IN THE COUNTY COURT AT CENTRAL LONDON

CLAIM NO: H10CL093

COURT 62 BY MS TEAMS
31st January; 1st & 2nd February 2022
BETWEEN:

(1) MR GARRY STEPHEN LUCAS
(2) L.B.J. (INVESTMENTS) LTD

Claimants

-and-

(1) MR LESLIE GILBERT
(2) EUROHOMES (UK) LIMITED

Defendants

Counsel for the Claimants: Mr James Goodwin, instructed by IBB Law LLP
Counsel for the Defendants: Mr Carl Troman, instructed by MJD Solicitors

JUDGMENT

Electronically Handed Down
9 February 2022

HHJ Saggerson

1. The trial of this action concerns the provision of the sum of £401,483.00 by the Claimants to the Defendants for the purposes of the purchase by the second Defendant ("Eurohomes") of freehold property at 12, Palmerston Road, London, E17 6PD. £335,483.00 came from the personal bank account of the first Claimant ("Mr Lucas") and the remaining £66,000.00 from the second Claimant ("LBJ") a company controlled by Mr Lucas's wife as majority shareholder. The second defendant ("Mr Gilbert") has been at all material times the sole director and registered owner of the single issued share in Eurohomes.

2. The "purchase price" (£401,483.00 – comprising £360,000.00 paid to the vendor and other incidentals) was transferred directly to the vendor's solicitors by Mr Lucas on 21 December 2011 and represented the entire cost for the purchase of 12 Palmerston Road. This property ("the property") was divided into several parts which included residential accommodation and two business units: a mini-cab office and an IT repair unit "M Solutions". This latter unit was occupied at the time of the purchase by Eurohomes by Mr Sayed Nadeem as a protected Landlord and Tenant Act 1954 tenant.

3. Mr Lucas is, and since 1985 has been, a solicitor specialising in commercial property as well as having extensive commercial property interests of his own. His colleague in legal practice, Mr Stuart Jacobs ("Mr Jacobs"), also features in some of the events

relevant to this action. Mr Gilbert after a career in retail has, since 2005 worked fulltime "in property" (as he put it).

4. Stripped to its basic essentials this action concerns the question of whether the Claimants invested capital in Eurohomes or the property giving rise to rights of ownership in Eurohomes or the property as they maintain, or whether, as maintained by Mr Gilbert, the provision of purchase monies was by way of a loan, or alternatively, was provided on precise terms that were never finalised nor agreed between the parties at or before the time the property was purchased.

5. Important additional issues arise. Mr Gilbert says that because Mr Lucas, in his capacity as a solicitor, then with the firm Lucas McMullan Jacobs, in which Mr Jacobs was also a partner, acted for the Defendants in the conveyancing of the property at the end of 2011 as well as in respect of other matters, any agreement reached between them in 2011 or later must be set aside on the grounds of breach of fiduciary duty or by virtue of undue influence.

6. It is not controversial that the property was ultimately sold by Eurohomes on 13 February 2020 for £1.3 million (subject to overage provisions). Before that 12b (one of the commercial units) had been sold to Mr Gilbert's SIPP for £125,000.00 on 12 April 2017. The remaining parts of the property had been charged for loans advanced by Mizrahi Bank on 19 December 2017 to the extent of £360,000.00. Each of these transactions was without the knowledge of Mr Lucas, I find. In the meantime, between 2011 and 2020 improvement works had been undertaken and the property managed and maintained by Mr Gilbert. Of the ultimate sale proceeds, £1 million was attributable to the main part of the property and £300,000.00 to Mr Gilbert's SIPP in respect of 12b.

7. The trial took place by MS Teams. I had the benefit of a digital trial bundle of 1467 pages and a supplemental bundle of 76 pages, detailed skeleton arguments from counsel representing both Claimants (Mr Goodwin) and both Defendants (Mr Troman) on which I have been able to rely extensively, and a bundle of authorities. Where I refer to documents in this Judgment I do so in the numbers appearing in square brackets and with the prefix "Supp" where the reference is to the supplemental bundle. The witness statements of Mr Lucas and Mr Gilbert stood as their evidence-in-chief and each was cross-examined. A witness summary was provided for Mr Jacobs so that his evidence was given orally both in-chief and in cross examination. At the conclusion of closing submissions, I indicated that I would take time for consideration and circulate electronically, in draft, a judgment for editorial comment and correction. This I did. I received suggestions on 8 February 2022. If further submissions need to be made in respect of an Order or as to costs, I will give further directions for either written submissions or a further short hearing.

8. I set out the issues in this action in more detail as follows:

    8.1 Whether before completion on the property in December 2011 and the provision of the purchase monies by the Claimants there was a settled agreement on terms certain between the parties.
    8.2 If there was such an agreement, whether it was for the purposes of a capital investment as part of a joint venture by the Claimants in Eurohomes to purchase

and develop the property, or alternatively in the property itself, or whether the purchase monies were provided by way of a loan to the Defendants.

8.3 Whether there was an agreement in 2015 between the parties to the effect that Mr Gilbert would procure Eurohomes to issue and allot a further share so that Mr Lucas and Mr Gilbert would be registered each as 50% stakeholders in Eurohomes.

8.4 What was the scope and extent of Mr Lucas's fiduciary duties and whether such duties were engaged at all in any part of the transactions relevant to this action.

8.5 Whether any agreement in 2011 or 2015 is vitiated by Mr Lucas's alleged breaches of fiduciary duty.

8.6 Whether either of these agreements is vitiated by undue influence.

8.7 What forms of relief should be granted to any of the parties?

9. It is worth emphasising Mr Troman's starting point on behalf of the Defendants. In this case there is no written contract relevant to 2011 or 2015; there is no contemporaneous memorandum or attendance note; no draft or executed trust deed; no share transfer documentation and no conveyancing file. This, it is submitted (not without some justification), would be unfortunate in any case, but is particularly startling where one of the parties is an experienced commercial property solicitor and is strongly indicative of the fact that the parties had not reached an agreement in 2011 when the monies were provided and were not provably of the same mind. I am reminded that it is ultimately for the Claimants to prove their investment case and their entitlement to one of the forms of relief claimed.

10. What we have is a catalogue of emails passing between Messrs Lucas and Gilbert, and others, over a period of several years, overwhelmingly post-dating the completion of the purchase of the property in December 2011 and thus the provision of the funds. Mr Troman, again rightly, reminds me that it is not the function of this court to construct an agreement (whether in 2011 or 2015) where none exists. It is not for me to write a contract that seems fair and reasonable in the blinding light of hindsight. The evidential value of the post 2011 emails is limited to whether any of them shed clear light on what had been agreed between the parties orally before the Claimants' money was provided taking account of the fact that one might expect a degree of self-serving justification after the event. I will refer to some of the emails in the course of this Judgment. However, I have considered and re-visited all the emails referred to in the cross-examination of the witnesses and nobody should fall into the trap of thinking that because I do not refer to all of them, I have not read and considered them, recognising as I do that the informal expressions used are not always consistent.

11. I also bear in mind the observations of Leggatt J. in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm):

> "… the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony

> of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

12. I have also been referred to, and take heed of, the Court of Appeal's observations in *Natwest Markets Plc v Bilta (UK) Ltd (In Liquidation)* [2021] EWCA Civ 680:

> "Faced with documentary lacunae …, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence; the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness box, especially when their version of events was challenged in cross-examination. Provided that the judge is alive to the dangers of honest but mistaken reconstruction of events, and factors in the passage of time when making his or her assessment of a witness by reference to those matters, in a case of that nature it will rarely be appropriate for an appellate court to second-guess that assessment."

13. It is bearing all this in mind that I approach some general observations about the witness' oral evidence. One of the uncovenanted benefits of a remote trial is that with multiple screens, it is easier to assess a witness's presentation simultaneously with consideration of key documents and cross-examination where everything is open on parallel screens, than it is when studying a paper file in court with a witness in the witness box.

    13.1 I got the distinct impression that Mr Lucas is as much a commercial property businessman as he is a solicitor. He practices the "business of law". This is not necessarily a bad thing, but it calls for caution on his part. I was, nonetheless, impressed by his evidence, not because of any confident self-assertion about what happened or what was agreed, but because of his candour about what he could not recollect after all these years. I rather suspect that Mr Lucas has never read a judgment of Leggatt J. or anybody else for that matter, so it would have been very easy for him to allege a clear recollection of events in the hope that he would be believed. He made important concessions in his oral evidence to the effect that before the money had been provided for the purchase of the property nothing had been said about the property itself being held on trust and nothing discussed about the mechanism of the shareholding. He agreed that he and Mr Gilbert had not sorted out the mechanism of the joint venture that he said the parties had agreed. He was prepared to accept, in a measured fashion, that he might have been wrong about when he first contemplated drafting a trust deed. He did not try and pretend that he had any clear recollection of what he and Mr Gilbert had said to bring about their agreement. I considered that he was embarrassed by his failure, in this instance, to document matters appropriately.

    13.2 Unfortunately, I was unimpressed by the evidence of Mr Gilbert. I found him to be someone who presented with *faux naiveté*. He maintained that he was a "learner" who regarded Mr Lucas as a mentor on whom he placed the utmost reliance. I reject this evidence. Despite his protestations to the contrary, I find

that he was an experienced and sophisticated property businessman by 2011 with control over and experience of a considerable property portfolio [181 para 5 – see also 617 and 667]. He repeatedly asserted that he felt manipulated by Mr Lucas and unable to withstand what he maintained was Mr Lucas's post-2011 revisionism regarding their professional relationship and the "investment". I reject this. He maintained repeatedly he did not know what a trust was and was "*bewildered*" by what he perceived to be Mr Lucas's manoeuvrings from 2012 onwards and as time went by he simply agreed with anything proposed by Mr Lucas to regularise the status of the purchase monies because he lacked the energy or ability to argue. I reject all of these contentions. In his Amended Defence and Counterclaim he positively asserted that the monies were provided as a loan at a commercial rate of interest. In his oral evidence he said that there was nothing agreed about interest, and that he had constructed this element of his case in order to be fair to Mr Lucas. His evidence, therefore, contradicted his pleaded Defence. He said in his oral evidence that nothing had been finalised or agreed before completion in December 2011 and that after the event he had come to the conclusion that the only viable reconstruction was that the money must have been a loan at a commercial rate of interest. He even asserted that he thought Mr Lucas might have had security for the provision of the money but was unable to say what that might have been. His intermittent attempts as a witness to feign confusion with documents and the concept of a joint venture, trusts or "equity" were singularly unconvincing. I find that Mr Gilbert is not to be trusted as a witness. He prevaricates. He is a tricky customer. I find that it is he who has been trying to take advantage of the fact that nobody thought it expedient at the time to record what had been agreed in 2011. To adopt his own expression, I find it is Mr Gilbert who is the "moving target" in this case. It is he who is trying to take advantage of the gaps in the documentary evidence and personal recollections. I regret to say that I found his evidence about what happened in the run-up to the provision of the purchase monies and Eurohomes' purchase of the property to be untruthful.

13.3 In some cases, it would enough for me to conclude that I prefer and accept the evidence of Mr Lucas over that of Mr Gilbert, which I do. However, I have reminded myself in this case that this still leaves a number of important gaps and that my conclusion that it is Mr Gilbert who is manipulative and unreliable does not lead inexorably to the conclusion that the Claimants have proved their case. It is with this in mind that I consider the emails passing between the various protagonists and the other documents.

14. If I had any criticism of the Claimants' case it might be that, out of an abundance of caution, any number of alternatives are postulated giving rise to the conclusion that by hook or by crook the Claimants have a proprietary interest in Eurohomes, the property or the net proceeds of sale. This is not an unusual problem, but it provides the space within which the Defendants can prevaricate and have prevaricated.

15. The Claimant's primary case is that before the property was purchased it was orally agreed in about November 2011, between Mr Lucas and Mr Gilbert on behalf of both Defendants that on provision of the purchase monies for the property Mr Lucas would be allotted an equal shareholding to that of Mr Gilbert in Eurohomes to hold for himself or at his direction by a corporate vehicle such as LBJ. The Claimants describe this as

the "2011 agreement". By this agreement Mr Lucas agreed to participate in a joint venture with Mr Gilbert and Eurohomes to secure equal, albeit indirect, interests in the property such as to enable them to benefit equally from its ownership by Eurohomes and ultimately the proceeds of resale at a profit.

16. In my judgment, an objective assessment of all the evidence demonstrates that this is precisely what the parties had orally agreed in November 2011 despite the absence of potentially critical documents, the inexact language sometimes used in messages passing between Mr Lucas and Mr Gilbert and Mr Lucas's candid evidential hesitations and memory frailties. I find that Mr. Gilbert had been interested in the investment and development possibilities presented by the property from as early as 2002. He approached Mr Lucas in June 2011 [1009] with the prospect and due to the unavailability of bank finance it was agreed that Mr Lucas would source and provided the purchase monies.

17. Their oral agreement concluded before exchange of contracts on the property, I find, was as follows:

    17.1 Mr Lucas and Mr Gilbert would engage in a joint venture to purchase, maintain, manage and develop the property. The fundamental agreement was that Messrs Lucas and Gilbert would share equally in the project, undertaking different roles, but sharing in the venture on a 50-50 basis.

    17.2 Mr Lucas would source the purchase funds.

    17.3 The property would be purchased by Eurohomes.

    17.4 Mr Gilbert would, in due course, source the equivalent of one half of the purchase price and reimburse Mr Lucas for the purchase price to that extent.

    17.5 Mr Gilbert would be responsible for the management, maintenance and future development of the property.

    17.6 Both Mr Lucas and Mr Gilbert would be entitled to 50% of the income generated by the property and 50% of any profit made as a result of redevelopment of the property and any future sale, and they would share equally in the costs of maintenance, management and development.

    17.7 Mr Lucas's half share in this joint venture would be brought about by allocating to him, or to his order, an equal shareholding in Eurohomes by some appropriate mechanism yet to be finalised.

18. It was a matter of indifference to both Mr Lucas and Mr Gilbert how and from where the purchase or reimbursement monies were sourced but both envisaged that each might use corporate vehicles under their respective control. This included an agreement that the allocation of the equal shareholding in Eurohomes could be, at his election, to Mr Lucas personally or to someone else or a corporate vehicle under his control.

19. The details of any redevelopment or improvements were not agreed in 2011. It was too early in the venture. Notwithstanding the open-ended nature of the future plans for the

property, both Mr Lucas and Mr Gilbert contemplated and agreed that they would share equally in decisions about the process of improvement or redevelopment and the costs associated with any such process as well as on-going management and maintenance.

20. The equal shares joint venture was an agreement between Mr Lucas and Mr Gilbert. How, and precisely when, the allocation of equal shareholdings in Eurohomes was to be brought about, the identification of any nominated shareholder for Mr Lucas and a reimbursement timetable and plan for Mr Gilbert's 50% contribution to the purchase price were probably not settled in 2011. A process of accounting and payment for maintenance and management costs and equalisation of the parties' respective contributions to expenses was not discussed or agreed either. In 2011 there was no discussion and no agreement about trusts whether in respect of a Eurohomes shareholding or the property itself. Nonetheless, Mr Lucas and Mr Gilbert had a clear, simple and certain framework agreement which was consistent with commercial common sense. There was nothing for Mr Gilbert to be bewildered about.

21. The parties agree that Mr Gilbert reimbursed £189,976.15, being one half of the purchase price for the property, in 2013 as part of a more wide-ranging accounting process [Supp. 26]. The dates and accounting mechanics of this are unimportant. What is important is that the sum represents one half of the purchase price. The tabulated accounting is Mr Gilbert's. Both the table and the narrative in this message, dated 21 August 2012, are more consistent with what I find to have been the 2011 agreement than with a loan.

22. I am satisfied that when, in his oral evidence, Mr Lucas accepted that there had been no express discussion about the "*mechanism"* of the shareholding or the mechanics of the joint venture he meant nothing more than that matters of the kind summarised above had not been discussed, at least not in any detail, or settled.

23. I find it inherently improbable to a high degree that Mr Lucas and LBJ would have advanced over £400,000.00 by way of unsecured loan to Eurohomes. It is even less probable (if that were possible) that such a sum would be advanced without any provision for interest (and Mr Gilbert resiles from any agreement as to interest such as is asserted in the Defence). The improbabilities pile one on the other because the Defendants do not assert any provision for repayment, leaving repayment on demand as the only viable possibility and that could have defeated the whole objective from the Defendants' point of view. The irreconcilable difference between the Defence, based on a commercial rate of interest (whatever that is) and no interest, save at the gift of Mr Gilbert, simply reinforces the point that the provision of the purchase monies was not a loan. Mr Lucas may have been lax in his attention to documentary detail in this instance, but to advance such an unsecured loan to a single-share, sole-director company, with few if any other assets, would have been unimaginable folly.

24. I remind myself once again, however, that the improbability of the Defendants various changing positions on this "loan" does not in itself prove the Claimants' primary case in respect of the 2011 agreement. It merely indicates that something else, other than a loan, is commercially more probable. I approach this in the context of Mr Gilbert's unconvincingly wavering positions that this was an unsecured loan at commercial interest; a loan without interest or something, the basis of which, he completely failed to understand.

25. The "something else" is not, in my judgment, likely to have been that nothing had been agreed at all and that the purchase monies had been advanced on the basis that the parties would reach an agreement later, whether that be for a loan on commercial terms or some form of equitable proprietary interest in Eurohomes or the property.

26. My starting point is the email sent by Mr Gilbert to Mr Lucas dated 17 January 2012, less than a month after the purchase of the property [Supp 6]. So far as relevant (with emphasis added) it says:

> "Garry These are the current notes that I have on Palmerston. I will speak to my bankers immediately; Financial: 1 Buy ½ in (confirm date) 2 Strategy for bank financing (Medium & long term) Tenants: 12- Sally Wright paying £4,800PA Direct to Lucas. Agreement to lose 1/3 space and pay same rent on 10yr lease (reviewable). 12A – Victor + Wonderlease £1200pcm for 1yr? Secret spot- Gain access and reconnect to main flat and rent say £700pcm 12B –Saed currently paying £750 PCM. Papers serving today. Regularise or remove. Planning: measured survey in hand Long term strategy undecided
>
> Company: Eurohomes; Shareholder agreement to be written up. Shares to be 50:50"

27. In my judgment there are a number of critical points about this message.

    27.1 Its proximity in time to the provision of the money.

    27.2 It states that Mr Gilbert is writing from "the current notes" he has about the arrangements which is indicative of a pre-existing agreement and notes about it.

    27.3 It confirms that he, Mr Gilbert, has to provide equal capital investment: "buy ½ in". This is only consistent with some form of ownership entitlement on the part of Mr Lucas.

    27.4 It discusses "strategy" for the property (medium and long term) - including bank financing and tenants. This can have been none of Mr Lucas's business in the absence of some agreement giving the Claimants a material ownership interest of some sort.

    27.5 It rounds off with an unambiguous statement that a shareholder agreement (inferentially already agreed) was to be *written up*. (Not, critically, to be arrived at).

    27.6 The share(s) [obviously in Eurohomes] are to be held 50-50 (between Mr Lucas and Mr Gilbert).

28. What this message does *not* say or even imply, is that the welcome provision of the purchase monies must be put on a proper footing as yet to be finalised; or that it was a loan.

29. If ever there was an evidential "smoking gun", this email, in Mr Gilbert's own digital hand, is it. It strongly suggests that there had already been a clear agreement before the provision of the purchase monies for 50-50 shareholding in Eurohomes subject to parity of capital contributions. The fact that Mr Lucas, much later, on 14 October 2013 [1126]

refers to himself as the "funder" is no more than a recognition of the respective contributions to made by Messrs Lucas and Gilbert: namely, that the former's role in the joint venture was to provide the initial funding for the purchase (subject to recoupment of ½ from Mr Gilbert) and Mr Gilbert would look after the maintenance, management and any development prospects of the property. This is consistent with their respective experience.

30. I find the rest of the emails between 2012 and 2018 to be overwhelmingly supportive of the conclusion that the Claimants' primary case based on the 2011 agreement is correct.

31. When Eurohomes bought the property there was a commercial tenant, Mr Nadeem, in occupation of part of the property. Proceedings in Bow County Court were initiated in 2013 by Eurohomes in respect of a new lease and instructed Mr Jacobs of Lucas McMullan Jacobs in respect of this litigation. Ultimately the court approved the terms of a new lease, but Mr Nadeem decided the terms were not to his liking and he resolved not to take it up. By this route Eurohomes secured possession. In a witness statement dated 28 June 2013 verified with a statement of truth in those proceedings [874] Mr Gilberts says [paragraph 2]: *I am a director of Eurohomes Ltd and 50% shareholder"*. Whilst the statement may well have been drafted by Mr Jacobs or under his supervision, the draft was on and, I find, consistent with Mr Gilbert's instructions. The paragraph is free-standing and obvious at the beginning of the statement and Mr Gilbert had been advised to read and consider it carefully before signing, making any alterations he considered necessary [919]. The statement is consistent with what Mr Gilbert wrote to Mr Lucas in an email dated 10 October 2013 [1126] when litigation strategy was under discussion. Mr Gilbert says: *"Eurohomes ... is a company owned 50/50 between ourselves ... you are a 50% shareholder"*. He also suggested in that email that if the litigation strategy could not be agreed one or other of Mr Lucas or Mr Gilbert might be *"... removed from the shareholdership ..."*.

32. I reject Mr Gilbert's explanation to the effect that he simply overlooked this "mistake" in his witness statement and that it didn't really matter anyway in the context of the 1954 Act application. In emails to Mr Jacobs at the end of September 2013 [846; 848] he states that both Mr Lucas and he were *"the client"* in respect of this litigation and in a further reference to Mr Lucas that *"...my partner is your partner..."*.

33. The truth of the matter is that in the context of the Bow County Court case, in the witness statement and relevant emails, Mr Gilbert, unconcerned about the formalities, unguardedly recognised the reality and substance of what had been agreed in the 2011 agreement. He proceeded on the basis that that which ought to have been done (the equalisation of the shareholding in Eurohomes), had been done.

34. What happened between 2012 and 2018 is illustrated in innumerable emails passing between Mr Lucas, Mr Gilbert and others (including Mr Gilbert's accountant, Mr Chernoff). What all this amounted to, in my judgment, was a process whereby various options were under discussion in order to formalise what had been agreed in 2011. As early as the spring of 2012 Mr Lucas had given thought to a draft trust instrument, the details of which he can no longer recall. Later, for example [1197], on 18 August 2015, Mr Gilbert writes to his accountant regarding the 50-50 shares in Eurohomes recognising that by this stage Mr Lucas had nominated LBJ as the appropriate corporate

vehicle to hold his 50% interest. Later still [1241], on 29 March 2017, a clear inference arises to the effect that Mr Gilbert and his accountant were discussing Mr Gilbert's holding of the single Eurohomes share on trust as to 50% to the order of Mr Lucas. In March 2017 there were even exchanges between Mr Lucas and Mr Gilbert [1216; 1217; 1218] to the effect that Mr Gilbert would *"buy-out"* Mr Lucas.

35. I am satisfied that all the discussions about what Mr Lucas calls the mechanics are consistent with there having been an agreement in or about November 2011 to effect I have stated in paragraph 17 above.

36. It is likely that from about 2014 Mr Gilbert became increasingly dissatisfied with what he perceived to be the imbalance of the respective roles of himself and Mr Lucas. I daresay he considered that he was doing all the management and maintenance donkey-work and taking steps to devise and progress development proposals, and accumulating costs in the process, whilst the "silent" partner, Mr Lucas, was benefitting from all his hard work. The impasse reached regarding formalising Mr Lucas's 50% shareholding interest in Eurohomes, whilst initially due to Mr Lucas's laxity, was prolonged because Mr Gilbert began to reassess the balance of engagement in the property joint venture in his own interests and as a result he attempted to engage in renegotiation, he prevaricated, he subsequently became obstructive and ultimately treated the property as his own as if Mr Lucas had no shareholding interest in Eurohomes.

37. In July 2015 [856; 857] Mr Lucas recognised that he needed to make a further financial contribution reflecting costs of refurbishment and redevelopment, maintenance and management. The sum was £144,416.00. Mr Lucas suggested making three equalisation payments over time totalling this amount. He only made two. £50,000.00 or thereabouts is outstanding. The email correspondence regarding this equalisation also includes proposals for formalising a 50% shareholding interest in Eurohomes. However, in my judgment, this correspondence only reflects what had been agreed in 2011. The equalisation of the shareholding had been agreed at the outset, it was not conditional on Mr Lucas honouring his payment plan to equalise on-going costs associated with the property. No doubt there will have to be an accounting in due course of where the parties stand financially.

38. All other things being equal, therefore, the first Claimant is entitled to a declaration to the effect that he is entitled to a 50% interest in the share in Eurohomes and the share is held on trust in equal shares between Mr Lucas and Mr Gilbert. Mr Lucas is also entitled to an order for specific performance of the 2011 agreement to bring about an equal shareholding in Eurohomes as between himself and the first Defendant.

39. The Defendants maintain that all other things are not equal. It is submitted that the 2011 agreement as I have found is unenforceable on the grounds of breach of fiduciary duty and, or alternatively, undue influence. Submissions based on estoppel and illegality have not been pursued.

40. In respect of both breach of fiduciary duty and undue influence I accept the submissions of Mr. Goodwin. I am satisfied that fiduciary duties did not arise in respect of the 2011 agreement as I have found it to be in paragraph 17 above.

41. Whilst the relationship of these parties was one of solicitor and client – a fiduciary relationship – with regard to the act of purchasing and the conveyancing matters relevant to the property and the 2013 Bow County Court litigation about the new commercial lease for one of the tenants, this fiduciary relationship did not arise with regard to or extend to or include the 2011 agreement. This was a separate joint venture commercial investment agreement. The whole point of the 2011 agreement was that both Mr. Lucas and Mr Gilbert would invest and profit from their respective investments in Eurohomes and the property. The fiduciary obligation of loyalty reflected in the prohibition on acting in a situation where a potential conflict of duty and interest could arise and the prohibition on making a profit out of the fiduciary position, if applicable, would make a mockery of the fundamentals of the 2011 agreement. From the outset Mr Lucas and Mr Gilbert agreed that they were "in it" together, equally, to their mutual financial advantage. A joint venture agreement does not in itself give rise to a fiduciary relationship and as noted by Carr J. in *Fujitsu Services Ltd v IBM UK Ltd* [2014] EWHC 752 (TCC) one must be careful not to distort the contractual agreement arrived at between commercially contracting parties by too readily superimposing fiduciary obligations inconsistent with the contractual bargain.

42. I gratefully adopt the summary of principles from paragraph 104 onwards of Mr Goodwin's skeleton argument.

> McGhee et al, *Snell's Equity (34th Edition)* ("*Snell"*) describes the position as follows at §7-012:
>
> "(a) Scope**.** The scope of fiduciary duties is "*moulded according to the nature of the relationship and the facts of the case*". However, application of fiduciary doctrine is not an unprincipled exercise in judicial discretion. Rather, it requires a meticulous examination of the facts of each case in order to determine what non-fiduciary duties are owed, so as to be able to determine the effect that fiduciary principles will have in the case:
>
> > "The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."
>
> Careful analysis of both fiduciary and non-fiduciary duties is crucial. It is nonsensical, for example, to talk of a conflict between duty and interest without careful analysis of what non-fiduciary duties are in fact owed. Those duties will differ with the circumstances of each case. Fiduciary doctrine must be applied in a way that is sensitive to those differences.
>
> It is also necessary to determine in what respects the person is a fiduciary, because outside of those respects the fiduciary owes no fiduciary duties and is free to act in accordance with ordinary legal principles."
>
> (footnotes and citations omitted)
>
> Professor Conaglen, in his seminal monograph *Fiduciary Loyalty* (Hart, 2010), states in Chapter 7 that:

> "… the moulding of fiduciary duties takes account of the fact that fiduciary duties can be excluded if the principal authorises the fiduciary to act in a way that would otherwise constitute a breach of fiduciary duty. In that sense, the existence of fiduciary obligations is only a presumption, even in cases involving a settled category of fiduciary relationship […] This is not a matter of judicial discretion but rather gives effect to the arrangements the parties have created."

43. I am satisfied that the 2011 agreement was outside the scope of any fiduciary relationship between Mr Lucas and his then firm and the Defendants.

44. Mr Gilbert's evidence to the effect that he was unaware of the details of LBJ's involvement; its financial contribution to the purchase of the property, the directorship of Mr Jacobs or any other details, is simply mendacious. LBJ was effectively doing nothing than being used as a corporate vehicle to Mr Lucas's order. Mr Gilbert was uninterested in the detail because he was contracting with Mr Lucas. Even if the 2011 agreement could be shoe-horned into a fiduciary relationship, Mr Gilbert enthusiastically approved and authorised the conduct that would have, in other circumstances, constituted a breach of fiduciary duty. He had had his eyes on the property for many years, he wanted funding, the funding was only realistically available from Mr Lucas and nobody in Mr Lucas's position would provide the funding whilst subordinating his own commercial interest to those of Mr Gilbert or Eurohomes. As a sophisticated property businessman Mr Gilbert understood this and proceeded accordingly. In introducing Mr Lucas to the property, Mr Gilbert encouraged, even enticed Mr Lucas to step outside the scope of any fiduciary relationship with regard to this joint venture. There was, I my judgment, no material failure to disclose information to Mr Gilbert.

45. The Defendants' case on undue influence is, in my judgment, just as unconvincing. Given that a rebuttable presumption of undue influence will arise in the context of a relationship of influence between two parties, which will include solicitor and client, the presumption is only engaged where the impugned transaction calls for an explanation. That is, it must be a transaction that *"cannot be readily accounted for by the ordinary motives of ordinary persons in that relationship"* or *"…was explicable only on the basis that undue influence has been exercised to procure it"*. (Snell: 8-032; *National Westminster Bank Plc v Morgan* [1985] AC at 704; *Royal Bank of Scotland Plc v Etridge (no.2)* [2002] 2 AC 773).

46. Once all the contributions and cross-contributions are ironed out and subject to final accounts being taken, Mr Lucas, whether directly or indirectly through LBJ, has contributed, in round figures, about £300,000.00 net and there may be a further £50,000.00 equalisation payment outstanding from him. Without his initial capital provision, the property would not have been secured when it was and would not have been acquired at all without additional financing costs. Mr Lucas waited until mid-2013 before any capital equalisation was made by Mr Gilbert. Of course, Mr Gilbert also played his part on the ground. This classic joint venture has every appearance of affording all the protagonists value for money and discernible mutual benefits. I am at a loss to see how it could conscientiously be said that any operative undue influence was actively or subliminally at work here.

47. In all the circumstances, there must be judgment for the first Claimant for declaratory relief and specific performance as indicated above and the counterclaim must be

dismissed. I do not see any need to make any Order in respect of the second Claimant's claim. Further directions as to the taking of an account may be necessary.

48. This Judgment is deemed electronically handed down on 9 February 2022. I extend time for Counsel to attempt to arrive at an agreed form of Order until 4.00pm on Friday 18 February 2022.