Neutral Citation No: [2024] EWHC 1840 (Ch)

Case No: PT-2022-BRS-000032

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY, TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street
Bristol BS1 6GR

Date: 19/07/2024

Before :

MR JUSTICE ZACAROLI

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Between:

DUNCAN McNIVEN — **Claimant**

- and –

(1) ISLA JANE NIVEN — **Defendants**
(2) HEATHER McNIVEN
(3) SARAH SPENCER-FUTTER

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Christopher Jones (instructed by **Richard Nelson LLP**) for the **Claimant**
The **First and Third Defendants** appeared in person.
The **Second Respondent** was not present or represented.
Hearing dates: 5, 6 and 7 June 2024

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JUDGMENT

Mr Justice Zacaroli :

Introduction and outline of the facts

1. This is a dispute between adult siblings over the property lived in by their late mother for most of her adult life. Without intending any disrespect, for the sake of simplicity I will refer to each of the siblings by their first names.

2. The claimant, Duncan McNiven ("Duncan") is the second child and only son in the family, born in 1959.

3. The oldest daughter is the second defendant, Heather McNiven ("Heather"), born in 1958. She has played no part in the proceedings. The third sibling is the first defendant, Isla-Jane Niven, born in 1961who is generally known as Jinny ("Jinny"). The fourth sibling is the third defendant, Sarah Spencer-Futter ("Sarah"), born in 1966.

4. Their father, also called Duncan McNiven, died in 1989. I will refer to him as "Mr McNiven Senior". He suffered from alcoholism and both of the daughters who gave evidence referred to his abusive behaviour towards them when younger.

5. Their Mother, Jean (who I will refer to as "Mrs McNiven") died on 2 November 2019. Although a draft typed will, prepared by solicitors and dating from 1993, and a hand-written home-made draft will dating from 1999, have been found, no executed will has been located. In the absence of evidence that any will was executed, I infer that Mrs McNiven died intestate.

6. The property in question is 138 Queen's Road, Tewksbury ("No.138").

7. The family moved into No.138 in 1969, when Duncan was about 9 years old. No.138 was then a council house.

8. Given the difficult family history, it is not surprising that each of the daughters left home early.

9. Jinny left home in 1980. Due to the serious rift with her father, Jinny did not visit her parents' home again until her father died. In that period, she saw her mother only from time to time, when they both happened to visit Jinny's grandmother (Mrs McNiven's mother) at the same time. After her father died, Jinny saw a little more of her mother, and would stay with her sometimes. The relationship between them, however, was never good. Jinny said her mother was a difficult woman, who could herself be physically and emotionally abusive to her. In about 2002, as a result of Jinny not being told that her grandfather was dying until it was too late to see him, Jinny broke off relations with her mother altogether. She barely spoke to her again until she died.

10. According to Jinny, she witnessed worse behaviour by Mrs McNiven towards Heather, before she (Heather) was thrown out of No.138. Heather does not otherwise feature in the history of the family relevant to this claim.

11. Relations between Sarah and her mother were better. Sarah left home in 1985, aged about 19, when she got married, but she remained in contact. Sarah and her husband,

Clifford, moved back in to No.138 for two periods in around 1989-1990 and 1991-1992.

12. Duncan's relationship with his mother was much better. In mid-1982, he and his parents together purchased No.138 from the council under the right-to-buy scheme. The purchase price was approximately £11,000, after a substantial discount (approximately 46%) to which Mrs McNiven and Mr McNiven Senior were entitled on the basis of their previous occupation as council tenants. It was necessary for Duncan to join in the purchase because neither of his parents would have been able to obtain the mortgage needed to fund the purchase price. Duncan was working and had sufficient income to service a mortgage. A mortgage was entered into with Cheltenham & Gloucester Building Society ("C&G"). Duncan's evidence is that his mother explained to him about the discount they were entitled to, and said that if Duncan joined in the purchase in this way, the house would eventually be his.

13. The idea of the house eventually becoming Duncan's was reflected in the conveyance, which contained a declaration of trust to the effect that the three of them held the property on trust for each of them as joint tenants. On the death of a joint tenant, their interest passes to the other joint tenant(s).

14. Upon Mr McNiven Senior's death, his name was removed from the property register. Mrs McNiven and Duncan became, at that point, joint owners in equity, with a 50% share each in No.138.

15. Shortly after Mr McNiven Senior died, Duncan married his wife, Ulla, who is a Finnish citizen. He wanted to raise funds to finance a home with his wife. Duncan says (and Sarah corroborated this) that an attempt was made to try and find a smaller house for Mrs McNiven to live in, so that No.138 could be sold, but no suitable property was found.

16. Instead, a second mortgage was taken out on No.138 as security for funds borrowed (mostly, if not completely) by Duncan to finance the purchase of a home in Finland. There remained one over-arching mortgage account, but it was split into two sub-accounts: the first for the existing purchase mortgage, and the second for the mortgage to secure the new borrowing by Duncan. Mrs McNiven and Duncan were jointly liable to repay the whole of the mortgage.

17. The next critical event was in January 1993. Duncan had become concerned that he might become subject to a Finnish wealth tax on the value of No.138 if he remained on the register. Accordingly, he reached an agreement with his mother that legal title would be transferred into her sole name. A necessary consequence of this was that the mortgages were restructured, so that Mrs McNiven assumed sole responsibility for the mortgage payments.

18. Duncan's case is that he reached an agreement with his mother at this time that: (1) legal title would be transferred to his mother; (2) he would continue to meet all payments due under both mortgages; (3) he would continue to own his (half) interest in the property; and (4) he would become the sole owner of No.138 when Mrs McNiven passed away.

19. Mrs McNiven was advised by solicitors, Thomson & Badham. In a letter from them dated 14 January 1993, they referred to the fact that the title to the property, and the mortgages, were to be transferred into Mrs McNiven's sole name "with your son acting as guarantor of the two mortgages". No records remain to indicate that Duncan in fact became a guarantor. I infer, however, that he did so, because I do not think it credible that C&G would have agreed to a restructuring under which the only repayment covenant was from Mrs McNiven, who was then (or was about to be) retired with little more than a state pension, without taking a guarantee from Duncan. That is particularly so if, as Jinny suggested, as a result of a general fall in property values, the value of No.138 was not far from the amount outstanding under both mortgages.

20. Duncan's case is that he fulfilled his side of the agreement reached with his mother in 1993, and continued to pay the amounts due under both mortgages, except where he was unable to do so due to his own straightened financial circumstances. This occurred from time to time. When it did, his mother stepped in to cover the repayments.

21. While Jinny and Sarah accept that Duncan paid *some* of the mortgage payments thereafter, they contend that he failed to pay a large proportion of them, leaving Mrs McNiven to pay very substantial amounts herself. I address this dispute in more detail below.

22. The first mortgage was repaid in full in 2013. Mrs McNiven herself repaid the final instalment of £108.

23. It is not known precisely when the second mortgage was repaid. I infer, however, that it was repaid in about 2014. The last available mortgage statement (for 2012) indicates that monthly payments of £250 or £200 were made throughout that year, that the monthly payment would reduce to £179.35 from March 2013, and that the interest charge was by this stage less than £190 for the year. The outstanding balance of £3114.50 at the end of the year would, at that rate, have been repaid within less than 18 months.

<u>The witnesses</u>

24. Of the three principal witnesses, Duncan, Jinny and Sarah, it is Duncan alone who can give first hand evidence as to the arrangements he made with his mother, and as to the payments he made in respect of the mortgages. I found him to be a straightforward witness, who gave his evidence carefully and honestly. Unsurprisingly he did not have a detailed memory of much of events, but I found him to be candid as to the things that he could remember, and those that he could not.

25. An example of this was his willingness to volunteer information which was against his interest. This occurred in relation to the extent to which he paid the mortgage in those periods since 2006 where his bank statements have not survived. There are significant gaps in those bank statements but, as Jinny pointed out in cross-examining Duncan, on each page of the statements that has been kept there is recorded a payment (either to C&G or to Mrs McNiven) in relation to the mortgages. The case advanced on Duncan's behalf was that I cannot infer that the *only* payments made by him in respect of the mortgages from his bank account were those for which records remain.

He volunteered in cross-examination, however, that it may well be that the explanation for why he has retained only some of pages of his bank statements is because at some point in the past he made a conscious decision to retain those statements that he saw as relevant. The obvious inference is that the missing pages do not record any payments in relation to the mortgages.

26. All the witnesses agreed that Mrs McNiven was private about her finances. Sarah and Jinny are therefore unable to give direct evidence about the extent to which Duncan or Mrs McNiven made payments.

27. Although Sarah maintained a good relationship with her mother, apart from one occasion when she accompanied her mother to a meeting with her bank manager in 1997, she was not privy to the details of Mrs McNiven's financial affairs. She said that she never saw any paperwork in relation to the mortgage, and that while she saw her mother's bank statements in a draw, she never looked at them.

28. Given that Jinny had very limited interaction with her mother before 2002 and virtually none thereafter, she can give little evidence of her mother's financial arrangements. Much of her witness statement consists of her analysis of financial records, which she has undertaken since her mother's death, and of information that has come from Sarah. I find that insofar as Jinny relies on matters told to her by Sarah, these matters were also mostly learned by her since Mrs McNiven's death. Sarah accepted that she and Jinny were not close, and that she did not – for example – tell Jinny about the fact that no.138 was transferred into Mrs McNiven's sole name as a result of Duncan's concerns over his Finnish tax position. She explained this lack of communication on the basis that her mother did not like it when the daughters got on.

29. As a result, Jinny's evidence often took the form of submission, based on her analysis of the documents. In the course of preparing the case, and in particular in the preparation of their witness statements, Jinny discussed matters with Sarah. I do not criticise them for this, and while I do not doubt that Jinny and Sarah firmly believe the conclusions that Jinny has reached on the basis of her review of the documents, I think it highly likely that many of their purported recollections of events have been infected by the analysis they have carried out, and discussions they have had, in the course of preparing this case.

30. Insofar as Jinny referred in evidence to her mother's difficulties with the mortgages, this is in generalised terms. She said in her witness statement that "my mother seemed to bring her worries about paying the mortgage in to virtually every conversation I had with her, it was very clear that she was very worried about it with only her income and my father's drinking." I place little reliance on this evidence. As I have noted above, Jinny barely spoke to her mother in the last two decades of her life and, even before that, her contact was intermittent at best. In any event, the reference to her father's drinking would place such conversations prior to 1989. In cross-examination Jinny accepted that she understood these concerns to be more about the burden of being responsible in law for the mortgages, rather than because the mortgages were not being paid, although sometimes it was due to missed payments.

31. Jinny made much in argument of the fact that the transfer of the legal title into Mrs McNiven's sole name made her mother legally liable for all mortgage repayments, and although she had the benefit of Duncan's agreement to make all the mortgage

payments, she was dependent on him being able to pay. In reality, however, Mrs McNiven had always been legally exposed for the whole amount of the mortgages, because each joint mortgagor is liable for the whole, and had been reliant throughout, therefore, on Duncan to make the payments.

32. I also heard evidence from Edward Jones (Mrs McNiven's brother) and Clifford Spence-Futter (Sarah's husband). In addition, witness statements were provided by Anneka Spencer-Futter (Sarah's daughter) and John Bell (Mrs McNiven's brother in law and someone who assisted Duncan with administrative matters from time to time). Their evidence was mostly of peripheral relevance only. Where relevant to the issues I need to decide, I make reference to it below.

What was the understanding between Duncan and Mrs McNiven at the time of the purchase of the property in 1982?

33. The best evidence of what was intended in relation to the beneficial interest in No.138 at the time of its purchase is to be found in the conveyance. As noted above, that contained a declaration of trust in favour of the three purchasers as joint tenants. The legal consequence was that they each owned a third share in equity, and that upon the death of any of them, that person's share would pass to the others under the doctrine of survivorship.

34. I find that this accurately reflects the understanding between Duncan and Mrs McNiven at the time of the purchase.

35. Sarah said that she asked her mother at the time whether it meant that Duncan owned No.138, and her mother said "no, he was signing as a wage earner rather than a buyer." I do not accept, if this is what Sarah means to say, that Mrs McNiven told Sarah that Duncan had no beneficial interest in no.138 at all. That was clearly not true, given the express terms of the conveyance. Sarah was only 16 at the time, and I think it unlikely that Mrs McNiven would have had a discussion with Sarah about the nuances of shared legal and beneficial ownership, or that Sarah would have understood this. In fact, what Sarah says her mother told her – that Duncan did not "own" No.138 (i.e. he was not the sole owner) – was true. If anything at all was discussed between them, I find that it went no further than that generalised statement.

36. On the other hand, Duncan's evidence that his mother explained that the house would eventually be his not only accords with the legal reality, but also explains why Duncan thereafter undertook the responsibility for paying the mortgage. It also reflects the family dynamic. However unfortunate, and unreasonable, it may be, the relationship between Mrs McNiven and her daughters was such that I do not think she ever intended to leave No.138 to them.

37. Accordingly, I accept Duncan's evidence that his mother explained to him at the time of the purchase that the house would eventually become his.

Who owned the beneficial interest in No.138 in 1993?

38. There is no doubt, in my view, that No.138 was beneficially owned, immediately prior to the transfer of legal title into Mrs McNiven's sole name in 1993, by her and Duncan as joint tenants. That was the effect of (1) the declaration of trust upon the

acquisition of the property in 1982, (2) the death of Mr McNiven Senior, upon which his share passed equally to the two survivors, and (3) the absence of anything happening to sever the joint tenancy in the meantime.

What agreement in relation to No.138 was reached in 1993?

39. I accept Duncan's evidence as to the broad nature of the agreement he reached with his mother when the legal title was transferred into her sole name in 1993. In particular, I accept his evidence that his mother promised him that the property would be his on her death, that he promised to continue paying the mortgages, and that this was an informal agreement so that neither of them saw any need to put anything in writing.

40. The fact that Mrs McNiven, very shortly after this, instructed solicitors to prepare a will leaving No.138 to Duncan, corroborates that such an agreement had been reached (even though it does not appear that the will was executed).

41. The conclusion that Duncan agreed to continue to pay both mortgages is supported by annual mortgage statements immediately following the transfer of the legal title to this mother. These show that payments by standing order were made under both mortgages during that year (of £102.18 per month under the first mortgage and £387.20 per month under the second mortgage). It is common ground that where payments were made by standing order or direct debit, they were made by Duncan (insofar as Mrs McNiven made any mortgage payments, these were by cheque or cash deposits at C&G). It is further supported by the evidence I set out below which supports the view that Duncan continued paying both mortgages when he could for the remainder of the term.

42. The conclusion that Mrs McNiven promised him that No.138 would still be his on her death is corroborated by Sarah's and Clifford's evidence. Although Sarah pleaded in her defence that her mother had never mentioned any sort of agreement with Duncan about the ownership of No.138, she accepted in cross-examination that she had known all along that Mrs McNiven had agreed with Duncan that he would continue paying the mortgages and would have the house when she died. She said that Mrs McNiven had shown her will to her in 2014 (she did not realise it was a draft will), telling Sarah that the house was going to Duncan because that is what she had agreed with him.

43. Clifford also accepted that he knew of the arrangement made in 1993, whereby Duncan came off the title of the property for tax reasons, he continued to pay the mortgage and would have the house after Mrs McNiven died.

44. I find it inherently unlikely that Mrs McNiven and Duncan referred in 1993 expressly to the "beneficial interest" in the property. On the other hand, I accept that they did not intend Duncan to give up his beneficial interest in no.138. In this regard, I am satisfied that the only reason why Duncan and his mother agreed to transfer the legal title to her was because of Duncan's concerns over being subjected to a Finnish wealth tax. That was Duncan's evidence, which was corroborated by Mr Jones, who discussed it with Duncan at the time. Sarah also accepted that she knew at the time that Duncan's name was removed from the register for tax reasons, because that is what her mother told her.

45. No other reason for the transfer has been suggested. It took place some four years after the second mortgage, and additional borrowing to finance Duncan's home in Finland, and there does not appear to have been any connection between these events. It is inherently unlikely, in my view, that Duncan would have intended to gift his half share in the property to his mother. The fact (as I have found above) that Duncan agreed to continue paying both mortgages is inconsistent with an intention that he intended to give up all beneficial interest in the property.

46. Even if, as Jinny contends, there was little if any equity in the property in 1993 (as a result of a fall in property values and the burden of the two mortgages), the continued payment of the mortgages would reverse that position.

47. Accordingly, I conclude that Duncan retained his half-share in the equity of No.138 following the transfer of the legal title to his mother.

Did the 1993 agreement sever the joint tenancy in equity?

48. The only authority to which I was referred on the severance of a joint tenancy was the passage in Megarry & Wade, the Law of Real Property, 10th ed., at §12-036. This indicates that the methods of severance include those recognised in equity before 1926, that is: (1) by any act of one of the persons interested operating upon their own share; (2) by mutual agreement; or (3) by a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common.

49. These also include the acquisition of another estate in the land by one of the joint tenants. Mr Jones cited Megarry & Wade at §12-048 for the proposition that the acquisition by one joint tenant of the legal estate as trustee ought not, without more, sever the joint tenancy (although I note that no authority is cited for this, the footnote referring only to a Canadian case which the editors suggest would not be followed in England).

50. In this case, the transfer of legal title did not stand alone. It was accompanied by the agreement which Duncan reached with his mother. In my judgment, the making of that agreement did constitute a course of conduct which was inconsistent with the continuing mutual intention that the property was held as joint tenants.

51. Mrs McNiven's part of the agreement is not in itself inconsistent with an intention to continue to hold as joint tenants (because it merely reflected the consequences of a joint tenancy). On Duncan's case, however, it was part of that agreement that he would repay both mortgages. That suggests, in my view, an element of conditionality: Duncan's inheritance of his mother's half share was dependent on his continuing to repay the mortgages. If, for example, he had stopped paying altogether shortly after the agreement, then I consider that Mrs McNiven would have been free to deal with her share of the property as she wished. That is inconsistent in my view with the intention that her share would unconditionally pass on her death to Duncan as joint tenant.

Who paid the mortgages?

52. Duncan's case is that he paid the mortgages from 1982 until their expiry, apart from some periods, particularly towards the end, when he was in financial difficulties.

53. The best starting point is the contemporaneous documents, insofar as they have survived, being certain of the statements for the mortgage account and for Duncan's own bank account.

54. Duncan's evidence was that, until about 2005, the mortgage was paid by direct debit or standing order. That is corroborated by such bank statements as are still available. The annual mortgage statement from 1990, for example, indicates that it was then being paid by standing order (referring to the change in the standing order amount as from March 1991). There are also extracts from Duncan's bank statements for periods in 1994, 2002-2003 and for various periods between 2006 and 2013. To the extent that these show payments to C&G, these were by direct debit or standing order until 2003, but not from 2006 onwards.

55. Accordingly, I conclude that until at least 2003 the predominant way in which the mortgage was paid was via direct debit, by Duncan.

1990

56. The earliest surviving records are the mortgage statements from 1990 (by which time the mortgage had been split into two sub-accounts). These show the mortgages being paid in full, and on time, each month by standing order (this is apparent from the fact that the statements indicate that an amendment was to be made to the monthly standing order payments from March 1991, to £112.62 on the first mortgage and £461.43 on the second mortgage). Accordingly, these show that it was Duncan that paid all of the sums due on both mortgages in 1990.

1993

57. The mortgage statements from 1993 show regular monthly payments by standing order. Accordingly, it was Duncan who paid all sums due on both mortgages in 1993.

1994

58. A single page has survived from Duncan's bank statement for his account with NatWest, from June 1994. This shows payments by standing order for that month on both mortgages, in the same amounts as the monthly payments in 1993.

1997

59. The mortgage statements from 1997 show that, apart from a period from May to August, monthly payments were made on time by standing order, i.e. by Duncan. The May payments (of £102.18 for the first mortgage and £387.20 for the second mortgage) were recalled. From June onwards, the monthly payment was reduced to £85.45 for the first mortgage and £277.06 for the second mortgage. A double payment was made in June (i.e. covering May and June).

60. The statements themselves do not reveal why this happened. Jinny contends that because the payments in May and June were marked "receipt" on the statement, as opposed to "direct debit receipt" (which was how every other payment was described) this shows that Mrs McNiven made these payments. Duncan accepts that for the later C&G statements, from 2006 onwards, where a distinction is drawn between "bank payment" and "receipt", the latter shows payments being made by Mrs McNiven. It is

not clear that the same can be said about the different wording on the statements from 1997.

61. Duncan's evidence, however, was that he had little work for a period in 1997 and so had difficulty paying the mortgage. If that is so, then the difficulty was temporary, as the C&G statements show him making payments until May and again from September. Importantly, the statements do not show any payments being made by Mrs McNiven, apart possibly from the June payments.

62. Sarah and Jinny suggested that the problem was much greater than that. In her witness statement, Jinny said that it appeared from the mortgage statements that the mortgages were falling into arrears in 1997. She referred to Sarah's statement for the details of what happened then. In her statement, Sarah said that she accompanied her mother to a meeting at her bank in 1997, where she was extremely upset when explaining the issues she was facing "with the mortgage etc." She appended a fuller account of the meeting as Appendix A to her statement. In that note, she referred to visiting her mother to find her upset that her cheques kept bouncing. Her mother told her that Duncan kept missing mortgage payments, so she (Mrs McNiven had taken it over) and that "as she was struggling to pay the mortgage and everything else on a single income, she was bouncing cheques to give herself time to find the money to pay other bills."

63. It became apparent during Sarah's cross-examination, however, that this was a meeting with the TSB, not C&G, and related to Mrs McNiven's personal accounts with the TSB. Sarah accepted that her mother was upset about her general finances, and credit card debts, and that the meeting with the bank was not due to there being problems with the mortgage. A possible clue to the source of Mrs McNiven's financial difficulties is that Sarah said she had difficulty "juggling", for example she would buy her grand-daughter a really expensive dress and shoes, and then realise that she herself needed new shoes.

64. Jinny argued in her witness statement that "it can be seen that the loans appear to have been restructured at this time to reduce the payments to a more affordable level". The impression she sought to give was that this corroborated Sarah's evidence that her mother was struggling because of the mortgage repayments in 1997. This is, however, clearly wrong. Even if the payments were restructured to make them more affordable, the payments were being made by standing order by Duncan, so it is him alone that would have benefited from the reduction in the amounts payable.

2002-2003

65. For 2002-2003, Duncan's bank statements are available for the period 13 January 2002 to 13 April 2002; 13 July 2002 to 3 January 2003; and 13 October 2003 to 29 December 2003. These show monthly direct debit payments of £363.15 to C&G on the first or second of each month covered by the statements, except that the payment in December 2003 is reversed (twice) presumably because of a lack of funds. Accordingly, during this period until December 2003, the evidence suggests that Duncan was repaying both mortgages.

2004-2005

66. For 2004, only the statement for the second mortgage survives. This shows that, apart from a receipt of £264.76 in January (following the recall of the direct debit payment for that month), nothing else was received by C&G. In other words, neither Duncan nor Mrs McNiven was paying the mortgage during this period.

67. No account statements have survived from 2005, but a letter from the bank to Mrs McNiven dated 5 May 2005 indicated that she was "slightly behind" with the mortgage payments, and that a sum of £977.81 was now due.

68. It is Duncan's case that he was struggling financially in about 2004-2005, and so was unable to meet the mortgage payments. He said that this was not of major concern to start with, because there had been overpayments in prior years. That is corroborated by the fact that the bank does not appear to have been chasing for payment (despite not receiving any money) in 2004, and the fact that the arrears were only "slight" by the middle of 2005.

69. There are, however, paying-in receipts which evidence many payments into the C&G account by Mrs McNiven during 2005. According to Jinny these payments totalled £3,468.06 in 2005. There is also in evidence a letter from the bank to Mrs McNiven dated 28 April 2005 informing her that the bank was willing to grant her a loan. It is not known how much this loan was for, but it is consistent with Mrs McNiven being in need of funds, probably in part because of Duncan's failure to pay the mortgage at this time.

2006-2009

70. For each of 2006, 2007, 2008 and 2009 Duncan can prove from the available records that he paid virtually all of the mortgage payments.

71. For 2006:

    (1) The mortgage statements indicate that a total of £4,720.04 was received by C&G.

    (2) Duncan's bank statements indicate that he paid £4319.96 during the year.

72. For 2007-2008, for which the mortgage account statements are missing:

    (1) The best estimate of what was received by C&G (as I note in more detail below) is £7,994 (the aggregate of the reduction in capital, and interest and other charges estimated at £3000).

    (2) Duncan's bank statements reveal that he paid to C&G during that period a total of just over £8,000.

73. In 2009:

    (1) The mortgage statements show that a total of just over £5,000 was received by C&G.

(2) Of this amount, approximately £3,350 was received by bank payment, and therefore most likely form Duncan. Duncan's bank statements evidence payments of £3,070 to C&G and £1715 to his mother, described in his statements as mortgage contribution. Accordingly, it appears that he funded the whole of the mortgage in that year.

2010 onwards

74. Form 2010, however, Duncan struggled to make the mortgage payments, and Mrs McNiven paid at least a substantial part of them instead.

75. In 2010:

(1) The mortgage statements show that only nine payments were received by C&G during the year, totalling £2065.19.

(2) Duncan's bank statements (which only exist up to 13 October 2003) show that he made four payments to C&G, totalling £960 and that he paid a further £150 in January to Mrs McNiven which partially covered the sum she paid that month of £225.13.

(3) Mrs McNiven made the remaining four payments, totalling £800.

76. In 2011:

(1) The mortgage statements show that C&G received £2,637.34.

(2) Apart from a telephone card payment of £217.34 made on 2 February , all of the monthly payments thereafter (of £220) were paid by Mrs McNiven – totalling £2420.

(3) Duncan's bank statements are available only for the last quarter of the year. In that period he paid his mother a total of £690.

77. In 2012:

(1) The mortgage statements show that C&G received £2490.

(2) All of the monthly payments were made by Mrs McNiven.

(3) Duncan's bank statements are available only for the first quarter, and these show that he paid his mother in that period £480.

Jinny's calculations

78. Jinny's case is based to a large extent on the proposition that Mrs McNiven paid, over the whole life of the mortgages, sufficient to have funded the acquisition of the property, i.e. enough to pay off the whole of the first mortgage (and, she said, to pay some of the second mortgage). She produced a schedule at trial of payments which she says were made between 2005 and 2013 referable to the repayment of the mortgages.

79. First, she calculated that between 2006 and 2013 a total of £37,557.33 was paid to C&G. This is based on the annual mortgage statements for each of 2006 and 2009-2012. For the years 2007, 2008 and 2013 there are no mortgage statements, so Jinny has simply included the reduction in the capital amount of the loans during those years.

80. Of this, she said that Duncan's bank statements show that he paid a total of £16,995.09 to C&G and a further £2,985 to his mother – totalling £19,980 that was funded by him.

81. From this, Jinny deduced that the remainder of the payments to C&G came from her mother. Accordingly, she contends that her mother paid £17,577.24. Next, she added in a further £3468.06 (based on the paying in receipts from 2005). Between 2005 and 2014, therefore, she concluded that her mother made mortgage payments of over £21,000.

82. There are, however, a number of problems with these calculations.

83. First, Jinny has overstated the payments received by C&G shown on the mortgage statements. The statements are divided into three parts. The first part contains the aggregate payments across the two mortgages. The second part then contains the details for sub-account 1 and the third part contains the details for sub-account 2. The key information is contained in the "summary of your total borrowing" on the first page of each statement. Jinny has mistakenly added to this the details for sub-account 1 again, thus double counting them.

84. Second, the total of the payments made in 2009, appearing on the first page of the mortgage statement for that year, is £7805.24. This overstates the actual position, however, by £2614.47, because (as appears from the details in respect of the sub-accounts) this was the sum of three notional transfers from one sub-account to the other. It does not reflect actual receipts from the borrower during the year.

85. Having addressed those errors, the correct figure for the sums paid to C&G, according to the annual mortgage statements, is as follows:

2006	£4720.04
2009	£5190.77
2010	£2065.19
2011	£2637.34
2012	£2490
Total	£17,103.34

86. To that must be added an estimate for the amounts received by C&G during the years for which mortgage statements are missing. The starting point is the reduction in the capital amount outstanding during those periods (£8,108.03). To that must be added an estimate of the interest and other charges paid. The interest and other charges paid in 2006 totalled £1872.20. The interest and other charges paid in 2009 was significantly less, being in the order of £850. Interest rates were much higher, in 2006 than in 2009, however, and they remained high during most of 2007 and 2008. Accordingly, I estimate that the interest charges during 2007 and 2008 would have been nearer to the amount charged in 2006, though with a reduction due to the

decreasing amount of capital outstanding. I estimate the total interest charges during 2007 and 2008 at £3,000. The interest charge after the end of 2012 would have related solely to the second mortgage. Interest charged during 2012 had been only £189.48. Given the substantial reduction in the capital amount outstanding by the end of 2012, I estimate only a further £100 interest charge was incurred in 2013.

87. Accordingly, I estimate that the total amount paid to C&G for the period 2006 to 2013 was approximately £28,300.

88. Jinny accepts that Duncan can prove that he paid over that period (either to C&G or to his mother) £19,980.09. Accordingly, that leaves an amount of about £8,300 between 2006 and the expiry of the mortgages which was paid to C&G but which Duncan cannot prove was paid or funded by him.

89. I have noted above that Duncan accepted, when it was pointed out to him that the bank statements he has produced all contain at least one reference to a payment to C&G or his mother, that it is possible (though he cannot recall) that at some point he threw away bank statements unless he thought they were relevant. I find that is the most likely explanation for the statements from 2006 onwards, although I also accept his evidence that on occasion, when he was in the UK, he would help is mother out with the mortgage by contributing cash.

90. After the trial, Jinny produced a further schedule which identified from the few C&G statements that existed from before 2006, payments described as "receipt". On the assumption that these were cash receipts from Mrs McNiven, she has added these amounts in. As I have noted above, it is not clear that payments marked as "receipts" from earlier years were necessarily payments made by Mrs McNiven. Aside from the payments in June 1997 (see above), there are only a few of these, and they are of relatively small amounts.

Sarah's evidence as to Duncan's failure to pay the mortgage

91. In her witness statement Sarah referred to five occasions when she says her mother, and not Duncan, was paying the mortgages.

92. The first occasion was in about 1985. This was when Sarah got married and left home. It coincided with Duncan starting to work in London. Sarah says that her mother started to comment that she was struggling financially, as Duncan had stopped paying the mortgage "due to London rents etc."

93. The second occasion was in 1987-1988. Sarah says that her mother told her that she was "robbing Peter to pay Paul" due to the difficulty of running No.138 on her own.

94. The third occasion was in 1989-1990 when Sarah said that she and her family moved temporarily into No.138. She said that her mother was struggling financially, and each month she and her husband would withdraw money which she called "the mortgage payment" from the Halifax and paid it into C&G for the duration of their stay.

95. The fourth occasion was that in 1997 (to which I have referred above) when she accompanied her mother to a meeting with the bank manager.

96. The fifth occasion was in 2005 when her daughter, Anneka, who had moved in with Mrs McNiven sometime in 2004, "took over paying the mortgage as her contribution".

97. As I have noted above, contemporaneous records survive in respect of the third and fourth occasions and, in part, in respect of the fifth occasion.

98. As for the third occasion, in 1990, the mortgage statements show that Duncan paid the whole of the sums due on both mortgages for that year.

99. Sarah and Clifford accepted in cross examination that it was Mrs McNiven's practice to ask anyone who was living at No.138 to contribute towards the household expenses. I accept, therefore, that Sarah and her husband did make regular payments to Mrs McNiven during the period they were living there. Since, however, the contemporaneous records demonstrate that Duncan met all mortgage payments during 1990 (the only part of this period for which records remain), I reject the argument that these were payments towards the mortgage. Whether or not Mrs McNiven described the payments she received from Sarah and her husband as "mortgage" payments, they were not in fact used to repay the mortgages.

100. As for the fourth occasion, in 1997, I have addressed this above. The contemporaneous records indicate that Duncan was paying the mortgage, and undermine the suggestion that Mrs McNiven was then called upon to do so, save possibly for the payments made in June.

101. The fifth occasion is 2005, when the contemporaneous evidence suggests that Mrs McNiven was making substantial payments towards the mortgages. It was normal for Mrs McNiven to expect family members, who were working, to pay for staying with her, and it would not be surprising if Mrs McNiven did use payments from Anneka to help fund the mortgage repayments at that time.

102. So far as earliest two occasions are concerned, no records remain. There was a dispute between Jinny and Sarah, on the one hand, and Duncan, on the other, as to whether he continued to "live" at No.138 after he started working in London. In the end, however, this came down to a semantic dispute about the meaning of "living" somewhere. It was common ground that Duncan stayed at No.138 most weekends, but in London during the working week.

103. Duncan accepts that when he was in financial difficulties, he was unable to meet all the mortgage payments. That occurred particularly in later years. During the 1980s, however, he insisted that he was not in financial difficulties. His move to London was for a job that was significantly better paid, so that he was more, not less, able to meet the mortgage payments. He maintained that he made all the mortgage repayments during that period.

104. It is common ground that Duncan made all the mortgage payments in the early years after the purchase of No.138, and as I have already noted the mortgage statements show that he did so in 1990. I accept his evidence that he was not in financial difficulties during the 1980s. There is no reason for Duncan to have lied about that, and he is likely to have remembered if, as he says, the move to London was for an increased salary.

105. I prefer Duncan's evidence on this point to that of Sarah. Her purported recollection that her mother was having to pay the mortgages in 1990 is undermined by the contemporaneous documents, as is her evidence as to the events in 1997.

106. Sarah's reference to events in 1987-1988 does not take matters further. She refers only to her mother having financial difficulties, and does not say that this was because she was having to pay the mortgage.

Conclusions on the repayment of the mortgages

107. In light of the above evidence, I find on the balance of probabilities as follows in relation to the mortgage payments.

108. Duncan made either all or nearly all of the mortgage payments from the outset of the mortgage until the end of 2003, during which period the mortgages were paid by standing order or direct debit. There were some limited exceptions to this, but overall the picture is one of him taking responsibility for repayment of both mortgages.

109. In December 2003, Duncan's financial circumstances meant that he was unable to meet the mortgage payments. In 2004, the shortfall was covered largely by overpayments in previous years (which explains why C&G was content not to chase for payments each month, despite nothing being paid). In 2005, however, the mortgage payments were met mostly by Mrs McNiven. I accept it is possible that Duncan reimbursed his mother for some of those payments, but his own bank statements have not survived from that period.

110. Between January 2006 and the middle of 2010, Duncan resumed paying the mortgages in full.

111. By the middle of 2010, however, he was again experiencing financial difficulties. Thereafter, while he paid some amounts to his mother to help her with the mortgage, Mrs McNiven took over repaying most of the amounts due under both mortgages.

Legal consequences

112. On the basis of my conclusion that the events of 1993 severed the joint tenancy between Duncan and Mrs McNiven, but did not deprive Duncan of his 50% beneficial interest in No.138, he remains at the very least entitled to one half of the net proceeds of sale of the property.

113. Duncan's case, however, is that he is entitled also to his mother's half share in No.138, on the basis of a proprietary estoppel.

114. The three main elements of proprietary estoppel were identified as follows by Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 1 WLR 776, at §29:

> "a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance"

115. The core requirement, which permeates all elements, is "unconscionability". Whether the detriment suffered in reliance on the representation or assurance is sufficiently

substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded, which is the essential test of unconscionability: see *Winter v Winter* [2024] EWCA Civ 699, per Newey LJ at §25, citing Lord Walker in *Gillett v Holt* [2001] Ch 210.

116. Detriment may, but need not, consist of financial detriment, but must be something substantial: *Gillett v Holt* (above) at p.232D-E.

117. If these elements are established, then the court moves to consider the appropriate remedy. The approach to be taken is explained in *Guest v Guest* [2022] UKSC 27, per Lord Briggs at §74-80. Having determined that the repudiation of the promise in light of the detrimental reliance on it would be unconscionable, Lord Briggs (at §75) considered the starting assumption (though not a presumption) would normally be that:

> "the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise."

118. The court may, however, need to listen to reasons from the promisor (or her executors) why something less than full performance would negate the unconscionability, and therefore satisfy the equity.

119. At §76, Lord Briggs said:

> "If the promisor asserts and proves, the burden being on him for this purpose, that specific performance of the full promise, or monetary equivalent, would be out of all proportion to the cost of the detriment to the promisee, then the court may be constrained to limit the extent of the remedy."

120. There is a spectrum of cases from, at one end, the "almost contractual" nature of the promise, where the court is more likely to regard fulfilment of the promise as the appropriate remedy, to, at the other end, cases where the nature of the promise and/or the nature of the reliance is much less certain.

121. At §80, Lord Briggs said:

> "In the end the court will have to consider its provisional remedy in the round, against all the relevant circumstances, and ask itself whether it would do justice between the parties, and whether it would cause injustice to third parties. The yardstick for that justice assessment will always be whether, if the promisor was to confer that proposed remedy upon the promisee, he would be acting unconscionably. 'Minimum equity to do justice' means, in that context, a remedy which will be sufficient to enable that unconscionability question to be answered in the negative."

122. As to the first element, for the reasons I have set out above, I find that Mrs McNiven made repeated assurances to Duncan that No.138 would belong to him on her death.

Such an assurance was first made on the purchase of the property in 1982, and was repeated when the property was transferred into Mrs McNiven's sole name in 1993.

123. I find that it remained Mrs McNiven's intention that No.138 would pass to Duncan at all times up until at least the time that the mortgages had been fully repaid, and that, at the very least, she continued to encourage Duncan to believe that was the case. That was Duncan's evidence, which I accept. It is corroborated by Sarah's evidence that Mrs McNiven reiterated to her in 2014 that the house was to be left to Duncan, and by Sarah's reaction to discovering after Mrs McNiven's death that there was no signed will. In her witness statement, Sarah said: "I said [Duncan] wouldn't be happy", the implication being that she was aware Duncan believed that the house was to be his.

124. There is some evidence that Mrs McNiven changed her mind towards the very end of her life. Sarah referred to an occasion when her mother had been moved into a care home and said something to the effect that No.138 was not Duncan's house, "it never was and it never will be". In cross-examination, when she was asked whether her mother had changed her mind, since 2014, about the property going to Duncan, Sarah said that what her mum said, and what she did, were two different things. Sometimes she would go back on her word, and would do things to be deliberately hurtful. Even if Mrs McNiven did change her mind, this was only after all of the detrimental reliance upon which Duncan relies had occurred. It was therefore too late: if the other elements of the claim in proprietary estoppel are made out (as to which see below), Mrs McNiven would by this time have been herself estopped from going back on her promises.

125. As to the second and third elements, I find that Duncan relied on his mother's assurances to his detriment. That detrimental reliance consisted principally of assuming the responsibility for repaying the mortgage relating to the purchase of the property. This aspect of his detrimental reliance occurred over a period of at least 28 years, from 1982 until 2010. It also consisted, however, of Duncan – having moved out of No.138 – permitting his mother to remain there for the rest of her life, and taking no steps to realise his interest in the property. While it is likely that the value of the property was such, in 1993 at least, that there was little value in his half share (and may have been less than the amount of the second mortgage), it is also likely that the value of the property increased thereafter, certainly by 2006, when he continued to repay the mortgages rather than realise his interest.

126. It is also necessary to balance against the detriment Duncan suffered, any benefits which he received: namely the ability to borrow on the security of the property to purchase his home in Finland and the fact that, at times, his mother contributed towards the second mortgage.

127. I do not think, however, that these benefits are sufficient to mean that, overall, Duncan did not suffer detriment that can be characterised as substantial. At the time of the entry into the second mortgage, Duncan had a 50% beneficial interest in the property. The relevant benefit is the extent to which his mother's half share was encumbered by the mortgage. Although I do not have any formal valuation evidence, I am prepared to accept that it was likely that, at the time of the commencement of the second mortgage, it would have encumbered at least a significant part of Mrs McNiven's share in the property. As time went on, however, Duncan's share would

undoubtedly have been sufficient to bear the whole of the capital amount of the mortgage, had C&G ever sought to enforce it against the property.

128. As to the fact that Mrs McNiven made repayments in respect of both mortgages, for the reasons I have set out above, I consider that this occurred to any significant extent only in about 2005 and from the middle of 2010.

129. Although Duncan stopped making payments for a period in 2004-2005, he resumed paying both mortgages in full for the next five years, on the basis (as I have found above) that his mother continued to encourage him that the property would be his.

130. Of more significance is the second period from the middle of 2010. Having regard to the contributions to the mortgages over the whole of their terms, however, the amounts paid by Mrs McNiven were still relatively small.

131. Given the substantial reduction in the capital sum outstanding by 2010, and the very low interest rates at that time, Mrs McNiven paid during this latter period no more than about £8,300 (being the amount which Duncan cannot prove by reference to contemporaneous records was paid by him from 2006 onwards). In comparison, the amount paid by Duncan in 1990 alone was more than £6,600, and in 1993 was more than £5,800. Similar sums would have been paid in other years around that time. From 2006 to 2010 the total amount paid by Duncan (directly or indirectly) in repayment of the mortgages was in excess of £18,000.

132. Accordingly, looking at matters in the round, I consider that Duncan did suffer substantial detriment in reliance on his mother's promises that No.138 would be his on her death.

133. Similar considerations arise in addressing the core requirement, as identified in *Gillett v Holt*. I have little doubt that – had Duncan made all payments in respect of the mortgages – it would have been unconscionable for Mrs McNiven to renege on the promise that No.138 would be Duncan's on her death. The question is whether that is still the case in circumstances where Mrs McNiven paid significant amounts in respect of the mortgages when Duncan failed to do so. In my judgment, for similar reasons to those already given, it is. Duncan's failure to pay during 2004-2005 was temporary and had no effect on the agreement with his mother: he resumed repaying the whole of the mortgages in 2006 in continued reliance on the assurance that the property would be his. As for his failure to make payments after 2010, when set against the payments he made over the previous 28 years I do not think that this removed the element of unconscionability.

134. The fact that Mrs McNiven had to make mortgage payments herself does in my view, however, affect the appropriate remedy. Taking as the starting point that the simplest way to remedy the unconscionability constituted by the repudiation is to hold the promisor to the promise, an important feature in this case is that Mrs McNiven's promise was made in return for Duncan's agreement to continue repaying the mortgages. I consider that the appropriate remedy, which is sufficient to do equity and is proportionate to the detriment suffered, is to grant Duncan a beneficial interest in the whole of the net proceeds of No.138, less an amount which reflects the payments made by Mrs McNiven in respect of the mortgages.

135. I accept Duncan's evidence that his mother never asked for repayment of the amounts she had paid, but that does not in my view affect the conclusion that in considering how to do justice between the parties, it is fair if both Mrs McNiven's estate and Duncan are held so far as possible to the arrangement that he would have the property on her death and that he would pay the mortgages.

136. Accordingly, I conclude that Mrs McNiven's estate is entitled to retain out of Mrs McNiven's half share in the proceeds of sale of No.138 an amount that reflects the payments she made towards the mortgages.

137. Given the lack of financial records for much of the period, this involves an element of estimation. In respect of the period from 2006 to the end of the mortgages, I have already concluded that there were payments of approximately £8,300 which Duncan is unable to prove he funded, from the bank statements that have survived. On the basis that Duncan accepted that he may well have kept only those statements which contained relevant entries during that period, I give the defendants the benefit of the doubt on this issue, and conclude that net payments by Mrs McNiven over that period amounted to £8,300.

138. There is to be added to that the amount which it can be shown (from paying-in receipts) that Mrs McNiven paid in 2005, namely £3,468.06. In Jinny's post-trial schedule, she pointed out that C&G received amounts totalling £3,938.45 in 2005. Given that I accept that even when Duncan was not making regular payments, he would have made at least some contribution to the mortgage by making payments to his mother, I base my estimation of the amounts contributed by Mrs McNiven in 2005 on the lower figure supported by the paying-in receipts.

139. So far as the pre-2005 period is concerned, I am prepared again to give Jinny the benefit of the doubt, and assume that the "receipts" identified in Jinny's post-trial schedule reflect payments made by Mrs McNiven (including those made in June 1997 to which I have referred above). Those total £1,541.49.

140. The total of these three sums, rounded up, is £13,310.

141. I recognise that there may have been other occasions when Mrs McNiven stepped in to make contributions to the mortgages without being reimbursed by Duncan. I also recognise that there may have been occasions when Duncan reimbursed his mother with cash (including in the latter period, when I have assumed that to the extent that Duncan cannot prove by reference to his bank statements that he paid the mortgage, Mrs McNiven did so), such that no trace remains in the surviving bank statements. Doing the best I can on the evidence, I consider these matters would have largely balanced each other out overall.

142. Accordingly, I conclude that in order to reflect the equity that arises by virtue of Duncan's claim in proprietary estoppel, Duncan is entitled to the proceeds of sale of No.138 after a deduction, which will be retained by the estate, of £13,310.