Richard Andrew Campbell(Plaintiff) v Robert Campbell (First Defendant)

Jurisdiction:	Jersey
Judge:	T. J. Le Cocq, Bailiff, Jurats Olsen, Ramsden, Le Cocq, Deputy Bailiff
Judgment Date:	06 July 2017
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Text

Royal Court

(Samedi)

Before:

T. J. Le Cocq, Esq., Deputy Bailiff, and Jurats Olsen and Ramsden.

Between
Richard Andrew Campbell
Plaintiff

–v–
Robert Campbell
First Defendant

and

Longton Holdings Limited

Second Defendant

and

Financial Consultants (Jersey) Limited
First Party Cited

and

FCM Limited
Second Party Cited

Advocate J. S. Dickinson **for the Plaintiff**.

Advocate M. T. Jowitt **for the First Defendant**.

Authorities

Campbell v Campbell and others [2016] JRC 190.

Campbell v Campbell and others [2017] JRC 003.

Campbell v Campbell HC 2015-002052.

Trusts (Jersey) Law 1984.

Fiduciary Management Limited v Sheriden 2002/34 (see 2002 JLR Note 11).

Bagus Investments Limited v Kastening [2010] JLR 355.

Paragon Finance Plc v DB Thakerar & Co (a firm) [1999] 1 All ER 400.

Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669.

Lewin on Trusts (19th Edition).

Stack v Dowden [2007] 2 AC 432.

Laskar v Laskar [2008] EWCA Civ 347.

Agarwala v Agarwala [2013] EWCA Civ 1763.

Churney v Deripaska [2008] EWHC 1530 (Comm).

Tomlinson v Pickup [2014] EWHC 4495.

Shield v Shield [2014] EWCA Civ 1136.

Z v Y (Matrimonial) [2014] JRC 170.

Re Vandervells Trust No. 2 [1974] CH 269.

Flynn v Reid [2012] (1) JLR 370.

Business — dispute relating to entitlement interests in various corporate entities.

THE DEPUTY BAILIFF:

1 This matter concerns one aspect of a dispute between two brothers, Richard Andrew Campbell ("Richard") and Robert Campbell ("Robert") concerning their respective entitlements to an interest in various corporate entities through which they conducted their jewellery business or held assets. We refer to them by their first names as a matter of convenience without any disrespect.

2 Longton Holdings Limited ("Longton") is a limited liability company incorporated in Jersey, the shares of which are beneficially owned by Richard and Robert. The parties cited hold 50% of those shares for Robert. Richard holds the remaining 50% of the shares.

3 The essence of the claim is whether or not Richard is entitled to share in (a) the capital and interest (both already paid and due) of a loan in the amount of £2,919,018.75 made to Longton (the 2007 Loan) and, (b) the capital of a loan or loans made interest free to Longton in the amount of £264,988 (the Interest Free Loans). We refer to these loans jointly as the Longton loans.

4 This matter has, in its latter stages, taken a somewhat unusual procedural course. The Court concluded the evidence and reserved judgment on 7 th June, 2016. When the judgment was in the course of preparation, Richard applied to admit further evidence. That application was resisted and there was a hearing in which leave was given to Richard to adduce some further evidence (see *Campbell v Campbell and others* [2016] JRC 190). When Richard came to file his further evidence, Robert challenged the ambit of the evidence that Richard had filed and there was a further hearing in which the Court gave directions relating to the filing of that further evidence, and submissions on that evidence by both parties (see *Campbell v Campbell and others* [2017] JRC 003). The effect of these procedural steps was that the evidence was not in final form before the Court until February 2017.

Richard's Case

5 In essence it is Richard's case that the Longton loans derived in part from his and from Robert's personal assets, in part from loans in turn made jointly to Richard and Robert by their mother Lucie Marie Antoinette Campbell ("Lucie") and as to the rest from the jewellery business jointly owned by Richard and Robert. It should perhaps at this point be noted that

Richard claimed that the jewellery business was owned equally between himself and Robert and Robert claimed that the jewellery business was owned as to 51% by him and 49% by Richard. That is not a matter on which this Court was called upon to decide as it forms part of the issues that were being litigated between Richard and Robert before the High Court of Justice. The High Court has found in Richard's favour (see *Campbell v Campbell HC 2015-002052* at paragraph 70) and has held that the jewellery business was held between Richard and Robert on a 50/50 basis.

6 It is further his case that there was an understanding between himself and Robert created in part at the time when Longton was incorporated and subsequently when the 2007 loan was discussed between them and entered into that Richard would be entitled to 50% of the revenues of Longton. Although the Longton loans were in Robert's name Richard alleges that Robert holds the benefit of 50% of the capital and 50% of the income from those loans for him. We will set out the detail of the alleged understanding between Richard and Robert and the legal basis on which Richard puts his case hereunder.

Robert's Case

7 Robert for his part accepts that Richard is entitled to 50% of Longton but denies that Richard is entitled to 50% of the Longton loans either as to capital or interest. Instead, so Robert argues, the monies that were advanced by him to Longton under the Longton loans were first loaned to him by either Lucie or, as to the larger part, by a company called Azure Gold Limited (Azure Gold), a BVI company, on an informal and interest free basis. Ultimately, therefore, the capital when repaid by Longton will fall to be repaid to Azure Gold although he, Robert, is entitled to retain the interest paid on the Longton loans. In the light of the judgment of the High Court it is clear that Richard is entitled to 50% of Azure Gold. Robert's case is that the Longton loan should be taken at face value as a loan made by him to Longton. The Longton loans were entered into, with Richard's agreement, to secure a tax advantage.

8 It is further Robert's case that, as to the capital of the Longton loans at least, Richard's claim for a share is premature because those loans have not yet been repaid to Robert by Longton and Robert would simply be repaying them to Azure Gold (the loans to Lucie having been repaid) to which Richard would be entitled to benefit as a shareholder of Azure Gold.

9 It may at this point be appropriate to observe that, at the present time, Azure Gold has a single shareholder of record, Robert's wife, and she is also the sole director and signatory.

Background

10 To assist in an understanding of the case we will, at this stage, set out something of the background:

(i) Richard and Robert are the only children of the marriage of Mr Archibald Graham Campbell and Lucie. Richard at the material time lived in the United Kingdom and Robert lives in Thailand.

(ii) Richard and Robert own between them a jewellery manufacturing, retail and wholesale business which was started by Lucie, originally selling antique jewellery in London. Robert became involved and expanded the business.

(iii) Richard subsequently became a partner.

(iv) Prior to Lucie's retirement, the business had been owned as to 50% by Lucie and 25% each as to Richard and Robert. After Lucie's retirement Richard and Robert became partners in the business in proportions that were the subject of dispute. As we have said, the High Court has determined that they were equal owners.

(v) The business comprises a number of elements:

(a) A retail diamond and jewellery business operating from 26, New Bond Street, London (the “London property”) under the name of Lucie Campbell LP (“LCLP”) which is a registered UK limited partnership.

(b) A company incorporated in Thailand called RC Jewellery Trading Company Limited (RCJL) which is a jewellery manufacturer and carries out its business in Thailand.

(c) A property holding company called Milling Lock Limited (Milling Lock) which owns three buildings in Bangkok where RCJL's factory is situate. Milling Lock is also incorporated in Thailand.

(d) Azure Gold, which purchases jewellery from RCJL and sells it to LCLP in England and Lucie Campbell Corporation (LCC) in the United States and to others.

(e) A wholesale jewellery business in the United States which is conducted by LCC which is itself registered in the United States.

(vi) In or about 2001 the lease of premises in London at that time occupied by LCLP was to expire. Richard and Robert identified a property in Curzon Street which they intended to purchase. On taking advice it was decided that the property should be purchased in a manner that was separate from the business generally and it was proposed that it be acquired by a Jersey company, Longton.

(vii) Ultimately the purchase of the property in Curzon Street did not proceed but the London property was identified and was ultimately purchased and is held by Longton. We will deal with this at greater length.

The genesis of the Longton loans

11 In 1997 a Jersey law trust was established known as “The K Trust”. The beneficiaries of The K Trust appear to be Richard and Robert and the purpose of it was to facilitate a business that Richard and Robert and Lucie had (together with another person) for the acquisition of property in South London with a view to holding it for sale at a profit. It is not necessary to go into either the history or the detail of The K Trust insofar as it relates to the business of holding the proceeds of the sale of properties in South London which was, so it appears, a successful venture.

12 In March 1999 Azure Gold became part of the jewellery business.

13 As mentioned above, the lease of the premises in London from which LCLP could operate was coming to an end in 2001. As a result of this, Richard and Robert turned their attention to the possibility of a purchase of premises from which the business could function.

14 As we have said initially, in 2001, premises at Curzon Street were considered and as part of that potential acquisition, tax advice was taken to the effect that there might be a UK tax saving if that property was purchased by a non-UK resident company which might be owned by an overseas trust. Some thought was given, by Richard at least, to using The K Trust for that purpose which could be used to own the non-UK resident company.

15 It is Richard's case that he agreed with Robert that they would own the property, at that time anticipated to be in Curzon Street, on a 50/50 basis and that any net revenues or profits derived from the ownership, occupation and use of the property would be shared by them equally. It was also agreed, so Richard asserts, that the property would be acquired by a non-UK resident company and that holding company would be owned by The K Trust and held separate from the jewellery business. This was, so Richard states, similar to the way that the business of property development in South London had been held separately from the jewellery business.

16 Steps were taken to incorporate a Jersey company and ultimately Longton was incorporated.

17 Richard asserts that there were a number of conversations between himself and Robert regarding the acquisition of the Curzon Street property both over the telephone and face to face. Amongst the points agreed between them was that any monies borrowed from any bank or financial institution would be repaid as quickly as possible; money would be borrowed from Lucie; and that to pay interest on those borrowings and indeed to repay the capital, money would be taken out of the jewellery business with no requirement to repay that money to it. We have, of course, seen a significant amount of documentation concerning the incorporation of Longton and we will refer to some of it hereunder when we determine whether or not Richard's understanding of the arrangement between himself and Robert was correct.

18 It is clear that the potential purchase of the property in Curzon Street was a very slow moving affair and in 2002 the London property came into view. Richard went to view the property and formed the opinion that it met the needs of LCLP. There then, so Richard asserts, followed long conversations between himself and Robert in which it was agreed that the London property would be purchased by Longton and that he and Robert would own the London property equally through Longton and share in the profits or losses. It was agreed that this investment would be treated as separate from the jewellery business but a similar agreement was reached, so it is alleged, as was reached with the Curzon Street property, namely that any loans taken would be paid back as soon as possible, money would be borrowed from Lucie, Robert and Richard would each invest some of their own money and money could be taken out of the jewellery business to pay for the purchase of the London property and to repay any loans and that such money taken out would not need to be repaid into the jewellery business.

19 Richard alleges other understandings but the above seem to us to be the most salient.

20 The London property was accordingly acquired by Longton. RBS agreed to lend £1.6 million. It also lent a further sum, £577,500, on a short-term basis to cover the VAT element of the consideration which was to be reclaimed from HMRC. Contracts were exchanged for the purchase of the London property in July 2002 and completed in August 2002. Longton entered into the lease of the London property with Richard and Robert, who were trading as LCLP, in November 2002 for a 15 year term commencing 6 th September, 2002, at an annual rental of £170,000.

21 We have heard a significant amount of evidence concerning the funding of Longton from the period of its incorporation onward. The financial arrangements in connection with the jewellery business, Longton and generally between Richard and Robert were complex. Fortunately we do not think that we need to go into the details of this funding other than to note that it appears to us that the larger part of the monies received by Longton in terms of funding aside from bank borrowing appear to have derived from Lucie, entities that form part of the jewellery business (including Azure Gold) and from Richard and Robert individually.

22 In February of 2007 Robert raised with Richard the need to discuss the forthcoming rent review in connection with LCLP's lease of the London property which was then due in September 2007. This led to a discussion about the tax consequences for Longton after the RBS loan had been paid off, because the whole of the rent would then be liable to tax in the United Kingdom, i.e. there would be no mitigation of the tax payable thereon by reason of interest payments. In March 2007 Robert raised with Richard the concern that Longton had cash flow issues. They agreed an appropriate annual rental to be charged by Longton for the London property and Robert entered into the Longton 2007 loan with Longton in the approximate sum of £2.9 million in relation to which Longton was to pay interest at a rate of 3% over base rate. It is of course the basis upon which Robert entered into the 2007 Loan, that is, amongst other things, one of the central issues in this case.

23 Between November 2007 and December 2008 further funds totalling approximately £265,000 were advanced to Longton to assist it in meeting obligations in connection with the RBS loan and the 2007 Loan. Again, the basis on which these loans were advanced is a matter of dispute in these proceedings. It is Robert's case that he borrowed the money from Azure Gold in his personal capacity and therefore the loan from him to Longton was a personal loan; it is Richard's case that the money was advanced from the jewellery business through Robert but not by way of any loan but rather as part of the arrangement between them, so Richard alleges, ultimately to share in the repayment of the capital and interest equally.

The claims in law

24 Richard put his case on the basis that his share of the Longton loans are held for him on an institutional constructive trust or, alternatively, on a resulting trust. He also claims, alternatively, that he should receive restitution on the basis of the doctrine of unjust enrichment.

Constructive Trusts

25 Article 33 of the Trusts (Jersey) Law 1984 ("the Trust Law") deals with constructive trusteeship. It is the following terms:

> ***"33 Constructive Trust***
>
> > ***(1) Subject to paragraph (2) where a person (in this article referred to as a constructive trustee) makes or receives any profit, gain, or advantage from a breach of trust, the person shall be deemed to be a trustee of that profit, gain, or advantage*** .
> >
> > ***(2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust*** .
> >
> > ***(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it*** .
>
> ***This article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee."***

26 Accordingly the concept of constructive trusteeship is part of Jersey law but its statutory expression is not exhaustive.

27 If there is a gap in the Trust Law or the Jersey authorities then it is appropriate to have

regard to English law for guidance on the matter of constructive trusts and in *Fiduciary Management Limited v Sheriden [2002/34]* (see 2002 JLR Note 11), in referring to Article 29 (now Article 33) of the Trust Law, the Court at paragraph 88 said:

> ***"The Court considers that this specific provision, made by reference to an established product of English jurisprudence, intends that in the case of such trust the requirements for the coming into the being of the same trust are, by necessary implication, to be those prevailing in England and Wales with allowance only for specific situations prevailing in Jersey, in relation particularly to land law."***

28 In *Bagus Investments Limited v Kastening* [2010] JLR 355 the court, in referring to constructive trusts, stated, at paragraph 45(i):

> ***"Jersey law is similar to English law in relation to constructive trusts and would undoubtedly recognise the two different types or classes of constructive trustee described in the English cases…"***

29 The English case law has not always been entirely clear on the matter of constructive trusts. In *Paragon Finance Plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400 Millett LJ at page 408j says:

> ***"Regrettably, however, the expressions "constructive trust" and "constructive trustee" have been used by equity lawyers to describe two entirely different situations.*** The first covers those cases already mentioned, where the defendant though not expressly appointed as trustee, has assumed the duties of a trustee by a lawful transaction which was independent of and proceeded the breach of trust and is not impeached by the plaintiff. The second covers those cases where the trust obligation arises as a direct consequence of the unlawful transaction which is impeached by the plaintiff .
>
> ***A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another.*** In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust…
>
> ***The second class of case is different.*** It arises when the defendant is implicated in a fraud …."

30 In *Williams v Central Bank of Nigeria* [2014] UKSC 10 their Lordships addressed, in the context of a limitation argument, the nature of constructive trusteeship. Lord Sumption, at paragraph 7, states:

> ***"7. The combined effect of the definition sections of the Limitation Act 1980 and Trustee Act 1925 is that in Section 21 of the Limitation Act a trustee includes a "constructive trustee". Unfortunately, this is not as informative as it might be, for there are few areas in which the law has been so completely obscured by confused categorisation and terminology as the law relating to constructive trustees*** .
>
> ***8. The starting point for any consideration of this subject remains the well known statement of principle of Lord Selbourne LC in*** *Barnes v Addy* (1874) LR9 Ch App 244, 251:
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> ***"Now in this case we have to deal with certain persons who are trustees, and with certain other persons who are not trustees.*** That is a distinction to be borne in mind throughout the case. Those who create a trust clothe the trustee with the legal power and control over the trust property, imposing upon him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found even making themselves trustees de son tort, or actually participating in any fraudulent conduct of the trustee to the injury of the cestui qui trust. But, on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest fraudulent design on the part of the trustees."
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> ***9. It is clear that Lord Selborne LC regarded as a constructive trustee any person who was not an express trustee but might be made liable in equity to account for the trust assets as if he was. The problem is that in this all embracing sense the phrase "constructive trust" refers to two different things to which very different legal considerations apply. The first comprises persons who have lawfully assumed fiduciary obligations in relation to trust property, but without a formal appointment. They may be trustees de son tort, who without having been properly appointed, assume to act in the administration of the trusts as if they had been; or trustees under trusts implied from the common intention to be inferred from the conduct of the parties but never formally created as such. These people can conveniently be called de facto trustees. They intended to act as trustees, if only as a matter of objective construction of their acts. They are true trustees, and if the assets are not applied in accordance with the trust, equity will enforce the obligations that they have assumed by virtue of their status exactly as if they had been appointed by deed. Others, such as company directors, are by virtue of their status fiduciaries with very similar obligations*** .

> ***In its second meaning, the phrase "constructive trustee" refers to something else.*** It comprises persons who never assumed and never intended to assume the status of the trustee, whether formally or informally, but have exposed themselves to equitable remedies by virtue of their participation in the unlawful misapplication of trust assets. Either they have dishonestly assisted in the misapplication of the funds by the trustee, or they have received trust assets knowing that the transfer to them was a breach of trust. In either case, they may be required by equity to account as if they were trustees or fiduciaries, although they are not. These can conveniently be called cases of ***ancilliary liability.*** The intervention of equity in such cases does not reflect any pre-existing obligation but comes about solely because of the misapplication of the assets. It is purely remedial. The distinction between these two categories is not just a matter of the chronology of events leading to liability. It is fundamental. In the words of Millett LJ in Paragon it is "the distinction between an institutional trust and a remedial formula – between a trust and a catchphrase."

31 In *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, Lord Browne Wilkinson described the difference between the institutional constructive trust (i.e. falling within either of the two categories referred to by Lord Sumption) and a remedial constructive trust at 714f-h:

> ***"In the present context, that distinction is of fundamental importance.*** Under an institutional constructive trust, the trust arises by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past. The consequences that flow from such trust having arisen (including the possibly unfair consequences to third parties who in the interim have received the trust property) are also determined by rules of law, not under a discretion. A remedial constructive trust, as I understand it, is different. It is a judicial remedy giving rise to an enforceable equitable obligation."

32 It was argued by Robert that a remedial constructive trust could not be imposed as a matter of Jersey law. The case of Re Esteem [2003] JLR 188 was cited in which Birt, Deputy Bailiff, (as he then was) stated at paragraph 148:

> ***"The customary law of Jersey, with its influence from the civil law has always placed great store on matters of title and proprietary rights.*** We inclined to the view that the arguments of the trustee and the defendants are to be preferred to those of the plaintiffs on the issue of whether the court may take unto itself the right, as a matter of discretion, to reorder existing proprietary rights albeit a discretion to be exercised in principled grounds. Whilst it might be said to be attractive to have the remedial constructive trust as a remedial tool where the justice of the situation it required, we are not convinced that that attraction is sufficient to give the court jurisdiction to vary existing proprietary rights in this way."

33 Furthermore, we were referred to Underhill and Hayden in which the learned authors state (at paragraph 3.7 on page 74):

> ***"To impose a constructive trust in respect of specific property it is necessary to prove facts which fit the accepted special circumstances directly or by analogy, for the court cannot impose a constructive trust whenever justice and good conscience require it and thereby indulge idiosyncratic notions of fairness and justice."***

34 We do not need to consider the issue of remedial constructive trust further because, as we understand it, Richard is not seeking the imposition of a constructive trust as a remedy but rather for a finding that a constructive trust has always existed from the time when the arrangements between himself and Robert have been put in place on the basis of a common intention between them to that effect.

35 Whilst it is true, of course, that Jersey law has always placed a considerable weight on title and proprietary rights, it is equally true that Jersey law has embraced the concept of the trust both in statute and pre-statute and also has accepted and adopted the concept of the constructive trust. There is a very substantial distinction in our opinion between the imposition of a constructive trust as a remedy which of itself imposes ex post facto notions of fairness and fiduciary obligation which were not within the common intention of the relevant parties at the time, and the concept of a common intention constructive trust where, if the evidence supports such a conclusion, the trust is deemed to exist from the moment that the common intention is established whether by express statement, inference or imputation. In our view a common intention constructive trust as referred to in *Williams v Central Bank of Nigeria*, (cited above) is a part of the law of Jersey.

36 The requirements for a common intention constructive trust are summarised in Lewin on Trusts (19th Edition) at paragraph 9–053:

> ***"Where the purchaser of the property shares a common intention with the claimant that the claimant is to have a beneficial interest in the property even though he is not a legal owner, either at the time of acquisition or at a later date, and the claimant acts to his detriment upon the basis of the common intention, a trust is imposed so as to give effect to the common intention.*** This is now universally known as a common intention constructive trust… the common intention trust is now seen as constructive, imposed in order to provide the relief against an unconscionable denial by the legal owner of the beneficial interest of another."

37 Accordingly, on this analysis, we would need to ask ourselves whether there was a common intention that the Longton loans be beneficially owned other than in line with the legal title and secondly, on answering the first question in the affirmative, to determine the proportions in which the beneficial shares are held.

38 That is not, however, the end of the argument as it is argued by Robert that the common intention constructive trust was or should be limited to domestic arrangements or the like and not commercial arrangements such as this. We were referred to a number of cases.

39 *Stack v Dowden* [2007] 2 AC 432 (a decision of the House of Lords), dealt with a case involving a cohabiting unmarried couple who had purchased property for domestic occupation. The lead judgment in that case was given by Baroness Hale of Richmond and it is clear from reading both that judgment and the judgment of the other members of the court, that the context was important in identifying the applicable principles. At paragraph 68 of her judgment Baroness Hale said this:

> ***"68. The burden will therefore be on the person seeking to show that the parties did intend their beneficial interest to be different from their legal interest, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead parties, honestly but mistakenly, to re-interpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual. Nor may disputes be confined to the parties themselves. People with an interest in the deceased estate may well wish to assert that he had a beneficial tenancy in common. It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase*** .
>
> ***69. In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to defining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital monies; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inference is to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It would be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably***

could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the co-habitation context mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interest should be different from their legal interests will be very unusual .

70. This is not, of course, an exhaustive list. …" .

And further in the judgment, it is said:

"The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

40 The case of *Stack v Dowden* is undoubtedly important in the evolving concept of the constructive trust. It does appear, however, to be very much tied to its context and the nature of the constructive trust that was applied – namely that of cohabiting unmarried partners and the ownership of their domestic dwelling.

41 The instant case is, of course, very different. However it is difficult to view it as simply a commercial case. The arrangement that the Court is asked to consider is that between two brothers and although they were jointly running between them a commercial enterprise it is not in our view possible to divorce our consideration of this matter from the fact that this arose within a familial context which at the early stages was both amicable and trusting.

42 Much of the case law arises in the context of ownership of a family home but the suggestion from Lewin on Trust (19th Edition) at 9–050 and 9–051 is that the principles are of general application. The learned authors state:

"The principles discussed here are however, also applicable to assets other than to real property and to assets acquired other than by co-habiting couples… the same question may also arise in the principles discussed in this section apply, where property has been acquired… for the purpose of an investment at least where the common intention is represented by expressed discussions between the parties. But the principles discussed in this chapter may also apply where a business is acquired in the name of one party, or in any other circumstances where there has been an express common intention that another party is to have a beneficial interest in property…" .

43 A number of cases were cited to us as to whether or not this principle, as a matter of

English law at least, extends beyond the family domestic context.

44 In *Laskar v Laskar* [2008] EWCA Civ 347, the Court of Appeal considered the circumstances in which there was a joint purchase between a mother and her daughter ***"primarily as an investment"***. During the course of that judgment the court considered the decision in *Stack v Dowden* and Lord Neuberger's judgment at paragraph 15 to 17 is in the following terms:

> ***"The claimant contends that the reasoning of the majority of the House of Lords in*** *Stack v Dowden* ***… compels a finding in the present case that the beneficial ownership of the property was held in equal shares by the parties.*** As Chadwick LJ pointed out when giving permission to appeal, the *Stack* ***case was decided after Judge Levy gave his decision in this case.*** In the *Stack* ***case the two parties who purchased the house in question were living together in a long-term sexual relationship, and had children when they purchased the house, which they intended to be, and indeed was occupied as, their family home.*** It is by no means clear to me that the approach laid down by Baroness Hale of Richmond in that case was intended to apply in a case such as this. In this case, although the parties were mother and daughter and not in that sense in an arm's length commercial relationship, they had independent lives, and, as I have already indicated, the purchase of the property was not really for the purpose of providing a home for them. The daughter hardly lived there at the time it was purchased, and did not live there much if at all afterwards, and the mother did not live there for long. The property was purchased primarily as an investment .
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> ***16. Lady Hale's speech began by identifying the problem to be addressed as relating to "a co-habiting couple"….. But a number of the remarks in the course of her speech indicate that her reasoning was intended to apply to other personal relationships, at least where the property is purchased as a home for two (or indeed more than two) people who are the legal owners: … accordingly I think Judge Behrens was right to conclude … that the reasoning in the*** *Stack* ***case applied to a case where a house was purchased by a mother and son in joint names as a home for them both*** .
>
> ***17. It was argued that this case was midway between the co-habitation cases of co-ownership where property is bought for living in, such as the*** *Stack* ***case, and arm's length commercial cases of co-ownership, where property is bought for development or letting. In the latter sort of case, the reasoning in*** *Stack v Dowden* ***would not be appropriate and the resulting trust presumption still appears to apply. In this case, the primary purpose of the purchase of the property was an investment, not as a home. In other words this was a purchase which, at least primarily, was not in "the domestic consumer context" but in a commercial context. To my mind it would not be right to apply the reasoning in*** *Stack v Dowden* ***to such a case as this, where the parties primarily purchase property as an investment for rental income and capital appreciation, even where their relationship is a***

familiar one."

45 *Agarwala v Agarwala* [2013] EWCA Civ 1763, is an example of the way in which the principle has been applied. The case involved members of the same family, a sister-in-law and a brother-in-law, who had acquired a property as an investment. The Court of Appeal upheld a judgment of the court at first instance that there was a common intention constructive trust. Lord Justice Sullivan, at paragraph 18 of the judgment, considering the question of common intention, said this:

> ***"18. There is no force in these criticisms of the judgment. This was a case in which both parties were contending that there was a common intention. I would readily accept the proposition that if parties' recollections differ as to what their oral agreement was, that may well lead to the conclusion that there was no common understanding; the parties were simply at cross purposes as to what had been agreed. However, it was no part of Jaci's case before the judge that there was no common understanding because she and Sunil were at cross purposes. Given the nature of the two versions of the common understanding, there was no room for a misunderstanding for between Jaci and Sunil and none was suggested. Either Sunil was, if only in this particular respect, telling the truth about the agreement, or, as alleged by Jaci, he was lying."***

46 In *Churney v Deripaska* [2008] EWHC 1530 (Comm) the court considered, in the context of an application for permission to serve court proceedings out of the jurisdiction, whether a serious issue to be tried arose in connection with a common intention constructive trust with respect to shares in a commercial context. At paragraph 137 of his judgment, Mr Justice Christopher Clarke said:

> ***"137. The trust relied on is one that is said to arise from the intention of the parties to be inferred from the agreement they made. Mr Vos drew my attention to the exposition in Lewin on Trusts, 18th Edition, paragraphs 9–66 of the general principle of trusts founded on a common intention, which points out that the requisite intention may be shown by virtue of an express agreement or may, in certain circumstances be imputed to the parties. He also draws attention to the dicta of Lord Walker in*** *Stack v Dowden* ***… with which I respectfully agree, to the effect that whether the trust be regarded as express, constructive or resulting is distinctly academic (although of some importance in that case in relation to indirect contributions for the acquisition of property). …"***

47 It is not clear that the judge in that case had full argument deployed before him as to the law on common interest constructive trusts, nor indeed does it appear that he was considering the matter other than as one of contract and hence within the rules in which leave could be granted for service out of the jurisdiction. As an authority, even as an example, it must be to our mind of somewhat limited value.

48 In the case of *Tomlinson v Pickup* [2014] EWHC 4495 the High Court (His Honour Judge McCarhill QC) determined that, in connection with a business venture, he was satisfied that "the common intention constructive trust, as alleged by the claimants, had also been established on the balance of probabilities". Unfortunately, in the copy of that judgment supplied to us, there appears to be no consideration of relevant authority and it is difficult to decide whether the learned judge in that case had had relevant authority cited to him and the basis on which he was satisfied that a common interest constructive trusteeship could apply in the commercial context.

49 In *Shield v Shield* [2014] EWCA Civ 1136, the Court of Appeal was considering whether leave to appeal should be granted to an appellant relating to the ownership of shares as between a father and son. It was clear that there had been substantial legal argument before the first instance judge, to which he made express reference, but no certainty what that argument had been in so far as it may have related to common interest constructive trusts. Nor indeed does the judgment of the Court of Appeal, in refusing permission to appeal, deal at all with the legal principles. That being said, however, whilst finding against such a trust on the facts the first instance judge clearly had considered the question of common interest constructive trusts as one that he could find as a matter of principle if the facts had supported such a finding. Furthermore, the Court of Appeal, at paragraph 11 of Lord Justice Rimer's judgment says this of the judge at first instance's decision:

> ***"11 … If so, it might be said that he did not deal also with whether there was nevertheless at least a non-contractual commitment or agreement for the bequest of the shares that would in principle (subject to the question of detrimental reliance) be capable of giving rise to the creation of the type of common intention constructive trust or estoppel that Christopher asserts."***

And, at paragraph 18, in a short concurring judgment, Lord Justice Patten says:

> ***"… The difficulty which I see about the case based on common intention constructive trust and on some form of equitable estoppel is that an agreement by Richard to leave his son the shares by will, even had the judge accepted that such an agreement existed, does not obviously create an immediate binding trust, whether of a constructive or an express kind, because the terms of the promise are, on their face, inconsistent with the creation of an immediate equitable interest in Christopher's favour."***

It does, therefore appear that both the first instant judge and the Court of Appeal in that case accepted in principle that a common intention constructive trust can apply in circumstances other than relating to the purely domestic and in a rather more commercial context.

50 In our view we see no compelling reason in principle why a common intention constructive trust could not apply in circumstances that are outside the purely domestic and are rather more commercial in nature particularly, as in this case, where the alleged arrangement was between two brothers. It may be that the more commercial the context the harder it will be to

identify a proper basis for finding an intention to create a trust but where that on the evidence can clearly be shown in principle such a trust can exist.

51 What then is required for a finding to be made that there is a common intention constructive trust? In our view the main principles are as follows:

> (i) There must be a common intention that property be beneficially owned other than in line with legal title;
>
> (ii) Such a common intention does not need to be express (although it may be). It may be inferred by conduct or even imputed to the parties;
>
> (iii) The person claiming the benefit of the constructive trust must have acted to his or her detriment and this may be inferred from the fact that the claimant has made a financial contribution.

52 We do not suggest that the above list is exhaustive. Furthermore, our decision does not of course amount to a decision that these principles apply in connection with immovable property in Jersey (to which very different considerations apply) whether in the domestic context or otherwise or in all areas of potential claim or dispute.

Resulting trust

53 Jersey law also recognises the English law of principles relating to resulting trusts. In *Z v Y (Matrimonial)* [2014] JRC 170 the Court expressly applied the decision of Court of Appeal in England in *Re Vandervells Trust No. 2* [1974] CH 269 relating to resulting trusts.

54 We return to *Stack v Dowden* (cited above) and to the dicta of Lord Walker of Gestingthorpe who at paragraph 32 said this:

> ***"… the doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and commercial partnership.*** The well-known Australian case of *Muschinski v Dodds* (1985) 160 Clr 583 ***is an example.*** The High Court of Australia differed in their reasoning, but I find the approach of Dean J, at page 623, persuasive:
>
> ***"That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement.*** The contributions which each party is entitled to have repaid to her or him were made for, or in connection with, its purchase or development. The collapse of the commercial venture and the failure of the personal relationship jointly combined to lead to a situation in which each party is entitled to insist upon realisation of the asset, repayment of her or his

contribution and distribution of any surplus."

However, Dean J described this as a constructive trust, and he had earlier, at page 612, treated a resulting trust as excluded by evidence of the parties common purpose (building and running an arts and crafts centre), even though that purpose had failed. Professor Birks would have treated this as a resulting trust… Other scholars disagree."

55 We also return to the judgment of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* (cited above) where the learned judge said at page 708:

"Under existing law a resulting trust arises in two sets of circumstances:

(A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter presumption of advancement or by direct evidence of A's intention to make an outright transfer…"

56 In *Z v Y (Matrimonial)* the Royal Court, William Bailhache, Deputy Bailiff (as he then was) presiding, said this with regard to resulting trusts at paragraphs 103–104 of its judgment:

"103. Advocate Haines relies upon the decision of the English Court of Appeal in *Re Vandervells Trust (No. 2)* [1974] CH 269, ***upholding a decision of Megarry J at first instance. The passage cited in his skeleton argument came from the decision at first instance. … Megarry J said this:***

"(3) Before any doctrine of resulting trust can come into play, there must at least be some effective transaction which transfers or creates some interest in property .

(4) Where A effectively transfers to B (or creates in his favour) any interest in any property whether legal or equitable, a resulting trust for A may arise in two distinct classes of case. For simplicity, I shall confine my statement to cases in which the transfer or creation is made without B providing any valuable consideration, and where no presumption of ***advancement can arise; and I shall state the position for transfers without specific mention of the creation of new interests."***

104. We interpose here to say that the facts of this case appear to fall within this class of cases – there has been a transfer of a share without the transferee providing any valuable consideration and secondly, there is no presumption of advancement not least because the transferee is the father

of the transferor. Indeed in this case, the transferor has children of his own and if any presumption of advancement were to apply, it would apply towards them rather than towards his father. Megarry J continues:

> ***"(a) The first class of case is where the transfer to be is not made on any trust.*** If, of course, it appears from the transfer that B is intended to hold on certain trusts, that would be decisive, and the case is not within this category; and similarly if it appears that B is intended to take beneficially. But in other cases there is a rebuttable presumption that B holds on a resulting trust for A. The question is not one of the automatic consequences of a dispositive failure by A, but one of presumption; the property has been carried to B and from the absence of consideration and any presumption of advancement B is presumed not only to hold the entire interest on trust, but also to hold the beneficial interest for A absolutely. The presumption thus established is both that B is to take on trust and also what that trust is. Such a resulting trusts may be called "presumed resulting trusts" .
>
> ***(b) The second class of case is where the transfer to B is made on trusts which leave some or all of the beneficial interest undisposed of.*** Here B automatically holds on a resulting trust for A to the extent that the beneficial interest has not been carried to him or others. The resulting trust here does not depend on any intentions or presumptions, but is the automatic consequence of A's failure to dispose of what is vested in him. Since ex hypothesi the transfer is on trust, the resulting trust does not establish the trust but merely carries back to A the beneficial interest that has not been disposed of. Such a resulting trust may be called "automatic resulting trust"."

57 It seems to us that these principles are the applicable ones for us to consider.

Unjust enrichment

58 The doctrine of unjust enrichment has been upheld as a matter of Jersey law. In the case of *Flynn v Reid* [2012] JLR 370 in considering that doctrine and earlier Jersey cases on it, William Bailhache, Deputy Bailiff, as he then was, at paragraph 99 of his judgment said this:

> ***"… the doctrine of unjust enrichment is one which the Royal Court is prepared to recognise in principle."***

And, at paragraph 100:

> ***"However, the fact that unjust enrichment could not have been contemplated until recently in the type of circumstance facing the court in this case does not mean that the court is unable to declare new limits on a cause of action for unjust enrichment today.*** Indeed, we think that we would be failing the community in Jersey if we did not attempt to do so, recognising

that the circumstances which apply here might similarly apply in a good many other cases which might not necessarily be expected to come to court. We can contemplate such cases might include heterosexual and homosexual partnerships and circumstances falling short of those partnerships which the law formally recognises, such as marriage or civil partnership, de facto business arrangements not formally recorded in a partnership and platonic co-habitation arrangements…So the context for a claim in unjust enrichment may change. However the doctrine of unjust enrichment is a vibrant doctrine. What we need to do is analyse its component parts because there seems no doubt that the principles can be applied across a wider basis than merely a co-habitation case of the kind presently under consideration."

59 The Court then went on to deal with the principles and approached the question of unjust enrichment. At paragraph 107 of the judgment, the Court said this:

> ***"107. So there we have a reference from Lord Hope to two Scottish cases where the law of unjust enrichment has been applied. In*** *McKenzie v Nutter* ***Sheriff Principle Lockhart, having summarised the relevant law, described his approach as follows*** **(2007 SLT (Sh. Ct) 17** ***at paragraph 33):***
>
> ***"On the basis of the law which I have set out it is clear that the court may allow an equitable remedy in circumstances where one party has been unjustly enriched at the expense of another party.*** I propose to deal with this matter under four headings:
>
> ***(a) Has the appellant been enriched at the expense of the respondent and what is the nature of that enrichment?***
>
> ***(b) If so, was that enrichment unjust?***
>
> ***(c) If so, what remedy, in the particular circumstances of this case is open to the respondent?***
>
> ***(d) Is that remedy equitable?"***
>
> ***108. In our view, this approach to the questions of unjust enrichment is one which is not inconsistent with such slender authority as can be ascertained in Jersey law from the cases and is consistent with principle. It also provides a modern statement of an approach currently adopted by French courts to questions of enrichissement sans cause. The starting point is the legal interest. The court then looks at whether there has been enrichment which benefits the legal owner or owners or perhaps some of them at the expense of the claimant in a way that is unjustifiable. We also think that approaching the problem in this way will enable the court to consider enrichment problems holistically, rather than in separate compartments. We apply these principles to the facts of the instant case."***

60 Similarly, for the purposes of this judgment, we adopt those principles in considering Richard's claim under the heading of unjust enrichment.

The main factual issues to be decided

61 The main factual issues for us to determine may, in our view, be reduced to a number of questions. Some we will deal with separately, some as part of identifying the reality of the agreement between Richard and Robert. They are:

(i) What was understood and agreed between Richard and Robert when Longton was created?

(ii) What was understood and agreed between Richard and Robert about the 2007 loan?

(iii) Were any monies from the jewellery business to be repaid?

(iv) Was there a bona fide if informal loan made by Azure Gold to Robert?

(v) What was the origin of the money that formed the Longton loans?

(vi) What was the purpose of the Longton loans?

(vii) Was there any advantage to Richard in permitting the Longton loans if he did not share equally in them?

The evidence before the Court

62 We have not, in this judgment, referred to all of the lengthy evidence put before us. We have, however considered it in reaching our conclusions. We received affidavit evidence as evidence in chief from both Richard and Robert. There was also evidence in affidavit form from Mr David Sharp of Longton which was taken as read.

63 Richard and Robert both gave oral evidence in chief in support of their affidavits and were cross-examined at length. During the course of that evidence the Court had the opportunity not only to consider the answers given but also to assess carefully the demeanour of both Richard and Robert and the manner in which they answered the questions put to them. In the assessment of the Court, whereas on occasion the evidence of both brothers lacked an element of clarity on certain points, Richard's evidence was more clear, consistent and cogent than the answers given by Robert to questions put to him in cross-examination. Robert's answers seemed to the Court to be often evasive and implausible. Although we will come on to some of the detail of this subsequently in this judgment, in our view, in those circumstances in which there was a conflict between the evidence of Richard and that of Robert we preferred the evidence of Richard and found it more plausible and persuasive.

64 We are, of course, aware that the case before us is part of a much broader family dispute not only, as we have already stated above, as to the precise interest of each of the brothers in their business but also as to other collateral matters. There is clearly very significant mistrust between them and there are also other areas of contention. In particular we heard at some length about the fact that Robert had received Richard's wife's engagement ring to conduct some work on it and had failed to return it. There had, apparently, been criminal proceedings in the matter of the ring and there was clearly a great deal of bitterness surrounding this and other issues. In our view this bitterness informed these proceedings and some of the evidence.

65 In an email of 3 rd August, 2012, that Robert sent to Richard and to others he states:

> *"I am informing you all that at the moment I have one priority and one priority only.* This priority is to serve my self interest above that of all others."

What was understood and agreed when Longton was created?

66 It was Richard's evidence before us that, in conversation that started at the time of the Curzon Street property and continued into the acquisition of the London Property he and Robert agreed:

(i) The London property would be purchased by Longton.

(ii) That Richard and Robert would own the London property equally (through Longton) and would share the profits or losses (after deduction of expenses) arising from Longton and the ownership of a London property equally. The rent paid by LCLP for use of the London property would be used to make loan repayments due to the Royal Bank of Scotland and to cover operating expenses. The investment was to be treated separately from the jewellery business.

(iii) Any loans taken from a bank or financial institution would be paid back as soon as possible.

(iv) Robert and Richard would jointly borrow money from Lucie to assist with the purchase of the London property.

(v) Robert and Richard would each invest some of their own money and money could be taken out of the jewellery business in order to facilitate the purchase of the London property and to repay the loans from any bank or financial institution or to Lucie. Money taken out of the jewellery business would not need to be repaid to it.

(vi) Stock held in the jewellery business would be reduced to maximise revenue streams.

(vii) LCLP would occupy the London property and pay market rental.

(viii) Any personal monies advanced by Robert or Richard would be subject to a balancing payment to equalise contributions. There were discussions relating to which bank accounts would be used and how monies would be transferred by Azure Gold so that it could be taken out of the jewellery business.

67 In 2002 Robert appeared to take steps to prepare a will which protected Richard's position with regard to Longton. He sent a fax on 11 th October, 2002, to a Thai law firm to that end. In the fax Robert states:

> *"I am the sole beneficiary of a trust (Longton Holdings Limited – registered in Jersey).* Although I am the sole beneficiary my brother is entitled to 50% of this trust.
>
> *I would like to leave 50% of this trust to my wife and children and the other 50% of the assets of this trust are to be left to my brother Richard Andrew Campbell."*

68 It appears from the financial evidence we have seen that in accordance with the alleged understanding between them equalisation payments were made to balance the relative contributions of Richard and Robert to the funding of Longton.

69 It also appears from the correspondence that throughout much of the period loans from Lucie were treated as loans made to both Richard and Robert. For example in Robert's email to Lucie of 20 th January, 2005, he refers to how *"RC and RAC are borrowing £400k from you"*. He also says *"we are also borrowing from you U$70k"*.

70 In an email later that same day, Robert communicates again with Lucie correcting some of the figures and saying "AND WE COME TO A NEW TOTAL LOAN AMOUNT OF £564,920 WHICH, AT AN INTEREST RATE OF 4.25% COMES TO EXACTLY £24009.10P PER ANNUM. WE SHALL CALL IT £24K BETWEEN FRIENDS; PLEASE REMIND ME TO MAKE THE INTEREST PAYMENTS EVERY 6 MONTHS FOR £12K". It seems to us to be clear that Robert was treating his responsibility as being for one half.

71 There are further examples of communications of this nature and in relation to the funding of Longton. In none of those communications can we discern anything that demonstrates that Robert was placing exclusively his own money into Longton, rather than money that ultimately (whether as loans from Lucie or otherwise) that Richard and Robert were providing in equal shares.

72 When Robert was being cross-examined about the conversations that he had with Richard concerning the purchase of the London property, he seemed to suggest that there were no discussions between them relating to how the revenue from the property was to be dealt with. Eventually when being asked about discussions relating to how the property was funded, Robert said:

> *"I do not recall, as I said I do not recall having, I don't remember, I can honestly say I don't remember."*

73 He went on to confirm that he did not recall conversations relating to the use of the rental income to repay the bank loan.

74 It seems to us that these are just the kind of matters that would have been discussed between joint purchasers of a major income producing asset. Whereas it may be comprehensible that the detail of the discussion may have faded from memory, it does not seem plausible to the Court that the fact of such discussions should have done so.

75 Although the relationship between Richard and Robert is now characterised by bitterness and mistrust between them, at the time of the incorporation of Longton their relationship was very different. Their dealings were then characterised by mutual confidence and familial affection and trust. The two brothers took different roles in the jewellery business but they were both committed to it and worked for their mutual benefit.

76 We accept on the evidence that we have heard that Longton was created to hold the London property from which the jewellery business was to be conducted. Longton was the method by which the London property was to be held indirectly by both Richard and Robert in equal shares. We accept that it was the wish of both of them to keep property outside of the jewellery business as an asset that when the debt on it had been repaid would provide a valuable benefit to both of them.

77 It is for this reason that LCLP was to pay a commercial rent for the London property to Longton and it was also for this reason that any money advanced to Longton from the jewellery business, in whatever of its manifestations, was something that in effect Richard and Robert were taking out of the jewellery business and placing in Longton and it did not need to be repaid.

78 This to our mind also explains why it would be appropriate, were one of the brothers to advance more into Longton than the other, that the balance would be redressed by a balancing payment so that, in effect, the brothers had either contributed equally to Longton directly or indirectly from the jewellery business that they owned equally.

79 It is consistent, therefore, that any monies advanced to Longton by Lucie would be advanced to both of the brothers equally and would be repaid by both equally. It was, to our mind, an entirely equal endeavour between them.

80 Such was the measure of trust and confidence between the brothers, sadly now vanished, that it really did not matter through which accounts such monies were routed or which of the brothers controlled them.

81 It follows from the above that we are satisfied that Richard's version, to the extent that it differs from Robert's, around the creation of Longton is accurate. In addition to the understandings which we have set out above in our view it was also discussed and agreed between Richard and Robert that the rent paid by LCLP for occupying the London property would be used to make the repayments due to RBS (which had provided the mortgage for the purchase of the London property) and that the affairs of Longton would be managed in order to repay any financial institution as quickly as possible.

82 We do not find it surprising, and we accept Richard's evidence, that Robert was to keep a record of all the money used in relation to the purchase of the London property and Longton and further that money would be taken out of the jewellery business via Azure Gold (which was in effect controlled by Robert) to pay down the loans taken from RBS and from Lucie.

What was understood and agreed around the 2007 loan?

83 Our finding that Longton was to be shared 50/50 between Richard and Robert does not of itself indicate that the Longton loans should be similarly considered. However, in our view, it is much more likely that Richard's version of the understandings between himself and Robert at the material time are correct.

84 Throughout 2007 there were communications between Richard and Robert by email and by telephone. They discussed amongst other things the appropriate rental payment for LCLP with regard to the London property in the light of a rent review which was shortly falling due. There were also discussions relating to the ongoing funding of Longton to meet its cash flow needs and so Richard asserts both he and Robert agreed that Robert would on behalf of both of them enter into the 2007 Loan in the approximate amount of £2.9 million. Interest rates were discussed.

85 The 2007 loan is contained in a loan agreement between Robert and Longton entered into on 25 th July, 2007, and amended on 4 th October of that year. This is in the capital sum of £2,919,018.75.

86 It was Richard's evidence that the 2007 Loan was entered into within the context of the general agreement between them as to how they would deal with the matter of Longton, namely that they would share in it on a 50/50 basis. There was no variation discussed or agreed in connection with the proposed 2007 loan and certainly there was no suggestion or discussion between Robert and Richard to the effect that the 2007 loan would confer a benefit on Robert to Richard's detriment. It was understood between them that, whilst in Robert's sole name, he had the benefit of it for himself and Richard jointly.

87 Robert's evidence is that the Longon loans were made to Longton by him solely. It is

Robert's claim that the Longton loans were lent by him to Longton from either his own monies (to the extent of £13,100) or from monies that he had personally borrowed from Azure Gold in the sum of £2,616,988.75, and the sum of £564,920 that Robert claims to have borrowed from Lucie.

88 The evidence before us was contradictory. In an email dated 11 th July, 2007, Robert wrote to Richard in the following terms:

> *"A draft loan agreement has been drawn up between myself and Longton….*
>
> *In order for the interest charge to be tax deductible Longton has to make the payment; it cannot be left on the accounts as payable.* I hope that is clear.
>
> *Anyway so I mention all this for you to have a bit of a picture of the situation and I will call you later to discuss it."*

89 On 16 th July, 2007, Robert again sent an email to Richard in which he proposed that the loan agreement was proceeded with and said *"If you agree with the above then I will proceed"*.

90 Throughout October and November 2009 there was an exchange of emails between Richard and Robert and others in connection with the RBS loan and the 2007 Loan. It is not necessary to recite all of the emails but on 4 th November, 2009, Richard emailed a Peter Stokes at Davidson Dean and Others to provide information relating to Robert's financial affairs. The email contains the following:

> *"He has made an outstanding loan to Longton Holdings Ltd for £2,919,018.75.* Interest is paid on this loan at half yearly periods. The interest rate is 3% above the BoE base rate.
>
> *So the money owed by Longton Holdings is owed to Mr Robert Campbell the main shareholder."*

This email does not make reference to or suggest that the loan in Robert's name was anything other than a personal loan.

91 In an email to Goodman Jones on 20 th January, 2012, Robert sought advice. In particular he refers to Richard's position in the following terms:

> *"My brother and I are now of a certain age and he has sought advice as to asset reorganisations and should I die the assets would then transfer to my wife.* The solution given to my brother is that an offshore (Channel Islands) trust would be set up by me and that various assets then be transferred into the trust."

92 Robert goes on to seek advice on the possible ramifications of such a solution both for him

(Richard) and for Robert but then goes on to confirm:

> *"However since my half of the assets is inextricably linked to his half that any possible problems that could arise for him could then affect me."*

93 In an email in response, on 7 th February, 2012, Goodman Jones sought further information and Robert answered in an email of the same date in the following terms:

> *"If I may just clarify that the main asset to be held within the trust is Longton Holdings Limited.*
>
> *This is a Jersey based investment company which holds the long lease to the premises of 26 New Bond Street, London…..*
>
> *THE SHARES IN LONGTON ARE REGISTERED IN THE NAME OF FCN TRUSTEES (JERSEY) WHO HOLD THE SAME FOR THE ABSOLUTE BENEFIT OF ROBERT CAMPBELL.*
>
> *The original Mortgage Advance in relation to the acquisition of the above property was replaced by a loan of (circa) GBP2million from Robert Campbell (the loan) on which interest continues to be paid which absorbs almost all of the rental income (consequently Longton has little liability to UK income tax on the net income).*
>
> *Could I presume that since Longton is Jersey based that it would comply easily to the requirements for part of that asset to be transferred into the proposed trust?"*

94 Goodman Jones responded to that email with a further question in the following terms:

> *"We would need to see the accounts of Longton Holdings Ltd for say the past two years.* I assume that 50% of the company is to be transferred into trust. Is 50% of the benefit of the debt also to be transferred?"

95 Robert responded shortly after receipt in the following terms:

> *"Yes, both your assumptions are correct."*

96 It seems to us that this latter email is important and suggests very strongly that Robert was seeking advice in order to protect Richard's position as the Longton shares and the Longton loans were directly or indirectly held in his sole name. This also suggests to us that Robert recognised that one half of the shares in Longton were properly the property of Richard and that understanding extended also to one half of the debt. This appears to us to be entirely inconsistent with the position that Robert has taken in these proceedings and before this Court. It appears that both Richard and Robert were content to reflect to some third parties that the 2007 Loan was in Robert's name but where protective advice is

sought, Richard's position was acknowledged. We reject Robert's suggestion that in effect the statement in the email was inadvertent. We think that it reflected his understanding.

97 Additional evidence post-trial was also filed in the form of advice given to Richard by Cohen Arnold concerning any UK taxation issues arising out of a possible transfer of assets by Robert to him or for his benefit. The advice sets out the assets that might be subject to such a transfer and includes reference to the shares in Longton but makes no reference at all to the Longton loans. This, it is suggested by Robert, means that Richard did not believe that he had any entitlement to the Longton loans. We do not find that suggestion persuasive. Whatever the reason that Richard might have had for not mentioning the Longton loans when seeking advice, whether deliberately or by oversight, that does not it seems to us suggest that he held the view that he was not entitled to them.

98 It is much more consistent with the general purpose and holding of Longton that any financial arrangements between the brothers and Longton would be equal and again it is consistent with our view of the way in which they operated that the strict legal position, namely the name in which any loan was advanced, did not necessarily reflect the reality of the arrangements between them.

99 In our view when the 2007 Loan was created in Robert's name the reality of it was that this was a continuation of the 50/50 arrangement that existed between Richard and Robert in connection with Longton generally. That loan, both as to capital and income was to be shared equally between Richard and Robert.

100 We accept Richard's evidence to that effect and his further assertion that, had the loan in some way gone wrong, he would never have expected his brother to shoulder the burden solely because it had been a joint exercise. We think that the same holds true for the Longton interest free loans and that any monies due or paid into were understood between Richard and Robert to be for their benefit jointly.

101 Why then, if that is so, were the loans taken out in Robert's sole name?

102 As we have said we do not think that it mattered much to Richard and Robert in whose name various transactions were undertaken because of the trust that they had in each other at that time. However, it is also of course the case that Richard was at the material time, so we understand it, resident in the United Kingdom whereas Robert was resident in Thailand. One might, therefore, surmise that Richard wished to avoid UK tax liability by having the loan reflected as being held by Robert. Whether or not that is the case, and we have heard no expert evidence on UK tax provisions, that does not to our mind have any bearing upon the reality of what was understood at the time between Robert and Richard.

What was the origin of the money that formed the Longton loans?

103 With a view to identifying the source of funds paid to Longton from its inception until the Longton loans, we were referred to a considerable amount of detailed financial evidence including numerous bank statements and schedules of payments and receipts. These had been the product of very considerable analysis carried out primarily by Richard with a view to establishing that the source of funds for Longton had indeed been consistent with Richard's assertion as to the understanding that existed when Longton was created.

104 Robert largely accepted the accuracy of the documentation put before him which, contrary to his evidence, to our mind painted a picture that the source of funds had either been loans from Lucie which were understood to be joint loans from the communications between her and her sons, or from the jewellery business. During cross-examination Robert conceded that the £564,920 loan from Lucie was not in fact a sole loan but was one that was made to him and Richard but that he was “manager” of the loan. There were numerous accounts in play in various banks and at various times but; in summary, we are satisfied on a balance of probabilities that the source of funding was as pleaded by Richard namely loans made to Richard and Robert jointly from Lucie, monies extracted from the jewellery business and monies from Richard and Robert personally.

105 We do not see any purpose in going into the detail of the financial evidence. To do so would be a repetition of the very detailed evidence referencing and cross-referencing of specific figures between bank accounts and we do not think that this judgment would be improved by it.

Was there a *bona fide*, if informal loan made to Robert by Azure Gold?

106 It was, of course, in part Robert's case that a large amount of money which formed the Longton loans was itself a loan granted to him by Azure Gold and which he was due to repay.

107 We find this to be incredible. Firstly, there is no documentation whatsoever that has been put before us reflecting the existence of a bona fide loan from Azure Gold. We have seen neither loan documentation nor minutes or accounts. Secondly, although part of the jewellery business, Azure Gold has got one director, Robert's wife, and in effect there is no prospect of Azure Gold insisting upon the repayment of any supposed loan. Lastly, of course, the requirement to repay any money advanced by the jewellery business is inconsistent with the understanding that we have found as established insofar as it related to Longton generally.

108 In our view, for reasons that we do not speculate on other than to observe that they perhaps reflect Robert's avowed intention to look to his own interests, Robert has sought to justify the fact that the Longton loan is in his name with evidence that the source of those funds, Azure Gold, was by way of a loan. He still, however, retains any requirement for repayment within his effective control.

The purpose of the Longton loan and advantage to Richard

109 We heard in evidence that the purpose of elements of the Longton loan and in particular interest payments on it, was to remove profit from Longton so that Longton would not have the same liability to tax in the UK if its income had been retained within it.

110 This was put forward by Robert as a reason why the Longton loan interest payments were beneficial.

111 We can well see how, in some circumstances, removing income from Longton would mitigate its tax liability. However that of itself could have no benefit whatsoever to Longton's owners unless the income thus diverted found its way to them by some other method.

112 It seems to us abundantly clear that Richard secured no benefit at all from the Longton loan interest payments as a tax mitigating measure if those payments went to Robert alone. If they went to Robert and Richard jointly, of course, then theoretically Richard would benefit from putting those arrangements in place but he would not benefit and indeed only Robert could benefit, if the position was as Robert suggested. Would Richard have agreed with that? We do not think so and we cannot see any logical basis on which he would. Were those arrangements not in place, some income in Longton, even as reduced by the payment of tax, would have been attributed to Richard. Why would he have given that up to secure payments for Robert's sole benefit?

113 In our view, the position is clear. The Longton loans were loans held in Robert's name for himself and his brother jointly and to the extent that they gave rise to capital or interest payments it was for them jointly.

114 In addition, Richard asserted that he agreed between himself and Robert that they would jointly share the “net revenue” of Longton. Richard accepted in cross-examination that the Longton loans being obligations of Longton to other parties, could not be considered as a net revenue of Longton.

115 Whilst undoubtedly this is technically correct, in our view Richard's use of the expression “net revenue” reflected in effect the value in Longton after the payment of expenses. An arrangement whereby his brother would hold the Longton loans for them jointly would have been consistent with the concept of “net revenue” in a non-technical sense as part of the product of Longton after the repayment of its other third party expenses.

Discussion and conclusion

(i) Common intention constructive trust

116 Applying the principles that we have set out above to the facts that we have found to be established:

(i) There was in our judgment a common intention that the 2007 loan and the interest free loans, whilst, in the case of the former contained in a document in Robert's name alone, were in fact to be held on the basis of the understanding and agreement between Richard and Robert in connection with Longton generally and the London property, namely that the benefit of the 2007 loan and the Interest Free Loans were to accrue to Richard and Robert equally;

(ii) The understanding on which Longton and the London property were acquired, namely that of an equal interest in those properties and the fruits of those properties was an express understanding between them. That that understanding also applied to the Longton loans may either be inferred from the circumstances in which the Longton loans were made and the source of funds of the loans or may be imputed to Richard and Robert as a direct consequence of the generalised understanding relating to Longton;

(iii) There is no doubt that Richard acted to his detriment in as much as the value of his interest in Longton would have been reduced by the Longton loans and indeed, as we have found, he contributed to the Longton loans through amongst other things the use of monies derived from the jewellery business.

117 Accordingly in our view Robert holds the benefit of the Longton loans, as to one half thereof, as constructive trustee for Richard.

(ii) Resulting trust

118 Having reached the decision that we have on the question of a common intention constructive trust it is not necessary for us to consider the question of a resulting trust. Were we to be wrong, however, it seems to us that Richard has in effect through his equal interest in the jewellery business and an equal responsibility for Lucie's loans, provided to Robert the wherewithal to make the Longton loans. There is no question, as to 50% of the Longton loans, that Robert provided no consideration nor could in the circumstances it be suggested that any transfer to him was an advance.

119 We would accordingly be inclined to think that were we wrong in the question of common intention constructive trusts then nonetheless Robert would hold 50% of the Longton loans for Richard on a resulting trust.

Unjust enrichment

120 Because Robert holds 50% of the Longton loans as constructive trustee he has not, to that extent or at all, been unjustly enriched at Richard's expense. Accordingly in our view the case on unjust enrichment falls away.