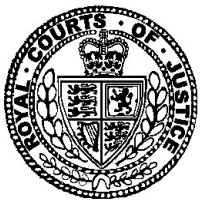

Neutral Citation Number: [2022] EWHC 551 (Ch) Case No: BL-2022-000208

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (Ch)

Royal Courts of Justice Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 11 March 2022

Before :

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

(1) DR VIKRAM BHAT **(2) MRS GEETHA BHAT**	**Claimants**
- and –	
MRS SMRUTI PATEL	**Defendant**

- -

Mr Oluwaseyi Ojo (solicitor advocate of **Taylor Wood**) for the **Claimants**
Mr David Warner (instructed by **Rainer Hughes)** for the **Defendant**

Hearing date: 11 March 2022

- -

Approved Judgment (corrected 16 March 2022)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR DAVID HALPERN QC SITTING AS A DEPUTY HIGH COURT JUDGE

Mr David Halpern QC :

1. I have heard two applications today:

   (1) The claimants (Dr and Mrs Bhat) apply for interim injunction to prevent the Defendant (Mrs Patel) from evicting them from premises which I will define as "the Adjoining Land".

   (2) Mrs Patel applies to strike out the Bhats' proceedings on the ground that they are an abuse.

2. I indicated at the outset, and both sides agreed, that I should take Mrs Patel's application first. If she succeeded, then there would be no surviving proceedings in respect of which interim relief could be granted to the Bhats.

3. I need to refer to three registered titles:

   (1) EX319108 known as 105 Calcutta Road, Tilbury ("**No. 105**");

   (2) EX857254 known as land to the south side of Calcutta Road; and

   (3) EX946493 known as 116 Dock Road (I shall refer to the last two titles as the "**Adjoining Land**").

4. Dr and Mrs Patel are the registered proprietors of No. 105, which comprises is a GP's surgery. On 15 April 2016 the Patels granted a lease of No. 105 to Dr Bhat. The lease is protected under Part Two of the Landlord and Tenant Act 1954.

5. It appears that there was a medical partnership between Mrs Patel, Dr Bhat and Mrs Bhat (albeit that Dr Bhat is the only one of the partners who is a doctor), but it is unnecessary for me to make any findings of fact about the partnership.

6. On 8 August 2017 the Patels bought the Adjoining Land, which lies immediately to the west of No. 105, for £100,000, and were duly registered as proprietors. It is common ground that the Bhats paid nothing towards the purchase price.

7. It appears that the partnership made an approach to NHS England ("**NHSE**"), who agreed to provide two thirds of the cost of building an extension to the surgery (the "**Extension**"). The Extension was to be substantially bigger than the original surgery and was to be built mostly on the Adjoining Land. It appears that the remaining one third of the cost was not paid by the Patels but was paid (in whole or in part) by the Bhats. I have not seen documents in support of these contentions and I make no findings of fact in this regard.

8. The Bhats fell into arrears with their payments of rent under the lease of No. 105 and the Patels brought proceedings in the Basildon County Court to forfeit the lease. The Bhats brought separate proceedings against the Patels, claiming a beneficial interest in the Adjoining Land. The Bhats' claim was consolidated into the original proceedings by way of counterclaim. The basis of the counterclaim is not easy not discern from the pleadings, but it includes the following:

> "*28. The [Bhats] further aver that they have acted to their detriment by agreeing to the Lease and the improvement grant believing that they will get at least 15 year Lease and security of tenure without the knowledge that Defendants will required (sic) them to vacate the property. Further, the [Bhats] have invested substantial amount of money in improving the state and value of the property to enhance their business all of which will be lost if they were to vacate the property as required by the [Patels]*."

9. There was a trial of the claim and counterclaim before Recorder Geraint Jones QC. In his judgment dated 11 June 2021 he began by saying that it was not easy to discern the issues from the pleadings but that the parties had agreed a list of issues which he would decide.

10. Unfortunately the list of issues is itself ambiguous. It includes the following:

> "*2. In respect of the [Bhats'] Occupation of the Premises and Rent payments:*
>
> *(a) Are the [Bhats'] right to occupy the Property based on a Lease or Licence ....*
>
> *(f) Are the [Patels] entitled to possession of the premises ...*
>
> *IN RESPECT OF [THE COUNTERCLAIM]*
>
> *3. Do the [Bhats] have any proprietary interest in the Land adjoining the surgery premises which is developed and is now part of the surgery premises?*"

11. It is not clear whether "*Premises*", "*Property*" and "*premises*" all refer to No. 105 alone or whether some of those terms include the Adjoining Land. On balance I agree with Mr Ojo that Issue 2 is concerned solely with No. 105 and that Issue 3, which is headed "*in respect of [the counterclaim]*" is concerned solely with the Adjoining Land. It follows that there was no express issue in relation to possession of the Adjoining Land, but there was an express issue as to whether the Bhats had any interest in the Adjoining Land.

12. The Recorder held as follows:

    (1) The Bhats had a lease of No. 105 but this did not extend to the Adjoining Land;

    (2) The Bhats were in arrears and their lease should be forfeited. He refused to grant relief against forfeiture;

    (3) The Bhats had no beneficial interest in the Adjoining Land; and

    (4) Dr Patel was "*an unreliable, inaccurate and sometimes untruthful witness*" (paragraph 18 of his judgment).

13. In relation to the Adjoining Land the judgment includes the following passages: "*9. The next issue is whether the [Patels] are entitled to an order for possession of both or either of the identified parcels of land. It is not necessarily the case that the same principles are applicable in each instance. ...*

> *11. The second of the actions which was consolidated is the [Bhats'] claim for a declaration that they have a beneficial interest in the [Adjoining*

Land]. Although not put in this way in the pleadings, the argument advanced by [their counsel] was that there had been an implied variation of the lease in respect of [No. 105], to include or add into it the [Adjoining Land]; whether they had a beneficial interest as a result of a resulting trust; whether they had an equity by reason of the operation of proprietary estoppel; and/or whether they had an equitable interest by reason of an established constructive trust. ...

55. It is important not to confuse or combine issues concerning occupation of the [Adjoining Land] by the Medical Practice (the partnership) with issues relating to the ownership of that land. This is especially relevant, as will be clear when I review the evidence applicable to this issue, because the [Bhats] advance the case that they have a beneficial interest in the [Adjoining Land]. When I asked [their counsel] to set out the basis or bases relied upon in support of that proposition he variously relied upon resulting trust, constructive trust, proprietary estoppel and possibly promissory estoppel or estoppel by convention. ...

65. ... Thus even if [Dr Bhat] believed or thought that any part of the grant monies would be paid towards the purchase of the [Adjoining Land], that is not what happened nor indeed was it something that could or should have happened given the terms of the NHS grant (which excluded a grant being made towards the purchase of realty).

75. On the basis of the totality of the relevant evidence I find as a fact that there was no promise, representation or discussion to the effect that the [Adjoining Land] would be purchased by anybody other than the [Patels] or that their purchase of it would be on the basis that they would hold it as trustees for others who would have a beneficial interest in it. The overall evidence leads me to conclude that [Dr Bhat] gave little, if any, proper thought to property matters largely because he held the view that upon [Dr Patel's] retiring from the Medical Practice he would be able to buy the two lots of land, being [No 105] and [the Adjoining Land], notwithstanding that nothing firm concerning price or other terms had been agreed or provided for by way of a formula for ascertaining a fair market price at the time when any such transaction might take place.

76. It follows that I reject the submission that the [Adjoining Land] was subject to any resulting trust. It is not the [Bhats'] case that they made any financial contribution to its purchase and so the essential precondition for a resulting trust to arise is totally absent.

77. [Their counsel] then argued that if there is no resulting trust, then the [Bhats] have a beneficial interest as to 34% in the [Adjoining Land] under a constructive trust. The essentials of a constructive trust are that there must have been a common intention between the paper title owners and the persons claiming a beneficial interest in the property, that the property should be held either in specified shares or in such shares as would be appropriate given the contributions in either money or kind made by the party claiming to have a beneficial interest. [The Patels' counsel] submitted that the common intention must be plain and obvious albeit that she

accepted that it could be implied from the conduct of the relevant parties. It is important to remember that implication is one matter and imputation is a totally different matter. A court is not entitled to impute a common intention to the relevant parties simply because it takes the view that that might achieve a fair outcome between them.

78. I have rejected [Dr Bhat's] evidence to the effect that there was any discussion or arrangement that he and his wife should have any beneficial share in the [Adjoining Land]. On that issue [Dr Bhat's] evidence was contradictory and inconsistent. It was contradictory because at various times throughout his evidence he insisted that he did not either seek a lease of the [Adjoining Land] or show any concern about the identity of its registered proprietors at the Land Registry because he believed it would be sold to him in due time. In my judgment that belief, which was repeated in the evidence, is quite inconsistent with there being an intention on the part of the [Bhats] that they should have a beneficial share in the purchase of the land either at the time when it was purchased (prior to the grant being approved) or subsequently.

79. I accept the evidence given by [Mrs Patel] that she and her husband had no intention whatsoever that the land should be held by themselves beneficially for themselves and the [Bhats]. I also accept the evidence that she never gave the [Bhats] any cause to believe that she and her husband would hold the land for themselves and the [Bhats] beneficially in either defined or undefined shares.

82. [The Bhats' counsel] next relied upon proprietary estoppel. For that principle to apply there needs to be a representation or assurance given to a third party that that third party will have rights in or over land if the third party expends money in improving the land or building upon it. Alternatively, proprietary estoppel may be made out where a landowner stands by knowing that a third party is expending his money in improving or building upon land at a time when the third party reasonably believes that he will thereby acquire rights in or over the land in consequence of the owner's implied assurance that that will be so. In short, the necessary representation or assurance can be either express or implied; it cannot be imputed.

88. In respect of the [Adjoining Land] there is no Lease to forfeit. The [Patels] have effectively brought the gratuitous licence to an end and there is no basis upon which the Court can refuse an order for possession in favour of Claimants who have sought the intervention of the court rather than resorting to self-help."

14. The Recorder accordingly ordered possession of both No. 105 and the Adjoining Land.

15. The Bhats appealed to the High Court and the appeal was heard by Fancourt J. In his judgment, dated 5 November 2021, he allowed the Bhats' appeal in respect of relief from forfeiture but otherwise upheld the Recorder's judgment. His judgment included the following passages to which the parties drew my attention:

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

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

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

34. The reason all these matters [that is, the intentions of Dr and Mrs Patel] are unclear is that the counterclaim was never advanced at trial on the basis that there was a common intention that the partnership would be entitled, in return for contributing towards the cost of the new premises, to occupy the new premises for any particular period of time. That period of time might have been until Mrs Patel retired or the Patels decided to offer the premises for sale, or until the fixed term of the lease of the Property terminated, until 2028, or until 15 years from completion of the works. It is easy to see how the counterclaim could have been advanced on the basis of a contractual licence for a period of time, enforceable in equity under constructive trust or proprietary estoppel principles on the basis of the Bhats' expenditure in improving the land, but it never was advanced on that

basis. Any argument that there was obviously and necessarily a right to use the new premises for 15 years from completion, by virtue of the terms of the grant and the covenants made by Dr Bhat, runs into the difficulty that NHS England's terms did not require the Sai Medical Centre, much less the Bhats as partners of it, to continue to occupy the new premises. The new premises only had to be used for general medical purposes for 15 years, with Dr Bhat not being entitled to dispose of any proprietary interest that he had. There is the further difficulty that it would not have been obvious to Dr Patel, who was not concerned with the grant application.

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

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

<u>Resolution</u>

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

58. As demonstrated by the correspondence with NHS England following the decision of the Recorder, the Sai Medical Practice satisfies an important local need for medical services, and the public interest would be likely to be harmed if the Patels resume possession of the Adjoining Land. That will also be likely to cause financial difficulty for Dr Bhat (and potentially for Mrs Patel and Mrs Bhat too) under the terms of the grant that was made by NHS England if the new premises are no longer used for general medical purposes. An obvious solution to the problem in these circumstances is for the Adjoining Land to be leased to the Bhats at a rent that makes allowance

for the contribution that they have made to its improvement. It is very much to be hoped that the parties are able to reach a reasonable solution, rather than spending more time and money litigating further the consequences of what they have done."

16. The current proceedings are brought by the Bhats against Mrs Patel alone. The Particulars of Claim are not easy to follow but include the following:

"*16. The Claimants aver that there was a common intention and agreement of the parties that the new premises would be occupied by the partners of the SAI Medical Centre for the purposes of carrying on the business of the partnership which was the provision of medical services to the local community for a term of no less than 15 years.*

17. *On the basis of the Agreement and common intention that the Claimants and the Partnership trading as SAI Medical Centre would enjoy occupation of the adjoining and for the business of the partnership, and in consideration, the Claimants who are the only equity partners of the Partnership agreed to the contribution of the 34% to the extension and building project, and also covenanted that the premises built on the adjoining land will be occupied by the partnership and SAI Medical Centre for the purposes of carrying on the partnership business for at least 15 years.*"

17. The relief sought includes specific performance of the alleged agreement and/or a lease for not less than 15 years, or alternatively a refund of the amounts paid by both the Bhats and NHSE to the surgery extension.

18. Mr David Warner, who appears for Mrs Patel, applies to strike out the new proceedings on the ground that the claim now made could and should have been made in the earlier proceedings (i.e. a *Henderson v Henderson* abuse). The witness statement in support of this application also alleges that the matter is *res judicata*. Mr Ojo (who appears for the Bhats) dealt with both bases in his skeleton argument. I indicated to the parties that I was proposing to deal with both bases and there was no objection from Mr Ojo.

19. Mr Ojo made the following submissions:

(1) The issue of a contractual licence or lease for 15 years was not raised in the earlier proceedings, as Fancourt J made clear in his judgment at [27].

(2) It could not have been raised in the earlier proceedings, because it is a partnership issue and Dr Patel, who was a party to the first proceedings, was not a partner.

(3) The Recorder "*gratuitously*" and unexpectedly "*sprung*" an order for possession on the Bhats.

(4) *Henderson v Henderson* is a broad, merits-based doctrine and the court should take into account the extreme hardship that would be suffered by the Bhats if they are evicted from the Extension and if they are ordered to repay the amount contributed by NHSE and to lose the benefit of their own

contribution to the Extension. Their patients would also suffer by being denied the services of their GP.

20. I put to Mr Ojo that Dr Patel was a necessary party to the current proceedings, because the Bhats are claiming a right to possession of land of which Dr Patel is a joint owner. On reflection, Mr Ojo agreed with me and applied for Dr Patel to be joined. This drives a coach-and-horses through Mr Ojo's second submission. In any event, even if Dr Patel had not been a necessary party to the current claim, that would not have been a good reason for failing to include the current claim in the previous proceedings: the counterclaim could have been brought against Mrs Patel alone.

21. I now turn to Mr Ojo's submission that the issue of a contractual licence or lease for 15 years was not raised in the earlier proceedings. I bear in mind the definition of *res judicata* given by Lord Sumption in *Virgin Atlantic Airways Limited v Zodiac Seats UK Ltd* [2014] AC 160 at [17]:

> "*Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see Civil Jurisdiction and Judgments Act 1982, section 34. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 St Tr 355. "Issue estoppel" was the expression devised to describe this principle by*
> *Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197-198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party*

> *from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger*."

22. Mr Ojo is correct in saying that the relief now sought is a lease or licence for 15 years, whereas what was previously sought was an equitable interest in the freehold. However, the only difference is in the relief. The cause of action remains the same. If the court finds that a proprietary estoppel has been established, it has a broad discretion as to what remedy to award, often described as being the minimum equity necessary to do justice. If the Recorder had found that the basis of a proprietary estoppel had been established, it would have been open to him to award a lease or licence for 15 years, even though what was sought was a freehold interest. Accordingly, in my judgment Mrs Patel has established a cause of action estoppel.

23. Further, the facts found by the Recorder at [75], [78] and [79] are inconsistent with both the representation and the detrimental reliance that would be required in order to establish a proprietary estoppel. The new proceedings therefore depend upon alleging facts which are contrary to the Recorder's express findings of fact. That is sufficient to establish an issue estoppel.

24. Mr Ojo says that the Recorder "*sprung*" the order for possession on the Bhats. I do not regard this as a fair characterisation of what happened. The Bhats claimed a beneficial interest in the Adjoining Land. They also claimed that it was part of their lease of No. 105. Both arguments were rejected. It followed that they had no right to possession. In my judgment the Recorder was therefore entitled to make an order for possession, at least in relation to the Adjoining Land. In any event, even if he was not so entitled, the way to object to this would have been to appeal on the ground that the Recorder had exceeded his jurisdiction by ordering possession of the Adjoining Land, However, they did not appeal on this ground and cannot now claim relief which is inconsistent with the Recorder's order insofar as it was upheld on appeal.

25. It follows that *Henderson v Henderson* is not relevant, because the issue now in dispute was raised before the Recorder. However, if I am wrong about this, then I am satisfied that that it could and should have been raised before the Recorder, because it arises between the parties to the earlier proceedings, it arises out of the same facts (as is clear, for example, from paragraph 28 of the original Particulars of Claim) and it is simply another route to resisting eviction from the Adjoining Land.

26. Mr Ojo relied on the well-known speech of Lord Bingham in *Johnson v Gore Wood* [2002] 2 AC 1 at 31, in which he refers to *Henderson v Henderson* as a broad merits-based principle. However, the injustice or hardship which the Bhats say would result from applying the principle is not sufficiently connected with the grounds on which Mrs Patel relies on the principle. In my judgment Lord Bingham's words were not an invitation to the court to take account of unrelated hardships and injustices. In that sense the position is analogous to the

"clean hands" doctrine in equity, which is sometimes sought to be invoked unsuccessfully where the uncleanness of the hands has no connection with the equity relied on.

27. The final matter which I have found more difficult is whether to strike out the pleading insofar as it makes a claim in relation to the money which the Bhats claim to have put into the Extension and to the sum which NHSE has threatened to seek to recover. The Recorder's judgment contains findings of fact at [75], [78] and [79] which make it impossible for the Bhats to claim for restitution for failure of basis. But subject to this, these issues were not before the Recorder.

28. I have considered whether to allow the Bhats to amend so as to preserve this part of their claim, but I have concluded that the Claim Form and Particulars of Claim are in too much of a mess. In the first place, it would be necessary to join Dr Patel into the proceedings. Secondly the parts of the claim which should not be struck out cannot easily be disentangled from the rest of the Particulars of Claim.

29. I am not encouraging the Bhats to bring further proceedings, but I do conclude that there is no objection based on *res judicata* or *Henderson v Henderson* abuse which prevents a claim against Dr and Mrs Patel in relation to (i) the moneys which the Bhats claim to have put into the Extension (provided it is not alleged on grounds which are inconsistent with the Recorder's judgment), or (ii) the issue whether they are entitled to an indemnity from the Patels in relation to any moneys repayable to NHSE. I have been taken to a notice dissolving the partnership. It may be that the proper place to consider these outstanding matters is in the context of the dissolution accounts.

30. I therefore strike out the proceedings. Had I not struck them out, I would have granted the Bhats the interim relief sought on the ground of the balance of convenience.

31. The Claimants are entitled to their costs of both applications and of the proceedings on the standard basis. I summarily assess those costs at £40,000 (inclusive of VAT).