Mr Bell had not indicated in the previous proceedings or in his solicitor's letter in 2016 (see paragraph 39 above) that there had been a change in beneficial ownership in 2010; he also referred to the text messages in which Mr Frenkel asked for payment and Mr Bell replied asking for payment details (paragraph 37 above); to Mr Bell's deposition in 2012 where he said that the owners of UK were himself, Mr Frenkel and Mr Lyampert (paragraph 35 above); to his statement in the 2015 proceedings clarifying that he meant that Mr Frenkel and Mr Lyampert were owners "via Inc" (paragraph 40 above); and to the closing submissions for Mr Bell in the 2015 proceedings to the effect that it was arguably correct that the three men were the owners of UK albeit in the case of Mr Frenkel and Mr Lyampert through the corporate vehicle of Inc (paragraph 42 above): J/2 at [40], [42]-[43]. He then referred to Mr Bell's position on dividends in the 2015 proceedings, namely that in his solicitor's letter it was said that he believed Inc was entitled to 50% of the dividends, which he had paid to Mr Lyampert at his direction on behalf of Inc, noting that it was the case of Inc and Mr Frenkel that this could only be on the basis that Inc continued to have a beneficial interest in the ownership of UK.
59. He continued:
- "45. On that latter point, as Sir Christopher Floyd observed in paragraph 29, the events of 2010 were not directly in issue in the 2015 proceedings. However, these inconsistencies cause me to doubt that as part of the 2010 agreement, Mr Bell and Mr Lyampert discussed expressly the share ownership of UK. It is more likely that what they focussed on was the business of UK going forward and how profits would be divided."
60. As already referred to, he then went on to consider the question of whether such a term should be implied, finding that it should be, but that the agreement failed as a contractual surrender for want of writing to satisfy s. 53 LPA 1925.
61. He next considered the question of proprietary estoppel. There was no substantial dispute as to the principles in relation to proprietary estoppel, which had been summarised by Sir Christopher Floyd in his judgment at CA [102], by reference to what Lord Walker said in *Thorner v Major* [2009] UKHL 18 at [29], as consisting of three main elements: (1) a representation or assurance made to the claimant; (2) reliance on it by the claimant; and (3) detriment to the claimant in consequence of his reasonable reliance: J/2 at [63].
62. HHJ Jarman then summarised the rival contentions. UK and Mr Bell contended that the Frenkel disavowal was a representation or assurance that Inc was giving up its beneficial interest in UK; that it was reasonable for Mr Bell to understand that as a promise that he could rely on; that he did so understand it; that in reliance on it he decided not to wind up UK and conduct its business through another vehicle; and that if Inc were allowed to go back on the Frenkel disavowal Mr Bell would suffer a detriment because Inc would become the controlling shareholder: J/2 at [66]. Inc and Mr Frenkel contended that the assurance was not sufficiently clear, Mr Bell could not have thought that Mr Frenkel was disavowing all of Inc's interest in UK, and Mr Bell could not have relied on the disavowal, as he saw Inc and Mr Lyampert as interchangeable: J/2 at [68].

63. Although it is quite a lengthy passage I think it is helpful to set out his reasoning and conclusions on these issues in full:

- “69. In my judgment, that was a clear enough assurance to Mr Bell that Mr Frenkel wanted nothing to do with UK and that the company and business was his to do with what he liked. This was important to Mr Bell, given that Inc had beneficial rights to control UK, and given that Inc was owned equally between Mr Frenkel and Mr Lyampert, whom Mr Bell saw then as two warring factions. He did not want to be between them. Once the Frenkel disavowal was given, that concern disappeared. It is likely that the precise legal consequences did not then much matter to Mr Bell. The two issued shares were in his name and the name of Mr Lyampert respectively. What mattered to Mr Bell, was that Mr Frenkel, one of the warring factions, was out of the picture so far as UK was concerned, and that Mr Bell was free to deal only with Mr Lyampert, with whom he remained on friendly terms. Mr Bell is likely to have reasonably understood the Frenkel disavowal to mean that Inc speaking through Mr Frenkel, would not seek to rely upon the 2004 agreement as to the beneficial interest of Inc in UK.
70. It is not surprising that Mr Bell did not understand the effect of the Frenkel disavowal in terms of corporate identity. Nor is surprising that, as he later recalled, he then saw Inc and Mr Lyampert as interchangeable, given the fact that Mr Lyampert assured him that, despite Mr Frenkel seeking to dissolve Inc and taking its staff to a new company, he, Mr Lyampert, would carry on with Inc as best he could. In my judgment neither of these facts, individually or taken together, are sufficient to impact upon Mr Bell’s reasonable understanding of what the Frenkel disavowal meant in terms of UK.
71. The focus on this issue was rather upon whether Mr Bell relied upon those assurances to his detriment. Unsurprisingly Mr Buck, supported by Mr Barden, submits that in light of the subsequent conduct of Mr Bell in engaging with Mr Frenkel’s request for payments from UK and Mr Bell’s inconsistent indications in subsequent proceedings and in the 2016 letter, it cannot be the case that Mr Bell understood these assurances in the way that he says or that he relied upon them at all, let alone to his detriment.
72. It is important in this context, in my judgment, to focus upon the detrimental reliance which forms part of Mr Bell’s case, and, in the words of Hoffman LJ in *Walton*, to look backwards from the moment the assurance fell to be performed. In my judgment that moment was immediately after the assurances, or in other words the Frenkel disavowal, had been given.
73. Mr Bell in cross-examination before me said that after the assurances, the impression he had was that UK was his. He also confirmed his witness statements to the effect that if he thought

UK would still be owned between himself and “the two warring partners...via Inc” he would have resigned from UK and he would have widened or restarted his other business operations which he had the knowledge and resources to make a success of “in order to avoid getting caught up.” Instead he entered into the 2010 agreement with Mr Lyampert. The latter gave evidence in support of this part of Mr Bell’s evidence.

74. In my judgment that evidence has the ring of truth about it, given the modest financial position of UK in 2010, and I accept it. Mr Bell’s evidence as to what he would have done if he thought that UK was still owned by himself and two warring factions is similar to what Mr Frenkel did in fact do. Mr Buck and Mr Barden submit that by 2011 and 2012 it was clear that Mr Frenkel was not walking away and yet Mr Bell continued to observe the 2010 agreement and did not resign from UK. Thus he did not rely upon the Frenkel disavowal.
75. However, in my judgment, once the 2010 agreement was made with Mr Lyampert on that basis and acted upon successfully for a year or two, it would be more difficult for Mr Bell to walk away from UK to pursue other business options. This was not dealt with in any great detail in the evidence before me. However, in my judgment it is likely that Mr Bell and Mr Lyampert made their decision in 2010 in reliance on the Frenkel disavowal.
76. The fact that Mr Bell in subsequent proceedings in California and in this jurisdiction became highly confused as to the legal consequences of all that occurred in 2010 (which are still not clear cut to lawyers) does not, in my judgment, significantly impact upon the detrimental reliance in 2010.”
64. It is now possible to consider the arguments advanced on this issue by Mr Buck and Mr Barden respectively. Mr Buck’s argument was that HHJ Jarman had acted inconsistently. When considering the question whether there had been any express discussion as part of the 2010 agreement, he relied on the various statements and acts on the part of Mr Bell after 2010 (his “subsequent conduct”) to conclude that there had not been: J/2 at [45]. But when considering the question whether Mr Bell had relied on the Frenkel disavowal he had ignored his subsequent conduct.
65. Viewed as a narrow point by itself I do not think there is the necessary inconsistency that Mr Buck suggested. At J/2 [45] the point that HHJ Jarman was making was that he thought it unlikely that Mr Bell and Mr Lyampert had in 2010 had express discussions, and reached express agreement, on the beneficial ownership of UK going forward, as if they had it is likely that he would have understood, and remembered, the legal position. A finding that Mr Bell and Mr Lyampert did not have express discussions in 2010 about changing the beneficial ownership is not necessarily inconsistent with a finding as to what Mr Bell understood by what Mr Frenkel said, which is a different question.
66. But there is a broader point. This is whether HHJ Jarman’s conclusion that Mr Bell

understood, from what Mr Frenkel said, that UK was his can stand with HHJ Jarman's other findings and with Mr Bell's subsequent conduct. This was the point on which Mr Barden concentrated his submissions. He said that Mr Bell's case (and that of UK) that Inc was estopped by proprietary estoppel required Mr Bell to have understood the Frenkel disavowal as meaning that *Inc* was giving up its interest in UK, and that this could not be squared with Mr Bell's subsequent conduct, all of which indicated that Mr Bell believed Inc to have remained a co-owner of UK with him in 2010.

67. Mr Barden said that HHJ Jarman correctly identified in his first judgment that he should be cautious about placing reliance on any of the oral evidence. That meant that the documentary record was more relevant in identifying what Mr Bell actually thought in 2010. Particularly telling were the statements made, by him or on his behalf, in the course of the 2015 proceedings, namely his Defence, which referred to the 50% of profits as "Inc's sum" and which pleaded that this was paid to Mr Lyampert after 2010 following the latter's indication "on behalf of Inc" that it should be (paragraph 38 above); and the letter from his solicitors which repeated his case as being that he believed that Inc "is the correct legal and beneficial owner" of 51% of UK (paragraph 39 above). These were formal legal documents written with the benefit of legal advice, and flatly inconsistent with his having believed in 2010 that Inc had given up its interest in UK. In the light of them it would require cogent evidence that he did believe that in 2010, or a cogent explanation as to how he could have changed his mind. But there was no such evidence or explanation. In truth, he said, HHJ Jarman had concluded that Mr Bell believed one thing in 2010, had forgotten it and come to believe something else between 2012 and 2017, and had then reverted to his original understanding in 2020. That was not sustainable.
68. This submission was persuasively advanced by Mr Barden. We are however hearing an appeal on a question of fact. Numerous recent authorities of the Supreme Court and this Court have emphasised how difficult it is for an appellate court to reverse a trial judge on a question of fact. There was no dispute before us as to the appropriate approach which is "a well-trodden path": *Volpi v Volpi* [2022] EWCA Civ 464 at [2] per Lewison LJ (not cited to us but a convenient summary of the relevant principles). An appellate court must ask itself whether the decision of the judge was wrong by reason of some identifiable flaw, such as a gap in logic, a lack of consistency or a failure to take account of some material factor which undermines the cogency of the conclusion: *re Sprintroom Ltd* [2019] EWCA Civ 932 at [26] per McCombe LJ. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion; what matters is whether the decision of the judge was rationally insupportable, one that no reasonable judge could have reached: *Volpi v Volpi* at [2]. The need for appellate caution is based on much more solid grounds than professional courtesy: *Biogen Inc v Medeva plc* [1997] RPC 1 at 45 per Lord Hoffmann. And it is trite law that reasons for judgment could always be better expressed, and that judgments should be read on the assumption that judges have all the evidence in mind, and that they know what they are doing unless they have demonstrated the contrary.
69. These principles require an appellate court to exercise considerable caution before concluding that a trial judge has reached a conclusion that is rationally insupportable or one that no reasonable judge could have reached. Before assuming therefore that

HHJ Jarman has made the error attributed to him by Mr Barden, we should look with care at his precise findings. These can I think be broken down as follows:

- (1) Mr Frenkel told Mr Bell that he wanted nothing to do with UK, and that the company and business was his to do what he liked with.
- (2) What was important to Mr Bell was that Mr Frenkel, one of two warring factions, was out of UK and he was free to deal only with Mr Lyampert.
- (3) Mr Bell saw Inc and Mr Lyampert as interchangeable, Mr Lyampert having assured him that he would carry on with Inc as best he could.
- (4) It is likely that the precise legal consequences did not then much matter to him; it is not surprising that he did not understand the effect of the Frenkel disavowal in terms of corporate identity.
- (5) Mr Bell is likely to have reasonably understood the Frenkel disavowal to mean that Inc, speaking through Mr Frenkel, would not seek to rely upon the 2004 agreement as to the beneficial interest of Inc in UK.
- (6) After the assurances the impression Mr Bell had was that UK was his.
- (7) If he had thought that UK would still be owned between himself and “the two warring partners...via Inc” he would have resigned from UK and would have widened or restarted his other business operations. Instead he entered into the 2010 agreement with Mr Lyampert.

70. Several of these findings seem to me eminently reasonable conclusions that cannot be faulted. I have no difficulty with (1) and (2), neither of which was challenged on appeal. Nor do I have any difficulty with his conclusion at (7), which HHJ Jarman said had the ring of truth about it. Taking these together, what they amount to is a finding that Mr Bell thought that Mr Frenkel was to be “out of” UK, leaving him free just to continue with Mr Lyampert, and that he relied on that belief in agreeing the way forward with Mr Lyampert. So far, so good.

71. I also have no difficulty with the finding at (3). It was entirely consistent with evidence given by Mr Bell in cross-examination before HHJ Jarman, which was to the effect that from 2010 he understood that Mr Frenkel had left Inc, wanted nothing further to do with Inc and was doing his best to shut it down; and that he was then dealing with Mr Lyampert on behalf of Inc and that these were, in effect, interchangeable: J/1 at [30]. Mr Twigger submitted that in this evidence Mr Bell was only referring to Mr Lyampert and Inc as interchangeable in the sense that he was going to be trading with Inc, which was now going to be run by Mr Lyampert alone, and that he was not saying anything about the ownership of UK, which he thought was shared between him and Mr Lyampert personally. That is a possible view, although I find it difficult to reconcile with his later statements about Inc still being the owner.

72. Nor do I have any difficulty with HHJ Jarman’s finding at (4), which is in effect that Mr Bell did not understand the legal effect of what Mr Frenkel had said. This is consistent with what he had said in his first judgment, namely that Mr Bell was

confused “in respect of the legal consequences rather than what Mr Frenkel told him” (J/1 at [33]), and that he was confused as to “the legal position relating to the ownership and profit distribution of UK and the control of Inc after his conversations with Mr Frenkel in 2010” (J/1 at [34]). All of this suggests that he thought Mr Bell did not have a clear understanding, either in 2010 or later, as to what the legal effect of what Mr Frenkel had said was, something that, as he commented in both judgments, was not clear even to lawyers: see J/1 at [33], J/2 at [76].

73. The difficulty I have however is squaring the findings at (5) and (6), which together amount to a finding that Mr Bell understood that Inc would not seek to claim a beneficial interest in UK, and that UK was his, with either HHJ Jarman’s other findings or with Mr Bell’s subsequent conduct. I have not understood how Mr Bell could at one and the same time fail to understand “the legal effect of the Frenkel disavowal in terms of corporate identity”, and yet understand the Frenkel disavowal as meaning that Inc “would not seek to rely upon the 2004 agreement as to the beneficial interest of Inc in UK”; or believe that UK was his.
74. The position can be simply stated: did Mr Bell think in 2010, as a result of Mr Frenkel’s assurances, that UK was his, that is that Inc did not have, or would not pursue, any claim to the 51% beneficial interest agreed in 2004, or not? At (5) and (6) HHJ Jarman finds that Mr Bell did think this; but at (4) he finds that Mr Bell did not understand the legal position.
75. I am very conscious that judgments are not to be subjected to a minute textual analysis, or picked over as if they were statutes or contracts. But even giving the judgment the most generous interpretation, I have not found it possible to reconcile these findings with each other. This is even without taking into account Mr Bell’s subsequent conduct, all of which is consistent with Mr Bell having thought that Inc continued to have an interest in UK, and none of which is easy to reconcile with an understanding that it did not. Mr Twigger submitted that HHJ Jarman had the advantage of seeing Mr Bell in the witness box, and that there was other evidence which went the other way, for example assertions in correspondence in the course of the 2015 proceedings suggesting that Mr Bell and Mr Lyampert were the beneficial shareholders of UK (J/1 at [52]). But this is not simply a question of whether a trial judge had material which he could accept. It is a question of whether his findings make sense when read together. For the reasons I have sought to give I do not think they do.
76. Where does this leave us? I would accept HHJ Jarman’s findings that Mr Bell thought that Mr Frenkel was “out of UK”, and that he was therefore free just to reach agreement with Mr Lyampert; that he was not therefore stuck with two warring partners; and that if he had thought he was, he would have folded UK and started another venture. But I would not accept his finding that Mr Bell thought that Inc would not seek to rely on the 2004 agreement to claim its beneficial interest in UK; or that he thought UK was owned solely by him. The evidence supported a finding that Mr Bell thought that with Mr Frenkel disavowing any interest, it would be just him and Mr Lyampert going forward. It no doubt also supported a finding that Mr Bell did not quite understand how this worked legally; but I do not think it supported a finding that he regarded Inc as having given up its beneficial interest in UK. On the contrary, what the evidence tends to suggest is that Mr Bell believed that with Mr Frenkel gone, Mr Lyampert was in effect Inc for these purposes. That would

explain not only his acceptance that Inc and Mr Lyampert were interchangeable, but also his statements in the 2015 proceedings that Inc was (and remained) the owner, and his description of the 50% of profits as Inc's sum, payable to Mr Lyampert at his direction on behalf of Inc.

77. I have considered whether the claim in proprietary estoppel can nevertheless be upheld. I have accepted HHJ Jarman's findings that Mr Bell did rely on Mr Frenkel's assurances in the sense that he believed that he would not have two warring partners, and would not have carried on with UK if he had thought he would have. To this extent I accept that he relied on what Mr Frenkel said to his detriment. But the difficulty with that is that the case was presented below, and maintained before us by Mr Twigger, on the basis that the Frenkel disavowal was an assurance *by Inc* that it was giving up its interest in UK, and that this was the assurance relied on by Mr Bell. I agree with Mr Barden that this case required Mr Bell to establish that he did understand what Mr Frenkel said in that sense. In those circumstances if, as in my view is the case, the crucial finding that Mr Bell thought that Inc was giving up its interest cannot stand, then I think that it does indeed follow that the claim is not made out.
78. I would therefore uphold this ground of appeal and set aside the finding that Inc was estopped by proprietary estoppel from claiming a beneficial interest.

Respondent's notice: implied term

79. That means that it is necessary to consider the Respondent's notice served by UK and Mr Bell. This contends that the judgment should be upheld on the alternative ground that HHJ Jarman was wrong to hold that the implied term he found could not be given effect because of s. 53 LPA 1925. It is also necessary to consider the response by Inc and Mr Frenkel that HHJ Jarman erred in finding that there was such an implied term. Logically the latter question falls to be considered first.
80. HHJ Jarman considered this question in his second judgment. Having rejected the argument that as part of the 2010 agreement, Mr Bell and Mr Lyampert expressly discussed the share ownership of UK (J/2 at [45]), he identified the next issue as being whether by agreeing to divide profits equally, it was implicit that they would also own UK equally (J/2 at [46]) and concluded that it was, as follows (J/2 at [48]):

“48. In my judgment, it was a necessary implication of the 2010 agreement that the shares in UK would thenceforth be held in the same way as the profits were to be split, namely that each of the issued shares would be held beneficially for the person in whose name it was issued. The 2010 agreement was entered into on the basis of the Frenkel disavowal, his setting up a new company to compete with Inc, and his steps to dissolve Inc. If there were no discussions between Mr Bell and Mr Lyampert in those circumstances as to how UK was thenceforth to be owned and controlled, then by agreeing to carry on the business of UK equally, the proper inference is that they are to be taken in all the circumstances as intending that ownership also was to be equal.”

81. There was no dispute as to the principles by which a term is to be implied into a

contract. They are summarised in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72 (“*M&S*”) at [16]-[21] per Lord Neuberger PSC. I would however accept Mr Twigger’s submission that the implication of a term into an oral agreement may be somewhat easier in practice than the implication of a term into a detailed and formal written contract such as the lease of some 70 pages in issue in that case.

82. I would also draw attention to the point that Lord Neuberger made in *M&S* at [21]:

“21 ... Sixthly, necessity for business efficacy involves a value judgment. It is rightly common ground on this appeal that the test is not one of “absolute necessity”, not least because the necessity is judged by reference to business efficacy. It may well be that a more helpful way of putting Lord Simon’s second requirement is, as suggested by Lord Sumption JSC in argument, that a term can only be implied if, without the term, the contract would lack commercial or practical coherence.”

The reference to Lord Simon’s second requirement is to his speech in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 283 where he identified the second requirement for a term to be implied as being that it was “necessary to give business efficacy to the contract.”

83. Mr Barden, who argued this point for the appellants, said that it was not necessary for the 2010 agreement to contain any agreement about the beneficial ownership of UK. The terms that HHJ Jarman found to have been agreed in 2010 between Mr Bell and Mr Lyampert (on behalf of themselves, UK and Inc) were (i) that Mr Bell and Mr Lyampert agreed to work together to carry on the business of UK equally between them; (ii) that the special trading arrangements agreed in 2004 between UK and Inc were replaced with normal trading terms (so that they were free to charge each other a normal mark-up and to compete with each other instead of having mutually exclusive territories); (iii) that Mr Lyampert agreed to take on Inc’s debt to UK; and (iv) that profits were to be split equally between Mr Bell and Mr Lyampert. None of these terms, Mr Barden said, required there to be a change in the ownership of UK. The commercial relationship between UK and Inc was something distinct from the ownership of UK; and there was also no necessary correlation between the entitlement to share in profits and ownership (as indeed was shown by the 2004 agreement under which ownership was split 51% / 49% but profits split 50% / 50%).

84. In my judgment however HHJ Jarman was entitled to come to the conclusion that he did. The statement by Lord Neuberger in *M&S* that the question of necessity for business efficacy involves a value judgment is a valuable reminder that questions of implication are not pure questions of law, but involve an assessment of the factual situation.

85. In the present case, the relevant facts included the fact that Mr Bell and Mr Lyampert were reaching new arrangements precisely because Mr Frenkel and Mr Lyampert had fallen out, and against the background of Mr Frenkel telling Mr Bell that he was free to deal with Mr Lyampert alone going forward. UK had originally been set up in 2004 to enable Inc to exploit the European and UK market: that explained the special trading arrangements then agreed under which Inc would supply UK at cost, Inc

would not compete with UK in that market, and profits would be shared (see paragraph 18 above). When, against the background of Mr Frenkel disavowing any ongoing interest, Mr Lyampert agreed (necessarily on behalf of Inc) that these special trading arrangements would come to an end and the two companies would be free to compete normally with each other (or, in Mr Bell's phrase, that "the gloves were off") that undoubtedly weakened the rationale for Inc to own and control UK.

86. When one adds to that the agreement that Mr Bell and Mr Lyampert would carry on the business of UK equally together, and would share the profits equally as the two shareholders, and, significantly, that Mr Lyampert would personally take on the outstanding 6-figure debt owed by Inc to UK, I think it was open to HHJ Jarman to conclude that it was implicit in these arrangements – in the sense that the contract would “lack commercial or practical coherence” without such a term – that Inc's place in UK was being assumed by Mr Lyampert personally and that he and Mr Bell would thereafter own, run and profit from UK equally. It is no doubt true that there is nothing impossible in the profits of a company being split differently from its ownership, but it is at least very odd for a small private company with two directors, two shareholders, and an equal division of profits between them, to be owned and ultimately controlled by someone else. For Inc to have retained its controlling 51% interest after the 2010 agreement came into effect, with the ability that gave it to step in and claim the majority of the value of the company that Mr Bell and Mr Lyampert were to take forward between them, would I think mean that the arrangement would indeed lack commercial or practical coherence – or at any rate that HHJ Jarman, who was immersed in the facts in a way we cannot be, was entitled so to conclude.
87. Mr Barden said that Mr Lyampert owed fiduciary duties to Inc and should not lightly be assumed to have agreed on behalf of Inc that he personally could take Inc's interest. But that seems to me to ignore the fact that the only other shareholder in Inc had told Mr Bell that as far as he was concerned he had no further interest in UK. This was the view taken by HHJ Jarman (J/2 at [53]) and there has been no separate appeal against that part of his judgment.
88. Mr Barden said the proof of the pudding was in the eating: it could scarcely be said to have been obvious that the beneficial ownership was going to be equally shared between Mr Bell and Mr Lyampert when Mr Bell's subsequent conduct demonstrated that he did not understand that to be the case. But obviousness and necessity are alternative requirements for an implied term, and even though this may only happen rarely, only one of them needs to be satisfied: see Lord Neuberger's fourth point in *M&S* at [21]. Moreover, whether a term is so obvious that it ought to be implied has to be determined objectively and does not depend on the subjective belief or understanding of one of the parties. In any event Mr Bell told Ms Tipples that he thought it was fine just to continue with the existing shareholders, which is in effect what HHJ Jarman found to have been implicitly agreed.
89. I would therefore dismiss the contention of Inc and Mr Frenkel that HHJ Jarman erred in finding that it was implicitly agreed as part of the 2010 agreement that the ownership of UK was to be shared equally between Mr Bell and Mr Lyampert.

Respondent's notice: s. 53 LPA 1925

90. The remaining question therefore is whether the agreement that UK should be

beneficially owned by Mr Bell and Mr Lyampert after 2010 is ineffective for want of formalities, specifically the requirement in s. 53(1)(c) LPA 1925. This, and s. 53(2), provide as follows:

“53. Instruments required to be in writing.

(1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol—

...

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.”

91. On this appeal it is not disputed that before the 2010 agreement each of the two issued shares, one in the name of Mr Bell and the other in the name of Mr Lyampert, was held on express trust as to 49% for Mr Bell and 51% for Inc (see paragraph 21 above). On the basis of the implied term found by HHJ Jarman, it was agreed that each share should be held beneficially by its legal owner. That means that what was agreed was (i) that in the case of Mr Bell’s share, the 51% beneficial interest formerly held by Inc should be transferred to Mr Bell so that he became the 100% legal and beneficial owner; and (ii) that in the case of Mr Lyampert’s share, the 51% interest held by Inc and the 49% interest held by Mr Bell should both be transferred to Mr Lyampert. The argument accepted by HHJ Jarman was that these would be dispositions of equitable interests subsisting at the time of disposition and hence were required to be in writing, and that the lack of such writing meant that the dispositions were invalid: J/2 at [59].

92. The argument put forward by Mr Twigger for UK and Mr Bell that this is wrong can I think be summarised as follows:

- (1) The 2010 agreement was a quadripartite agreement between Mr Bell, Mr Lyampert, UK and Inc.
- (2) By virtue of the implied term found by HHJ Jarman, Inc and Mr Bell agreed for valuable consideration to transfer their respective equitable interests (in the case of Inc to Mr Bell and Mr Lyampert, and in the case of Mr Bell to Mr Lyampert).
- (3) Such a contract, being a contract for the disposition of an interest in a private company, is specifically enforceable.
- (4) Under a specifically enforceable contract for the sale or disposition of specific property, the vendor or disponent holds the property on constructive trust for the purchaser or disponent until the disposition is completed.
- (5) That constructive trust is sufficient to carry the equitable interest in the property to the purchaser or disponent by virtue of s. 53(2) LPA 1925

notwithstanding the absence of signed writing.

- (6) Mr Bell and Mr Lyampert are therefore now the sole beneficial owners of their shares.

This argument is in my judgment sound and in accordance with orthodox principles, and I would uphold the cross-appeal brought by UK and Mr Bell accordingly.

93. Two points were in effect taken by Inc and Mr Frenkel in opposition to it. The first was that no constructive trust could arise (that is, challenging step (4)). The other was that there was no sufficient consideration for this element of the 2010 agreement to be specifically enforceable (that is, challenging step (2)).
94. I will take the latter first, which was primarily argued by Mr Buck. Having identified that there were three potential dispositions involved, one by Inc to Mr Bell, one by Inc to Mr Lyampert and one by Mr Bell to Mr Lyampert, he submitted that in each case consideration was needed, and that there was no consideration moving from Mr Bell to Inc.
95. Mr Twigger had a number of answers to this. The first, and most straightforward, was that this was a quadripartite agreement to which UK was a party as well as Mr Bell; UK undoubtedly gave valuable consideration to Inc by releasing it from the debt that it owed to UK; and UK was therefore able to enforce the agreement (made with UK as well as with Mr Bell) that Inc give up its interest to Mr Bell. I accept this submission which seems to me well founded. It is an illustration of the principle that where A agrees with B that B will confer a benefit on C, A can enforce that agreement for the benefit of C even if C cannot do so himself. This is the ratio of the well-known case of *Beswick v Beswick* [1968] AC 58 where Mr Peter Beswick (A) agreed with his nephew Mr John Beswick (B) that in consideration of the assignment of his business, Mr John Beswick would after his death pay his widow Mrs Ruth Beswick (C) an annuity. She was not a party to the contract at all and not able to enforce it in her own right, but she could, and did, obtain payment to herself by bringing a claim for specific performance in her capacity as administratrix of her deceased husband's estate. None of the members of the House of Lords had any doubt that she was entitled to specific performance in that capacity. As I understood it, Mr Buck accepted the principle. It seems to me to provide a complete answer to the objection based on lack of consideration: even if Mr Bell could not obtain specific performance, UK could, and that is enough.
96. That makes it unnecessary to consider whether Mr Bell himself provided any valuable consideration. Consideration, as Mr Twigger correctly pointed out, does not need to move to the promisor, only move from the promisee (see *Chitty on Contracts* (34th edn, 2021) §6-040, §6-041), and here Mr Bell agreed to give up his 49% interest in the share held by Mr Lyampert to Mr Lyampert. I think that was enough: it is trite law that if valuable consideration is provided, the adequacy of it is irrelevant, so the fact that Mr Bell gave up his 49% in that share in return for Inc's 51% in his own share does not seem to me to matter. Mr Twigger also submitted that Mr Bell personally agreed to procure UK to do various things (to release Inc from its debt, to agree to trade with Inc and the like). I have my doubts about that, as a director of a company would not normally be regarded as undertaking any personal obligation when he agrees that his company will do certain things – one would normally regard

him as acting solely as director – and Mr Twigger does not have any relevant findings of fact on the point. But I do not think it is necessary to consider that point further in the light of what I have already said.

97. So far as the agreement of Inc to give up its 51% interest in Mr Lyampert's share is concerned, I did not understand Mr Buck to dispute that adequate consideration was given by Mr Lyampert in that he agreed to take on Inc's debt. Mr Barden had a point in his written argument, not developed orally, that Mr Lyampert had not in fact discharged that debt to UK, but that seems to me irrelevant. If A (here UK) is owed money by B (here Inc), and C (here Mr Lyampert) agrees to be liable for the debt in place of B, C to my mind plainly provides valuable consideration to B whether or not C ever pays the debt to A. And quite apart from that, just as UK could enforce Inc's agreement to give up its interest in Mr Bell's share to Mr Bell, I do not see why it could not equally enforce Inc's agreement to give up its interest in Mr Lyampert's share to Mr Lyampert.
98. In my judgment therefore the objection based on want of consideration fails.
99. The other objection advanced by Mr Buck and Mr Barden was that no constructive trust arose in the circumstances. They advanced slightly different arguments. I will take Mr Barden's first. This was that the precise term found by HHJ Jarman was that the shares "would thenceforth be held" in the same shares as profits (see J/2 at [48], cited at paragraph 80 above). That was not, he said, an agreement for a future transfer. It was not therefore analogous to a contract for the sale of land or the like where the contract was to effect a conveyance in the future. There was a difference, he suggested, between a contract which contained an obligation to dispose of an interest in the future (in which a constructive trust might arise), and a purported immediate disposition. If the latter failed for want of formality, it could not be validated by treating it as a contract to convey, such as to give rise to a constructive trust.
100. I do not think this is right. I agree that there is in principle a difference between a purported immediate disposition and a contract to dispose. The difference can be seen for example in the doctrine that equity will not perfect an imperfect gift, with the result that a purely voluntary disposition that fails for want of formalities will not be saved by the doctrine of constructive trust. But it is different where the disposition is not purely voluntary but is given for valuable consideration. My understanding of the law is that in such a case equity will readily treat a purported disposition that is ineffective for want of formality as a contract to dispose, and if the contract is specifically enforceable, that will give rise to an equitable interest in the intended donee on the principle that equity looks on that as done that ought to be done.
101. We were not referred to any authority on the point but two familiar examples come readily to mind. The first is the case of a purported grant of a lease that fails to comply with the formalities prescribed by statute. The law here is well established and can be found set out, for example, in *Megarry & Wade on the Law of Real Property* (9th edn, 2019) at §16-045ff. As there explained, save for certain leases taking effect in possession for a term of three years or less (as to which see s. 54(2) LPA 1925), a deed is required for the grant of a lease. This has been the law since the Real Property Act 1845. A purported grant of a lease that fails for want of formality is clearly not in form a contract to grant a lease in the future, but equity would

nevertheless treat such an imperfect lease as a contract to grant a lease. That was decided in *Parker v Taswell* (1858) 2 De G and J 559. There it was argued that a purported lease, void for want of complying with the 1845 Act, could not be regarded as an agreement for a lease: see Mr Dart's submission at 567 that "This is not an agreement for a lease; it was intended to be a present demise, and it is either that or nothing." But this was rejected by Lord Chelmsford LC who said (at 570f):

"I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry that intention into effect."

The effect of treating an informal lease as an agreement in equity would normally be that it would be specifically enforceable, and, under the doctrine of *Walsh v Lonsdale* (1882) 21 Ch D 9, the parties were treated in equity as if the lease had been duly granted on the principle that equity looks on that as done that ought to be done.

102. The other example is the former method of creating an equitable mortgage by deposit of title deeds. For some two centuries before the passing of the Law of Property (Miscellaneous Provisions) Act 1989 it had been common to create security over land by the deposit of title deeds. Such a deposit was not in form a contract to grant a future mortgage but was intended to operate as the immediate grant of security. It could not of course take effect as a legal mortgage for want of formalities, but was regarded in equity as giving rise to a contract to grant a mortgage. Because such a contract was specifically enforceable, the effect was again to create an equitable interest, in this case an equitable mortgage, in the intended donee. Again this is all well established law: see *Megarry and Wade* at §23-041.
103. In my judgment therefore the fact that the implied term found by HHJ Jarman was not in form an agreement to dispose in the future of Inc's and Mr Bell's beneficial interests in the shares but an agreement that the beneficial interests in the shares should "thenceforth be held" for Mr Lyampert and Mr Bell provides no answer to Mr Twigger's argument.
104. That leaves the argument advanced by Mr Buck. He accepted that if Inc had contracted to sell its 51% interest to a third party X, then (assuming the contract were specifically enforceable) Inc would indeed hold the 51% interest on constructive trust for X and hence X would be the owner in equity of the interest. But he said that it made all the difference that Inc was agreeing to give up its interest to Mr Bell and Mr Lyampert who were respectively trustees for Inc. This was because a person could not be a trustee for himself.
105. I do not accept this argument. I will simplify the facts to explain the point. Suppose A is the legal owner of shares in a private company. A holds the shares on express trust for B. B agrees with A for valuable consideration that he will transfer his beneficial interest in the shares to A. I agree (and Mr Twigger did not dispute) that A cannot be a trustee for himself, so the effect of B's transfer to A would be to surrender or give up his beneficial interest to A, leaving A as both legal and beneficial owner of the shares. I agree (and again Mr Twigger did not dispute) that once the surrender has been effected, there is no trust involved at all. So if one assumes B executes a signed written disposition surrendering his beneficial interest to A, thereby complying with

s. 53(1)(c) LPA 1925, B's erstwhile beneficial interest at that point disappears. That all seems to me entirely straightforward and to give rise to no difficulty.

106. But what we are concerned with is the rights of the parties at an earlier stage, at which B has contracted to surrender or give up his beneficial interest in the shares to A but has not yet done so. Can A enforce that obligation? I do not see why not, provided that it is specifically enforceable. And the contract for the sale of shares in a private company (or the beneficial interest in them) is a contract which will normally be specifically enforceable. So the question is what are the rights of the vendor and a purchaser under a specifically enforceable contract for the sale of specific property where the contract has not yet been completed? That has been worked out in particular in relation to the sale of land, but it was not suggested that the principles are any different in relation to other types of unique property. The vendor under such a contract becomes a constructive trustee for the purchaser. It is a modified form of constructive trusteeship as the vendor has his own rights under the contract: see *Oughtred v IRC* [1960] AC 206 at 227 where Lord Radcliffe referred to the vendor as having become a trustee for the purchaser "sub modo".
107. What this means can be seen from *Megarry & Wade* §14-051ff. As there explained, while the vendor remains unpaid, the trusteeship arising from a specifically enforceable contract is of a peculiar kind, because although a trustee, the vendor has a personal and substantial interest in the property and usually a right to possession and rents and profits until the day fixed for completion: *ibid* §14-054. The vendor is therefore, at least so long as unpaid, not a bare trustee. Once however the purchaser has paid the whole price (and done anything else he is obliged to do before completion) the vendor does become a bare trustee for the purchaser: *ibid* §14-055. See for example *Shaw v Foster* (1872) LR 5 HL 321 at 349 per Lord O'Hagan, citing with approval the statement of Sir Thomas Plumer MR in *Wall v Bright* (1820) 1 Jac & W 494 that "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey." In a case like the present however where there is no price to be paid, and nothing else for the disponent to do, the effect is that the disponent holds his interest for the disponent from the date of the contract.
108. Does s. 53(1)(c) prevent this? If one leaves aside for the moment the fact that A is himself the legal owner of the shares, then the position is determined, at any rate at this level, by the decision of this Court in *Neville v Wilson* [1997] Ch 144. Here 120 shares in a company referred to as UEC were held as to 60 each by two individuals, referred to as "the widow" and "Mr Wilson", as nominees for a company referred to as JEN. The shareholders of JEN agreed to an informal liquidation of JEN whereby it was agreed that all its assets should be distributed to themselves rateably. They overlooked the 120 shares held by the widow and Mr Wilson for JEN, but the Court held that the effect of the agreement was that each shareholder agreed to assign his interest in the other shares of JEN's equitable interest in exchange for the assignment by the other shareholders of their interests in his own aliquot share: see at 155A-B per Nourse LJ giving the judgment of the Court. This is quite a dense passage but it seems clear enough that what Nourse LJ is referring to is an agreement by each shareholder to dispose of an existing equitable interest in favour of the other shareholders. Since there was no writing that raised the question whether each such agreement was rendered ineffective by s. 53(1)(c) LPA 1925.

109. The answer given by the Court was that it was not. At 155E Nourse LJ said that the simple view of the case was that the effect of each individual agreement was to constitute the shareholder an implied or constructive trustee for the other shareholders, so that the requirement for writing in s. 53(1)(c) LPA 1925 was dispensed with by s. 53(2). He then analysed in detail the speeches in *Oughtred v IRC* where different views on this question had been taken by their Lordships, and concluded at 157G:

“We do not think that there is anything in the speeches in the House of Lords which prevents us from holding that the effect of each individual agreement was to constitute the shareholder an implied or constructive trustee for the other shareholders. In this respect we are of the opinion that the analysis of Lord Radcliffe, based on the proposition that a specifically enforceable agreement to assign an interest in property creates an equitable interest in the assignee, was unquestionably correct; cf. *London and South Western Railway Co. v. Gomm* (1882) 20 Ch.D. 562, 581, *per* Sir George Jessel M.R. A greater difficulty is caused by Lord Denning’s outright rejection of the application of section 53(2), with which Lord Cohen appears to have agreed.

So far as it is material to the present case, what subsection (2) says is that subsection (1)(c) does not affect the creation or operation of implied or constructive trusts. Just as in *Oughtred v. Inland Revenue Commissioners* [1960] A.C. 206 the son’s oral agreement created a constructive trust in favour of the mother, so here each shareholder’s oral or implied agreement created an implied or constructive trust in favour of the other shareholders. Why then should subsection (2) not apply? No convincing reason was suggested in argument and none has occurred to us since. Moreover, to deny its application in this case would be to restrict the effect of general words when no restriction is called for, and to lay the ground for fine distinctions in the future. With all the respect which is due to those who have thought to the contrary, we hold that subsection (2) applies to an agreement such as we have in this case.”

110. That is binding on us, and establishes that an agreement to dispose of an equitable interest in shares will in the ordinary case give rise to a constructive trust in favour of the intended donee, and that even if there is no signed writing in compliance with s. 53(1)(c) LPA 1925, the agreement will be effective to carry the beneficial interest to the donee because of s. 53(2).
111. The question is whether it makes a difference that the intended donee is himself the registered legal owner of the shares. Mr Twigger said that this was in fact the case in *Neville v Wilson*, as the widow was herself one of the shareholders and entitled to a distribution of 4 of the 60 shares registered in her name. That is true and if the point had been argued it might have been decided, but there is no trace in the judgment or short report of the argument that the point was ever taken. I do not think we can get much assistance from it beyond the forensic point that it did not occur to counsel or the members of the Court that the position of the widow might be different. I think we have to decide the point for ourselves.

112. But I do not myself think there is the difficulty Mr Buck suggested. A holds on trust for B. B therefore holds a beneficial interest in the shares. B contracts to dispose of that interest to A. On the principles already discussed that means that B holds his interest on constructive trust for A. We know from *Neville v Wilson* that the lack of signed writing does not prevent such a constructive trust from being given effect. In the normal case where the intended donee is not the trustee the effect is that the beneficial interest passes from B to the intended donee, at any rate once his side of the contract has been performed so that he is entitled to call for it to be completed. In the case where the intended donee is the trustee, I do not see why the effect is not exactly the same, namely that B holds his beneficial interest for A. The alternative would mean that the beneficial interest remained with B, despite the fact that he has agreed that it should pass to A, and that that agreement is specifically enforceable.
113. Mr Buck said that that cannot be the case as it would mean that A would hold on trust for B who would in turn hold on trust for A and that is not possible. But I think this is to confuse the question whether B holds his interest for A with the consequences of his doing so. It is easier to see this if one considers the case where A still has to pay money or perform some other obligation under the contract. In such a case the effect of the contract would be, as I have explained above, that B would become a qualified trustee, or trustee *sub modo*, for A and not a bare trustee. There is no reason why such a constructive trusteeship cannot subsist as there is no objection to A holding on trust for B who in turn holds on a qualified trust for A, as in such a case B has his own interest and does not drop out. Now suppose that in such a case A pays the purchase price and becomes entitled to call for completion. B now does become a bare trustee, so the property is held by A on trust for B who in turn holds on trust for A. The effect it seems to me is that B would drop out, and A would be left holding both the legal and beneficial interest. As already referred to, A cannot hold on trust for himself, so the practical effect is that A would simply hold the whole legal and beneficial interest.
114. If this is right, and I am satisfied it is, then it cannot make any difference that A does not have to pay any money under the contract or perform any other obligation before being able to call on B to complete. From the date of the contract therefore A holds on trust for B who in turn holds on trust for A, with the consequence already identified that B drops out and A holds the whole legal and beneficial interest.
115. Mr Buck sought to support his argument by reference to two decisions of the High Court of Australia. The first was *DKLR Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (NSW)* [1981-2] 149 CLR 431. As its name suggests this was a stamp duty case. A company referred to as 29 Macquarie was the owner of a parcel of land. It transferred the land to the appellant company, referred to as DKLR, to hold on trust for it. It argued that all it had transferred was the bare legal estate in the land, leaving itself as owning the entire beneficial interest throughout. Aickin J rejected this argument as being based on a fundamental misconception, saying (at 463):

“If one person has both the legal estate and the entire beneficial interest in the land he holds an entire and unqualified legal interest, and not two separate interests, one legal and the other equitable. If he first holds the legal estate upon trust for some other person and thereafter that other person transfers to him the entire equitable interest, then again the first-named person does not hold two separate trusts, one the legal and the other the equitable estate; he holds a single entire interest

– he is the absolute owner of an estate in fee simple in the land. The equitable interest merges into the legal interest to comprise a single absolute interest in the land. It is a fundamental principle of both the common law and equity that the holder of an estate in fee simple cannot be a trustee of that fee simple for himself ...”

116. I see no reason to disagree with any of that, and none of it was disputed. But I do not see that it answers, or even really assists on, the question in the present case which is what the legal effect is if the owner of the equitable interest contracts to transfer it to the legal owner and that contract is specifically enforceable.
117. The second decision was *Corin v Patton* [1989-1990] 169 CLR 540. Here Mrs Patton was joint tenant with her husband of registered land. Shortly before she died, she sought to sever the tenancy by transferring her interest to her brother Mr Corin for him to hold on bare trust for her. The transfer was not registered before she died. The Court held that the relevant question was whether Mr Corin had acquired any interest in the property so as to prevent Mr Patton taking the whole by survivorship. Mr Corin had certainly not acquired a legal interest for lack of registration. And the transfer to him was voluntary so he could not claim an equitable interest as a purchaser under a specifically enforceable contract. It was argued among other things that equity should nevertheless give effect to the intention of the parties by constituting Mrs Patton a trustee for Mr Corin as bare trustee for herself. Deane J at 579 rejected this submission for a number of reasons, the third of which was that equity would not go through the charade of intervening to create trusts of property under which the legal owner held as bare trustee for another who in turn held as bare trustee for the legal owner. Equity would simply disregard the interposed beneficiary as having no interest in the property. He continued:
- “That means that such a trust is not possible since, once the interposed beneficiary is disregarded, the trustee and beneficiary would be the same person with the result that the legal and beneficial interests were merged.”
118. Again I do not disagree with what is said there but I do not think it has any direct relevance to the present case. There A was the legal owner. She tried but failed to transfer it to B to hold on trust for her. That could not be regarded as entitling B to claim an equitable interest in the land when he would simply drop out leaving A as the legal and beneficial owner. Here by contrast, A starts off by holding on trust for B. B tries but fails to transfer his interest to A. I see no objection to equity treating him as holding his interest for A. I agree that that will mean that B will then drop out, leaving A as the legal and beneficial owner, but that seems to me unexceptional.
119. For these reasons I consider that this objection to Mr Twigger’s argument also fails, and I would allow the cross-appeal of UK and Mr Bell, and uphold HHJ Jarman’s decision for different reasons.
120. I add that I am not sorry to reach this result. On the findings of HHJ Jarman, unchallenged in this Court, Mr Frenkel as long ago as 2010 told Mr Bell that he wanted nothing more to do with UK; Mr Bell did not want to be stuck with two warring partners and would have taken steps to close down UK if he had thought he would have been. But what has actually happened is that Mr Frenkel, first in his own

name, and then, with the appointment of Mr Yepremyan, through Inc, has spent much of the last 7 years or so claiming that directly or indirectly he does have a continuing interest in UK. Whether he and Inc are right requires close analysis of the legal position but the conclusion I have reached on the legal arguments produces what I regard as a just result, not simply a legally correct one.

Lord Justice Arnold:

121. I agree. The issue that has caused me most difficulty is the question of the implied term. I was attracted by Mr Barden's argument that it was not necessary for the 2010 agreement to contain any agreement about the beneficial ownership of UK. As Nugee LJ points out, however, the question for this Court is whether the judge was entitled to find that there was such an implied term. Given that the agreement was an oral one, the issue is, as Nugee LJ also points out, one which partly involves a factual assessment and partly involves a judgment as to whether the agreement would lack commercial or practical coherence without the term. In the end I have been persuaded that this Court would not be justified in reversing the judge's conclusion on this issue.
122. The only other observation I wish to add to give another example of the principle discussed by Nugee LJ in paragraphs 100-102. In intellectual property law, it is well established that an assignment of an IP right that fails to comply with the applicable statutory formalities is treated by equity as an agreement to assign, and if it is specifically enforceable the result is that the purported assignee becomes the beneficial owner of the right: see, for example, *Copinger and Skone James on Copyright* (18th ed) at 5-207 and 5-126 to 5-129 and the authorities cited.

Lord Justice Males:

123. I also agree. The effect of Lord Justice Nugee's analysis at [111] to [114] above is that the constructive trust in favour of Mr Bell ("A" in Lord Justice Nugee's example) came into existence and ceased to exist at the same moment. As soon as Inc's (B's) beneficial interest in the share held by Mr Bell was held on a constructive trust for Mr Bell, Inc dropped out and the beneficial interest ceased to exist separately from the legal interest which Mr Bell already held. That may be an unusual situation, but does not detract from the analysis.