IN THE COUNTY COURT AT BIRMINGHAM Case No. J70BM533

BETWEEN

MR JAHANGIR PERVAIZ (1)

MRS ZAREEN AKHTAR (2)

Claimants

-and-

MRS NASREEN AKHTAR (1)
MR ISMAIL HANIF (2)
MR HAWID HANIF (3)
MS ROHENA HANIF (4)

Defendants

-and-

MRS NASREEN AKHTAR

Part 20 Claimant

-and-

MR MOHAMMED HANIF

Part 20 Defendant

Before HHJ Truman on 11 and 12 April 2024

Mr Mohammed of Counsel (instructed by Blackfriars Law Solicitors) for the Claimant
Ms Mottershaw of Counsel (instructed by The Community Law Partnership Solicitors) for the First Defendant
No appearance by the Second, Third and Fourth Defendants, nor the Part 20 Defendant

JUDGMENT

I direct that pursuant to CPR 39APD6 paragraph 6.1 no tape recording shall be made of this judgment and that copies of this version shall stand as authentic and be treated as the official transcript

1. This matter concerns a somewhat unusual variation on whether the spouse of a sole owner of a property had a beneficial interest in that property, and whether that interest constituted an overriding interest, so as to bind a purchaser of the property in question. The background to the matter is derived mainly from the evidence of Nasreen Akhtar (the First Defendant/Part 20 Claimant) as she was the only person before the Court who could testify as to how the situation arose. It appears that Mr Mohammed Hanif (the Part 20 Defendant) purchased 58 Jeffcott Road, Ward End, Birmingham B8 3ED ("the Property") on 4 April 1996. He subsequently entered into an arranged marriage with Mrs Akhtar in 1997. Mrs Akhtar came to England in 1999. She and Mr Hanif subsequently had four children. The three eldest are all over 18 (and are named as the Second, Third and Fourth Defendants). The youngest is still under 16. As the Second, Third and Fourth Defendants have taken no part in the proceedings, any reference to "the Defendant" is a reference to Mrs Nasreen Akhtar. On Mrs Akhtar's account, her marriage was far from the happiest, but she and her husband remained together, albeit living more or less separate lives in the Property. Her written evidence was that he suggested a fresh start to her and a move to a property in Solihull (which they visited together), which would obviously entail the sale of the Property. Mrs Akhtar was not keen initially but was eventually reluctantly persuaded to agree to a move. The Property was then put up for sale.

2. In the summer of 2021, whilst Mrs Akhtar was abroad for nearly 4 months, the Claimants viewed the Property and agreed a sale with Mr Hanif. Their evidence is that he appeared to be the only person in occupation of the Property, which was registered in his sole name. The sale took some months to complete due to some issues over extensions built by Mr Hanif, but completed on 14 December 2021. The Claimants say that they were not able to move in at this point due to Mr Hanif saying he had nowhere to go. They reluctantly agreed to let him occupy the Property until 31 March 2022 under a written tenancy agreement. They had spent some time looking for a house before finding this one. When the tenancy expiry date was reached, after being unable to contact Mr Hanif, they went to the Property, only to find Mrs Akhtar in occupation with her children. She said that she had not been aware of any sale having been agreed or completed and refused to move out, and that has been the position since.

3. In May 2022, the Claimants issued their claim for possession. There was a hearing on 1 June 2022, when the matter was adjourned to 8 July 2022. Mrs Nasreen Akhtar entered a Defence Form received by the Court on 16 June 2022. It appears from her oral evidence that someone else handwrote this for her (in English) and she did not really understand what it said, even though she signed it under a Statement of Truth. It basically said that although the Property was in Mr Hanif's sole name, it was deemed to be owned jointly and that Mrs Nasreen Akhtar had a claim to the Property as a result of her marriage to Mr Hanif. There were a number of hearings before a formal Defence and Counterclaim dated 14 November 2022 was entered, together with a Part 20 claim against Mr Hanif. The formal Defence set out (for the first time) that Mr Hanif and Mrs Nasreen Akhtar had entered into a written agreement dated 17 July 2017 whereby Mrs Akhtar would loan Mr Hanif £70,000 (comprising £45,000 from gold owned by Mrs Akhtar and £25,000 in cash). Mr Hanif was to repay this total sum. Mrs Akhtar was to have "equal equity" in the Property. The money was said to have been used for substantial construction work to the Property.

4. As this document had not been mentioned before, the Claimants were understandably wary about it, especially with Mr Hanif's signature having a distinctive tail to it, which had not been seen on the conveyancing documents. Permission was given for expert evidence regarding the validity of the agreement, but ultimately that was not taken up. Permission was given for the Defendant to serve Mr Hanif out of the jurisdiction in Pakistan with the Part 20 Claim. A more detailed Order regarding service was made in April 2023 and the matter listed for further directions in June 2023. In August 2023, the Court accepted that Mr Hanif had been served but that he had failed to respond, and he was then debarred from defending or producing any evidence in respect of the Part 20 Claim without further Order of the Court. He has made no applications in that regard, nor taken any part in the proceedings since. At trial, I heard evidence only from the Claimants and the First Defendant.

5. The Defendant speaks limited English. She is able to read some English, but tends to have more difficulty if it is handwritten than if it is typed. She can read and write in her mother tongue of Urdu. She left all matters regarding household finances etc to her husband. He had apparently lived in the United Kingdom since he was about five and therefore did not have her limitations on communication. Her husband was therefore responsible for instructing estate agents to market the Property. Mrs Akhtar was aware of a For Sale board going up outside the Property. She was aware of the Property being marketed on Zoopla, and its proposed valuation. Her witness statement was often short on detail, but it said that their house had been up for sale for a long time with a For Sale board outside. It appears from the document at [157] of the trial bundle that the Property may have first been put up for sale on 9 December 2019. The Defendant had no knowledge of any sale to the Claimants having been agreed. Her complaint in reality was not that the Property was sold without her knowledge, but that her husband did not then proceed as planned but disappeared with the sale proceeds.

6. Part of the Claimants' evidence was from the estate agent who dealt with the disputed sale. He was supposed to attend the trial to give live evidence but advised the Claimants' solicitors at the last moment that he was too busy to travel to come to Court. He was willing to give evidence via Microsoft Teams. As this came about at very short notice, Counsel for the Claimants was in some difficulty and elected not to ask for permission for the estate agent to give evidence remotely. The estate agent was based in Birmingham so travel would not have been arduous. He had known about the trial date for some time. No formal arrangements had been made for setting up a link, providing him with a copy of the bundle for use at his office etc, because the solicitors had had no reason to suppose that any of those steps would be needed.

7. Generally speaking, only limited weight can be given to a witness statement where the maker is not available for cross-examination. That may be tempered in circumstances where the evidence given is supported by other accepted evidence. Counsel for the Defendant had indicated that she had only had limited cross-examination for the estate agent, which was more to do with what was not in his witness statement rather than what was ie what he might have known about Mrs Akhtar etc. The estate agent's evidence on the question of occupation etc had only said at paragraph 9, "I confirm I had only seen Mr Hanif at the property and have never been provided with the keys to the property. The handover of the key's arrangements were made between the parties directly." It thus appeared that the

estate agent's evidence would have been mostly uncontested with regard to such matters as Mr Hanif instructing them in December 2020 to sell the Property, there being 21 viewings by February 2021, when a sale was agreed (with a Sold flashing then being put on the For Sale Board) but that sale falling through (apparently due to Mr Hanif not having the right consents for the extensions made to the kitchen) and there being 9 viewings after the sale fell through.

8. Bearing in mind that Mrs Akhtar knew the Property was being marketed etc, I am prepared to accept the history given by the estate agent with regard to the number of viewings. Mrs Akhtar disputed that any Sold flashing had gone on the For Sale sign (in relation to the proposed sale in February), but I am uncertain as to whether she meant this. Despite the way the questions were phrased (which was clear), she appeared to take a number of them as relating to the disputed sale rather than the potential sale in February. Counsel for the Claimants (who speaks Urdu) had not taken issue with the wording of the translation given to Mrs Akhtar in respect of these questions, but that still leaves scope for misunderstanding by the witness. I had previously asked her to wait for the translation rather than answering straight away from her limited knowledge of English so that I could be sure she had understood correctly and also be sure that we correctly understood what her answer was meant to convey, but her answers to questions did not always properly relate to what she had been asked. I did not generally take that as being evasion on her part, rather that she was finding the proceedings difficult and stressful. There were some limited exceptions to this, which I refer to below. For the avoidance of doubt, I confirm that I have placed no weight on paragraph 9 of the estate agent's witness statement, leaving the issue of what could or should have been seen or known about occupants of the Property (other than Mr Hanif) to direct, oral evidence.

9. Reverting to the history, we now move to the Claimants' evidence on their understanding of the situation. They said that they saw the Property advertised on Zoopla, liked the look of it and arranged a viewing through the estate agents. They and their seven children attended on or about 29 July 2021, early in the evening. Only Mr Hanif was there. The condition of the Property was different from the pictures on Zoopla and there was no carpet on the stairs or in the bedrooms. The First Claimant, Mr Pervaiz, was a bit dubious about that, but the Second Claimant, Mrs Zareen Akhtar (no relation to the Defendant), thought it would be really nice once decorated and carpeted. They asked Mr Hanif why he lived in such a big house all alone. He apparently told them that he had initially bought the house to renovate and sell on, but he did not have the money any more to complete the rest, so he was selling it as it was and downsizing. They found this plausible as the house had very little in it and required finishing touches. The Claimants said that there was very little in the house itself, and no sign that anyone other than Mr Hanif lived there. There were no belongings etc. They said that you would expect if a family were living at the Property that there would be furniture, beds, wardrobes etc. Mrs Zareen Akhtar said if you have children, you expect to find their personal belongings, such as electronics or clothes/jackets lying around (but there was nothing like that). They said that Mr Hanif seemed really nice and answered all their questions.

10. The Claimants went home to think about it. Mr Pervaiz decided that he would arrange another viewing and take a builder to have a look at the works done by Mr Hanif and to see if anything else needed to be done. If remedial works were needed, he would want to take

account of those in any offer that he and his wife might make. Mr Pervaiz rang the estate agents to arrange another viewing. The estate agents apparently told him that he could sort that out direct with Mr Hanif and provided Mr Pervaiz with Mr Hanif's mobile number. Mr Pervaiz duly spoke to Mr Hanif, making an appointment for the following evening, together with another viewing by his wife and a friend. The appointment with the builder was apparently at 9pm. Mr Pervaiz said that if a man were married and had children, you would expect them to be around at that time of night on a weekday, but there was no-one else around. Mr Pervaiz's builder friend advised that the majority of the works were cosmetic only and generally the house was a good size for the family. Mrs Zareen Akhtar's second visit also went well, her friend liking the Property but apparently being a bit embarrassing by asking Mr Hanif if he was married. He said he was single and not married.

11. The Claimants made an offer, which was increased when Mr Hanif refused it. The revised offer was accepted and the Claimants went to their bank to start the mortgage process, see [146] which is an offer letter from the bank dated 9 August 2021. They also instructed conveyancing solicitors. Mr Pervaiz said that he arranged another viewing, which was agreed for 9am, to check room sizes and think about carpets and furniture. Mr Pervaiz said that, again, only Mr Hanif was present. As part of the conveyancing process, Mr Hanif signed a Law Society Property Information Form dated 25 August 2020 in which he said that no-one over the age of 17 (apart from him) lived at the Property and that the Property was being sold with vacant possession - [138]. Searches on the Property showed no adverse entries ie there was nothing registered by Mrs Nasreen Akhtar to show she had an interest in the Property. The sale of the Property was eventually completed on 14 December 2021.

12. The Claimants did not move into the Property straightaway. Mr Hanif had informed them that he was having difficulty finding other accommodation and they agreed, after some discussions, to give him a further three and a half months under a tenancy agreement. They said they were not happy about this but he basically refused to move out and they felt they had no choice. Their witness statements set out that they had been looking for a larger house for some time. One can perhaps understand why they reluctantly agreed to wait another 3 months or so, if they had found one that they really liked. Mr Hanif paid all the rent in advance. The tenancy agreement between the Claimants and Mr Hanif is at [18]. The arrangement made was for the Claimants to collect the keys from the estate agents at the end of the term. They were allowed to remain living in their old home by the people purchasing from them.

13. On 31 March 2022, Mr Pervaiz went to collect the keys from the estate agents but was told they did not have them. He was told to speak to his solicitors who would usually have the keys. He spoke to the solicitors who said that the agents usually had the keys. The solicitors rang Mr Hanif's solicitors. They did not have the keys. They were unable to contact Mr Hanif, and nor could the estate agents. It was suggested the Claimants go to the Property. When they attended, they found Mrs Nasreen Akhtar and her children in occupation. Mrs Nasreen Akhtar said she had not known about any sale. When she rang Mr Hanif to find out what was happening, he apparently told her that he had done it to teach her a lesson. He had then hung up on her. He had apparently gone to Pakistan, leaving his wife and children to deal with the problem he had caused. Mrs Nasreen Akhtar has since instituted divorce proceedings against Mr Hanif. The Defendant says that she has an interest in the Property,

that she was in occupation of it, and the Claimants should have known that. Hence she says that they are not entitled to possession of the Property.

14. The defendant's case relies upon Schedule 3 of the Land Registration Act 2002. Schedule 3 carries the title "Unregistered interests which override registered dispositions" and provides at paragraph 2:

> "An interest belonging at the time of the disposition to a person in actual occupation, so far as relating to land of which he is in actual occupation, except for—
>
> (a)an interest under a settlement under the Settled Land Act 1925 (c. 18);
>
> (b)an interest of a person of whom inquiry was made before the disposition and who failed to disclose the right when he could reasonably have been expected to do so;
>
> (c)an interest—
>
> (i)which belongs to a person whose occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition, and
>
> (ii)of which the person to whom the disposition is made does not have actual knowledge at that time

19. Counsel for the Claimants submitted that the purpose of the Act was to make it plain that a registered owner had the power to sell a property, unless there was something on the Register which limited his powers. He referred to Chapter 6 of Megarry and Wade and submitted that the policy was to protect a bona fide purchaser for value. There were certain limited exceptions to that. Prior to 2002, there had been a number of cases where equity had protected innocent occupiers of land which had been sold. These cases included *Hodgson v Marks [1971] Ch 892*, where an elderly lady had taken in a lodger who persuaded her to transfer the legal title to her property to him (with her to remain as the equitable owner). Unbeknownst to her, he sold the property, and then disappeared with the proceeds. Prior to the sale, the intended purchaser had seen the elderly lady at the property but had made no enquiries of her as to what interest she might have in the property. The Court upheld her claim to the property – she was in actual occupation and had an overriding interest. The purchaser was required to transfer the property back to her.

20. Counsel in the index case submitted that the basis of the Defendant's Defence was wrong – this was not a case which really relied on *Hodgson* or other similar cases. This was a case where the Defendant had approved of and authorised the sale of the Property. She was a party to it and agreed with it. He submitted that a person who told the legal owner that he could sell the Property could not then complain if that is precisely what occurred. The person might legitimately complain about the owner taking the money, but that was a different matter. Counsel submitted that it would be astonishing if the law protected a person in the Defendant's position, when she had agreed to a sale. She might not have been told when the Property had been sold, but she had agreed to a sale and knew the Property was up for sale. Counsel had been unable to locate a case where a person was claiming an overriding interest where they had authorised a sale.

21. Whilst I fully appreciate Counsel's concerns in this regard, it seems to me that my first consideration should be to have regard to what the statute says. It seems to me that if a person, who is in actual occupation of land, has an interest in that land, the law gives

them an overriding interest unless one of the specified exceptions applies. It therefore needs to be established whether or not the Defendant had an interest in the Property, whether she was in actual occupation at the relevant time, and, if she were, whether she fell within one of the specified exceptions.

22. Counsel's second main submission (if it were decided that the Defendant could, in principle, rely on Schedule 3) was that the Defendant was not in actual occupation at the time. He noted that Counsel for the Defendant had said that the Defendant was in occupation of the Property when it was marketed and sold, but he submitted that the evidence did not support that. He said the Defendant's written evidence was silent on the issue, whether it related to when the contracts were exchanged, when the deposit was paid, or when there was actual completion. He submitted that Counsel for the Defendant really had no evidence from her own client as to where she was on 14 December 2021 (the date of completion) or 20 December 2021 (the date of registration). The Defendant's witness statement had not even mentioned that she was out of the country for nearly 4 months from the beginning of June 2021, possibly because she knew it would damage her case. The witness statement did not deal with where she was for the months following her alleged return. There was no documentary evidence as to where the Defendant was living at the time of the sale. There was some evidence as to eg the Defendant being registered at the Property address with her GP, but that was general evidence, not something that confirmed she was actually living at the Property at the relevant time.

23. Counsel's final submissions related to the exceptions within Schedule 3. His Skeleton Argument had suggested that the Defendant fell within exception (b) because she had failed to disclose any interest when enquiry was made when she would reasonably have been expected to do so. This was on the basis that by (on her account) authorising her husband to deal with all the steps relating to the sale (marketing the Property, dealing with the estate agent etc), and leaving all those steps to him, she had also authorised him to respond on her behalf to any enquiries about her interest in the Property, but her husband had specifically said that he was the only person in occupation in eg the pre-contract enquiries (the Property Information Form). In closing, Counsel had relied more on this aspect as part of his submission that Schedule 3 just did not apply to the circumstances of this case because the Defendant had authorised the sale. I have not accepted that submission for the reasons given above. I consider that enquiries were not actually made of the Defendant as to her interest. On the Claimants' account, they could not make enquiries of the Defendant because they did not know she existed.

24. Counsel for the Claimants placed a great deal of weight on exception (c) – that the Defendant's occupation (if it existed) would not have been obvious on a reasonably careful inspection of the Property and the Claimants did not have actual knowledge of any such occupation. He noted that Counsel for the Defendant had been suggesting in cross-examination that the Claimants should have made enquiries with the neighbours, the estate agent etc. Counsel for the Claimants submitted that there was no obligation on the Claimants to rule out the possibility of there perhaps being someone else of whom they were not aware being in occupation. The Claimants' evidence was that there were no signs of anyone being in occupation other than Mr Hanif on all the occasions they inspected the Property, and the Defendant was not in a position to say what the Claimants actually saw, because she was not in the country. She could only say what she thought they should have seen. She had not called any of her children to confirm what the Claimants must have seen. The only direct evidence on the point was from the Claimants. The answers given to the pre-contract enquiries would not have led the Claimants to think

anyone else was in occupation. Counsel submitted that the Claimants' evidence on what they saw had not been impeached in cross-examination. The Defendant could not show that the Claimants had actual knowledge of her (alleged) occupation.

15. The Claimants' views on the Agreement of 17 July 2017 were dealt with more as an afterthought. Their primary position was simply that the Defendant could not satisfy the requirements of Schedule 3. However, it was then submitted that she did not have an interest in the Property. Counsel said that the Agreement appeared to be somewhat contradictory. The Defendant said she had wanted a receipt for the money she had provided to her husband for the building works. He had not given her a receipt but a document which appeared to be a loan agreement instead. As the Defendant had not understood what she was signing and thought it related to having a receipt for the money, Counsel for the Claimants suggested that the document might count as non est factum.

16. Further, it was not at all clear what the Agreement was intended to do. If the money she had given to her husband to pay the builders were a loan which she was expecting to be paid back (as she had said), why would she be given half the house? (The document did not suggest that the half interest would revert on repayment of the "loan"). Counsel further noted that there was no documentary evidence as to the Defendant removing money from her bank account to pay over, nor what the jewellery apparently sold was valued at. It is fair to say that the Defendant's evidence was very confused and confusing on whether the money apparently given to her husband was a loan or not, as she both agreed and disagreed with that, but it did seem on balance that she was expecting to be repaid. The Defence originally drafted for her had suggested that she had acquired an interest in the Property purely as a result of her marriage to Mr Hanif, it appearing from her oral evidence that the Defendant had forgotten about the Agreement. The Defendant 's evidence on what was said in her Defence and who provided that to her to sign was also somewhat confusing, despite attempts to clarify matters. I was left with the impression that the Defendant ought to have understood was what was being put to her, but, for reasons unknown, was trying to avoid the issue. Ultimately, the Claimants considered that the question of reliance on the Agreement was more a matter for the Defendant and Mr Hanif than them.

17. Each side had accused the other of colluding with Mr Hanif over the sale of the Property. There was some video taken by the process server in respect of service of the Court papers on Mr Hanif. Counsel for the Claimants asked both interpreters (one being necessary for each side) to translate what was being said. Mr Hanif was identified as the person being served. The interpreters understood him to be saying that he would sign the form he was given on the process server's advice (calling the process server by the generic title of "brother"). The video was not entirely clear but there was a reference to "stealing" and the process server saying something about "It is your property, it is your right".

18. Counsel for the Claimants wondered if that showed that Mr Hanif and Mrs Nasreen Akhtar were actually acting in collusion, because of Mr Hanif apparently being guided by the process server and the process server apparently telling Mr Hanif he had not done anything wrong. I do not accept that submission. We do not have a complete picture from the short and not always clear video. It would be taking verisimilitude quite far to go to the time and expense of personally serving Mr Hanif with Court papers in Pakistan to establish an apparent relationship breakdown, especially when Mrs Nasreen Akhtar and Mr Hanif's

children remain in England whilst he stays in Pakistan, some 2 years after the issue with the sale arose. Further, a process server just wants to serve the papers and to be able to establish that they were served. I can quite easily see how a process server might want to appear to be on someone else's side to avoid that person being awkward about service when the process server just wanted the form signed. From all that I have read and heard, I consider that it is more likely than not that this is exactly what it seems – an unpleasant husband who has taken the money and run, leaving his wife and family to deal with the fallout.

19. Mrs Nasreen Akhtar thinks the Claimants may have acted in collusion with Mr Hanif because she cannot believe that they did not appreciate that other people must have been living at the Property. She had said that "the community" knew she and her children lived at the Property, but there were no witnesses from "the community" to confirm what was known by the Claimants. There was some suggestion in cross-examination of the Claimants (which had not been mentioned in the Defendant's witness statement) that the Claimants' eldest son had gone to the same college as one of the Defendant's children. The Claimants denied that. In any event, there was no evidence as to eg the size of the school (the larger the school, perhaps the less likely that specific people might know each other), what years the children were in, whether they shared any classes etc and why the Claimants should actively know the address where the Defendant's children lived in any event. There was no evidence before me which suggested collusion, other than Mrs Nasreen Akhtar's belief that the Claimants "must have" known. Further, there is a vast difference between actively colluding and perhaps not appreciating that if there are people living in a property solely owned by the vendor, active enquiries may need to be made as to any rights those persons may have. It is, of course, quite possible that a person in those circumstances who did not make active enquiries may then be untruthful as to what they saw in the lead up to completion to avoid the terrible consequences of losing all/part of their intended home, for which they had paid good money.

20. I noted earlier that Mrs Nasreen Akhtar's witness statement was sometimes short on detail. It said nothing about what Mrs Nasreen Akhtar knew about the viewings that had occurred after December 2020 ie whether she had been at the house, whether she had been at work, asked to go out etc. It also omitted the fact that she had gone to Pakistan on 3 June 2021, flying out due to her mother having had a stroke. It therefore did not deal with when she returned to the Property. She was not able to return home (on her oral evidence) until 28 September 2021. This obviously covers the entire period when the Claimants say they visited (and the independent documentary evidence would support that timeframe). The Defendant is therefore unable to give any direct evidence as to what the Claimants actually saw, only what she thought they must have seen. She said there must have been clothes, shoes, and every child had a TV in their room. Two of her children were living at the Property. Although all of the adult children were named as Defendants, none of them have taken part in the proceedings. None of them have supplied witness statements. There was therefore no-one other than the Claimants to give evidence as to what would have been revealed vis-à-vis occupants on their viewings. Counsel for the Claimants noted that if Mr Hanif were devious and trying to defraud his wife, he might have taken steps to try and make the Property look as if only he were there.

21. Counsel for the Defendant dealt with the constructive trust issue first. The Claimants had not followed up on their initial allegation that the Agreement was a fake or a forgery. Counsel submitted that the Defendant relied on the Agreement, and on her conduct and that of Mr Hanif to establish a constructive trust. Counsel submitted that what had occurred satisfied the necessary requirements, as per *Lloyds Bank plc v Rosset [1991] 1 AC 107, Grant v Edwards [1986] 3 WLR 114* and *Stack v Dowden [2007] UKHL 17*. There were express discussions, and a signed document that said the Defendant would have an equitable half share in the Property. The Defendant's witness statement supported that. She said that Mr Hanif had explained it to her and told her that it acknowledged her half share in the Property.

22. The document had come about because the Defendant was concerned about having paid cash for the builders in respect of the construction works without having got a receipt. The Agreement had been what Mr Hanif had presented to her. Her Counsel submitted that it did not matter that she had been asking for receipts for what she had paid. That did not alter what the document was or her understanding of it – that it acknowledged her share in the Property. Counsel submitted that, whilst it referred to a loan, the Agreement went beyond that and expressly gave the Defendant a beneficial half share in the Property. The Agreement confirmed what the Defendant had paid over. Counsel submitted that there was sufficient to establish that the Defendant had indeed acquired such a share. She submitted that the only real doubt about the document was purely because of the (rather late) timing of its production. However, that could be explained by the Defendant simply being so stressed by all that had occurred. She had had people knocking at her door, claiming that the house she had lived in for years was theirs, they had then taken her to Court etc. The Agreement had come about some years before. Counsel noted that no positive evidence had been put forward that the document was a forgery. The Claimants had not obtained expert evidence when they had had permission to do so. Counsel submitted that the unusual "tail" on the signature of Mr Hanif (as compared to those on the conveyancing documents) probably showed it was a genuine signature. A forger would not have put forward a signature with such an obvious difference.

23. Counsel had concerns as to the extent of the Claimants' actual knowledge of their own witness statements when they had not understood parts of them (such as the reference to the Defendant not having entered any restriction on the Land Registry to safeguard her alleged interest). She was also concerned about the extreme similarity in their wording, which rather suggested that perhaps one of the witness statements, at least, was not in the witness's own words. That would cause doubt to be cast on the weight that could be given to the statements and the Claimants' credibility. She suggested that the some of the wording must have been because that was what the solicitors felt needed to be included (such as the lack of any interest on the part of the Defendant being noted with the Land Registry) and not because the Claimants themselves had thought about it. The Claimants had not thought the similarity in wording was surprising when they were married and lived together.

24. I do not think solicitors always take sufficient account of the requirement that statements should be in a person's own words. That lack of care may have an impact on how a person's evidence is viewed, but a solicitor's failure to follow the rules does not necessarily mean that the evidence being given is inaccurate. The Claimants did not come over as sophisticated people. There were also language difficulties. Mr Pervaiz could read a little English, but

properly required an interpreter. Mrs Zareen Akhtar could not read or write in any language. I accept that the Claimants were sometimes far from clear in understanding some of the more technical wording, and that it is likely that the solicitors included, for example, the lack of entries on the Land Registry, within the witness statements as a means of bringing evidence that was a matter of public record before the Court. However, I consider that the Claimants were clear on the bits that they ought to know about – such as what they saw and what was said by Mr Hanif on their visits to the Property.

25. As part of her submissions regarding the Defendant's possible interest in the Property, Counsel relied on *Williams & Glyn's Bank v Boland [1981] AC 487.* She submitted that Schedule 3 paragraph 2 was in the same wording as had previously been used, and thus *Boland* remained good law. Lord Wilberforce considered the question of occupation where he said:

Then, were the wives in actual occupation? I ask: why not? There was physical presence, with all the rights that occupiers have, including the right to exclude all others except those having similar rights. The house was a matrimonial home, intended to be occupied, and in fact occupied by both spouses, both of which have an interest in it: it would require some special doctrine of law to avoid the result that each is in occupation. Three arguments were used for a contrary conclusion. First, it was said that if the vendor (I use this word to include a mortgagee) is in occupation, that is enough to prevent the application of the paragraph. This seems to be a proposition of general application, not limited to the case of husbands, and no doubt, if correct, would be very convenient for purchasers and intending mortgagees. But the presence of the vendor, with occupation, does not exclude the possibility of occupation of others. These are observations which suggest the contrary in the unregistered land case of Caunce v. Caunce [1969] 1 W.L.R. 286, but I agree with the disapproval of these, and with the assertion of the proposition I have just stated by Russell L.J. in Hodgson v. Marks [1971] Ch 892, 934. Then it was suggested that the wife's "occupation" was nothing but the shadow of the husband's—a version I suppose of the doctrine of unity of husband and wife. This expression and the argument flowing from it was used by Templeman J. in Bird v. Syme-Thomson [1979] 1 W.L.R. 440-444, a decision preceding and which he followed in the present case. The argument was also inherent in the judgment in Caunce v. Caunce (supra) which influenced the decisions of Templeman J. It somewhat faded from the arguments in the present case and appears to me to be heavily obsolete. The appellants' main and final position became in the end this: that, to come within the paragraph, the occupation in question must be apparently inconsistent with the title of the vendor. This, it was suggested, would exclude the wife of a husband-vendor because her apparent occupation would be satisfactorily accounted for by his. But, apart from the rewriting of the paragraph which this would involve, the suggestion is unacceptable. Consistency, or inconsistency, involves the absence, or presence, of an independent right to occupy, though I must observe that "inconsistency" in this context is an inappropriate word. But how can either quality be predicated of a wife, simply qua wife? A wife may, and everyone knows this, have rights of her own; particularly, many wives have a share in a matrimonial home. How can it be said that the presence of a wife in the house, as occupier, is consistent or inconsistent with the husband's rights until one knows what rights she has? And if she has rights, why, just because she is a wife (or in the converse case, just because an occupier is the

husband), should these rights be denied protection under the paragraph? If one looks beyond the case of husband and wife, the difficulty of all these arguments stands out if one considers the case of a man living with a mistress, or of a man and a woman—or for that matter two persons of the same sex—living in a house in separate or partially shared rooms. Are these cases of apparently consistent occupation, so that the rights of the other person (other than the vendor) can be disregarded? The only solution which is consistent with the Act (section 70(l)(g)) and with common sense is to read the paragraph for what it says. Occupation, existing as a fact, may protect rights if the person in occupation has rights.

26. The quote obviously refers to there being some physical presence, and Counsel for the Claimants' point had been that there was no such physical presence. Counsel for the Claimants had not been suggesting that when a person went out shopping, or went on holiday for a couple of weeks, that they ceased to be in occupation, but he had been concerned about the Defendant being in occupation when she had certainly been absent for some 4 months during a highly relevant period, and was not in a happy marriage with her husband – her witness statement said they tended to live separate lives but living in the same house. Counsel for the Defendant submitted that the Defendant's evidence had been clear and consistent – that she had lived in the Property since coming to England. She had brought up her children there. She suggested that there was no credible evidence to dispute that. The Defendant might have been in Pakistan visiting her ill mother, but two of the (adult) children were still living at the Property. There was nothing to really show the Defendant was living anywhere else.

27. I would only comment that it is for the Defendant to prove she was in occupation at the relevant time in order for Schedule 3 to be engaged and the evidence on this point is scant. I am concerned about the omissions from her evidence. Whilst I think both sides were generally trying to do their best, and whilst the Property might have been the Defendant's usual home address, that is not the same as saying that she was actually there at relevant times. An otherwise truthful person might endeavour to not say things to try to avoid the awful consequences of what her husband had done. The Defendant's witness statement just says that she has always lived at the Property with Mr Hanif until he left for Pakistan on 30 March 2022. Counsel for the Claimants considered that the Defendant should have expressly set out where she was for the 6 months relevant to the case ie June to December 2021. He submitted that there was no evidence that the Defendant was even in the country, let alone the Property, and the Defendant could not "remotely" occupy the Property. She might have a right to return to it, but that was not the same thing.

28. I accept Counsel for the Claimants' submissions that the most likely reason for the witness statement not mentioning the (at best) 4 months' absence from 3 June 2021 is because it was hoped to skate over that absence, to avoid rocking the boat. I am also concerned that there is absolutely no discussion about the usual routine when people came to view the Property after it was put up for sale. Was it usual for everyone to go out, bar Mr Hanif, or not? The lack of this type of detail about important issues cannot help but raise doubts. The Defendant's passport might show when she returned to this country, but that had not been produced. There might have been correspondence addressed to her or replied to, which showed where she was at the relevant time, but none was produced.

29. Counsel for the Claimants had been concerned that there was no photos etc to perhaps show Eid celebrations at the Property which might have helped to show where the

Defendant was. Her witness statement did not specifically say where she was at the relevant time. It seemed to me that her Counsel's very general references to cases where tenants had been able to defeat claims for possession because they were still deemed to be occupying a property as their only or principal home did not really assist in meeting Lord Wilberforce's comments about a physical presence in the context of an overriding interest. I accept that earlier in 2021, the Defendant had paid the annual water bill, but that does not assist me in showing her having a physical presence in the Property many months later, nor whether signs of her occupation (clothing, other personal belongings etc) would have been visible.

30. Whilst Counsel for the Defendant categorised Mr Hanif's apparent explanation as to the reason he was selling the Property as weak (that he was the only person living in a 5 bedroomed property, that he had taken over a decade to carry out some renovation works, that there was a tightly knit community in the area, indeed that there were a whole series of things to show he was not telling the truth), that is not the test. People do not always tell strangers the truth, the whole truth and nothing but the truth about what they are doing and why. I have dealt above with the lack of evidence regarding what "the community" might know and why the Claimants might be expected to share that knowledge. The Claimants had no reason to doubt that Mr Hanif was the owner (which he was), the matter was being dealt with through genuine estate agents etc. The question is whether there were some objective signs to show the Defendant was, in reality, still in occupation and whether the Claimants knew that.

31. Counsel for the Defendant submitted that there was no credible explanation for the Claimants not visiting the Property between July 2021 and March 2022. She suggested that this was a huge gap for a property they were allegedly excited about buying. The Claimants said that they had already made a number of visits, so, essentially, more were not needed, even with the passage of time. I consider that different people may reasonably have different views on whether they want or need to re-visit. I accept the Claimants' evidence on this point.

32. Counsel submitted that the Claimants did know there was a family living at the Property, because when they went there at the end of March 2022, the Claimants knocked on the door. The Claimants had not been able to contact Mr Hanif, nor had the estate agents or solicitors. Counsel submitted the Claimants would not therefore have been expecting to see Mr Hanif at the Property, and they knocked because they were expecting someone else. I do not accept that submission. The Claimants had tried to collect the keys from the estate agents, they had spoken to their own solicitors when the agents said they did not hold any keys, the solicitors spoke to Mr Hanif's conveyancing solicitors and the agents, and it was then suggested that the Claimants should just go to the Property. I do not see what else they could have done but go to the Property. I do not see that they could do anything other than knock on the door when they got there because they did not have a key to get in, and the Property would not have looked deserted. The fact that Mr Hanif had not been answering his phone did not mean that he was not at the Property. The only way to find out who was there was to knock.

33. Counsel further submitted that the tenancy agreement between the Claimants and Mr Hanif had not been properly terminated. She submitted that the tenancy agreement did not prevent anyone else living with Mr Hanif, and the Defendant said she and her family were living there. This submission does not appear to be entirely correct as Clause 2 (i) of the tenancy agreement at [19] says that the tenant will: "not assign, sublet, charge or part with or share possession or occupation of the Property". On the Defendant's account, Mr Hanif

was sharing occupation with members of his family. Whilst a spouse and offspring are usually deemed to be properly in occupation of a property where the other spouse is the tenant, this tenancy agreement expressly prohibited anyone other than the tenant being in occupation. The Defendant and her children would therefore appear to be trespassers.

34. In relation to the tenancy agreement, Counsel submitted that any surrender of a tenancy had to be unequivocal. The giving up and accepting of possession had to be unequivocal. Abandonment of the Property did not necessarily mean surrender. It was a similar matter to non-payment of rent. Counsel therefore submitted that the tenancy had not been brought to an end, referring to *Preston Borough Council v Fairclough 1982 8 HLR 70* and *Bellcourt Estates v Adesina [2005] EWCA Civ 208*. I note that paragraphs 8, 9 and 10 of *Bellcourt Estates* read: *Mr Banning, on behalf of the appellant, in his skeleton argument submits that, for a surrender to have taken place, there must be either an express surrender by deed or surrender by operation of law; a surrender by operation of law requires some act or conduct on the part of the landlord which is unequivocally referable to a determination of the tenancy such that it would be equitable for him to rely on the fact that there is no surrender by deed. He submits that there was no such act or conduct here. The law is conveniently stated at page 849 of the 6th edition of Megarry and Wade: the Law of Real Property, in the following terms:*

> *"Abandonment of the premises by the tenant without more (even if rent is unpaid) is not a surrender, because the landlord may wish the tenant's liability to continue. Nor is the delivery of the key of the premises to the landlord enough by itself. Even if he accepts it, it must be shown that he did so with the intention of determining the tenancy ... and not merely because he had no alternative."*

So one asks if there has been unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy. No doubt Mrs Adesina unequivocally intimated that she would like to be rid of the tenancy if she could. But what unequivocal conduct of the Landlord can be relied on?

35. I do not consider that there can be any doubt in the circumstances of this case that Mr Hanif did not intend the tenancy to continue. He had agreed a 3 month period on the basis of him apparently needing to find somewhere else to live, he had signed an agreement that said only he should live at the Property, he had paid upfront for the rental period, he then went to Pakistan with no intention of returning to the Property and with the specific intention of causing his wife severe distress and upheaval. I consider that the Claimants accepted it as a termination of the tenancy. From their point of view, the tenancy was only ever intended to be for a 3 month period, to enable Mr Hanif to find alternative accommodation. The Claimants had been permitted to remain in their previous accommodation for that 3 month period, but the intention of all persons in the chain was for the Claimants to take possession of the Property and move in after that 3 month period. Once the rental period ended, the Claimants' unchallenged evidence was that they themselves had been obliged to move into rented accommodation because their purchasers wanted their property and the Claimants had nowhere else to go. They have therefore had to pay rent for accommodation, on top of having paid the purchase price for the Property, yet have not been able to occupy the Property themselves. Every action the Claimants have taken since the end of the rental period is firmly inconsistent with them wanting or agreeing to the continuation of the tenancy. I do not accept Counsel for the Defendant's submissions regarding the tenancy not having been properly determined.

36. In relation to whether the Defendant acquired an interest in the Property so as to engage Schedule 3, I deal with that aspect below, as part of the Part 20 claim. In relation to the issue of whether the Defendant was in actual occupation (so as to enable her to claim an overriding interest), I do not consider that I can be satisfied on the balance of probabilities that she was. I accept that the Property was her usual home address, but I do not consider I can be satisfied that it is more likely than not that she was actually occupying the Property at the time of disposition of the Property. This is for the reasons set out in paragraphs 27 - 29.

37. If I were wrong on that, I find that the Defendant's occupation would not have been obvious on a reasonably careful inspection of the Property at the time of the disposition. I accept the Claimants' evidence on what they saw when they viewed the Property on each occasion that they visited. I accept their evidence on what was said to them, which is supported by the untruthful details Mr Hanif put in the Property Information Form, and Mr Hanif telling his wife that he did it to teach her a lesson. I consider it more likely than not that Mr Hanif took active steps to present the Property in such a way so as not to make any potential purchasers appreciate that other persons (such as the adult children) were actually living at the Property. I have said that I consider Mr Hanif was deliberately trying to distress his wife, and I consider he acted in such a way as to bring the scenario that resulted about. Having hidden the Claimants' viewings, offers and exchange of contracts from the Defendant, I consider it more likely than not that Mr Hanif would have hidden the Defendant's presence if the Claimants had wanted to come round on completion etc.

38. I find that there was nothing seen by the Claimants, or mentioned by Mr Hanif, which would have put the Claimants on notice that the Defendant also lived in the Property. I find they had no actual knowledge that she was there until they visited the Property in March 2022. This is supported by the tenancy agreement which specifically forbade Mr Hanif from sharing occupation of the Property with anyone else, the purpose of which was to ensure that the Claimants could indeed move in when the tenancy ended. They, like the Defendant, have been put to a great deal of hardship by Mr Hanif's callous actions. I am extremely sorry for the Defendant. I am appalled by what her husband did, but I do not consider that I can say, in the circumstances of this case, that the Claimants should have to bear the burden of Mr Hanif's behaviour. The Claimants are entitled to an Order for Possession in consequence against all the named Defendants.

39. In relation to the Part 20 claim, I find that both the Defendant and Mr Hanif signed an Agreement under which the Defendant was to acquire a beneficial half share in the Property. I consider the Agreement evidences a common intention that the Defendant would hold an equitable half share in the Property. I consider the wording is sufficiently clear to record that the Defendant would loan Mr Hanif a sum of money and, in a separate clause, that the Defendant would acquire an equitable half share in the Property. Whilst it was intended that the money loaned should be repaid, the half share was independent of that repayment ie the half share would not revert to Mr Hanif on repayment. If Mr Hanif did not do all he should with regard to the sharing of assets, his obligation to repay would be increased to the principal sum plus interest (without the Defendant losing the half share). The Agreement contained a clause confirming that if a Court held any parts of the Agreement were invalid, void or unenforceable, it was the parties' intention that such provision should be reduced in scope by the Court only to the extent deemed necessary by the Court to render the provision reasonable and enforceable, with the rest of the Agreement not to be invalidated as a result. The Agreement was said to be executed as a deed, but was not witnessed, and thus does not fulfil the requirements of a deed.

40. The Agreement does however appear to comply with s2 Law of Property (Miscellaneous Provisions) 1989, although there may be some difficulties in relation to consideration, as the document is not a deed, and the referenced consideration appears to be past actions by the time of the Agreement. Whilst the Defendant's Counsel submitted that the Defendant acted to her detriment in making the payments that she did, I am uncertain how it can really be said that she acted to her detriment in reliance on the obtaining of a share in the Property when, according to her witness statement, she had already paid the money over to her husband before the Agreement was signed, despite its wording (see paragraphs 13 -17 [90-91]). The Agreement only came about because she was worried about getting receipts from the builders for the money which had been paid. However, it was clear from the Defendant's evidence that, following the Agreement, she had not sought any repayment of the loan. She believed that she had a half share in the Property and that it would remain as the family home (with the Solihull property to be substituted after the Property was sold). It was also clear that, despite the fact that she did not love her husband, she had trusted him in relation to making payments to him for building works and in respect of the Agreement (which he had produced). She had had no thought that he would do what he did. I consider that the Defendant acted to her detriment in continuing (as pleaded, and evidenced in her witness statement) to make considerable payments for the benefit of the household, in reliance on her having a half share, and in not seeking additional financial security to protect her from any change in circumstances (eg by seeking any earlier repayment of the loan or formal transfer of assets) in reliance on the Agreement reached that she would have a half share in the Property.

41. In conclusion, I find for the Claimants in respect of the issue of possession of the Property. I dismiss the Defendant's Counterclaim against the Claimants. In respect of the Part 20 Claim, the Defendant is entitled to a declaration as against Mr Hanif that he had held the Property on trust for himself and the Defendant beneficially in equal shares.