Neutral Citation Number: [2025] EWHC 202(Ch)

Claim No: CH-2019-000332

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**APPEALS (ChD)**

**ON APPEAL FROM THE DECISION OF HHJ PARFITT**
**AT THE COUNTY COURT AT CENTRAL LONDON,**
**CHANCERY LIST**

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 5 February 2025

**Before**:

**THE HONOURABLE MR JUSTICE THOMPSELL**

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**VASHIHAN RATNASINGHAM**

**Claimant/Appellant**

**and**

**(1) ANDREW LEWIS HUNT**
**(2) KENT PROPERTY ESTATES LTD**

**Defendants/Respondents**

**Mr Andrew Butler KC,** instructed under the Bar Direct Access scheme for the **Claimant/Appellant**
**Mr Paul Tapsell,** instructed under the Bar Direct Access scheme for the **Defendants/Respondents**

Hearing dates: 4-5 December 2024

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# APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 5 February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

**Mr Justice Thompsell:**

## 1. INTRODUCTION

1. This judgment relates to the appeal of an order (the "**Order**") of HHJ Parfitt (whom I shall refer to as the "**Judge**") dated 21 November 2019 made in the County Court in consequence of his oral judgment (the "**Judgment**") following a trial in October 2019.

2. The Judgment related to a number of matters arising out of a business relationship and putative agreements between the Appellant, Mr Ratnasingham and the First Respondent, Mr Hunt. It related in particular to arguments relating to the ownership of, or dealings with, various properties including in particular one at 137 Folkestone Road, Dover (the "**Folkestone Road property**), another property at 65 Northdown Road, Margate, also known as 55 Athelstan Road, Margate ("**Northdown**") and the Albion Inn, Broadstairs (the "**Albion**").

3. Whilst Mr Ratnasingham requested permission to appeal based on a number of grounds, by the order dated 19 March 2020 of Birss J (as he then was), permission to appeal has been granted in respect of only two grounds (identified as Ground 2 and (in part) Ground 4).

4. Ground 2 is stated as follows:

> "Even if the Judge was right to reject C's [the Claimant's] case that the Third Agreement was made, he was wrong to hold that C did not have an interest in Albion and/or other properties purchased on the security of Northdown/Albion."

5. Ground 4 is stated as follows:

> "The Learned Judge was wrong to hold that the Claimant's interest in the estate of Bernard Smith was represented by the division shown in the estate accounts attached to the letter from Fosters Law dated 9th September 2009."

6. This division has been said by Mr Ratnasingham to be wrong on the basis that these accounts (the "**Distribution Accounts**") ascribed what he argues to be an erroneous value to the Folkestone Road property. Mr Ratnasingham argues that it was incorrect to treat this property as being worth £50,775, when in fact this was a value based on occupation by a life tenant; and, thanks to Mr Ratnasingham's efforts, the life tenant was no longer in residence. The evidence before the Court showed that with vacant possession Folkestone was worth £135,250.

7. Another point argued by Mr Ratnasingham to be an error relates to the treatment of a £33,000 payment made out of the estate which was treated as being a benefit for Mr Ratnasingham but which he contended was equally for the benefit of Mr Hunt. However, permission to appeal has not been granted in respect of this point and so I will not consider it further.

8. I deal in more detail below with both grounds, starting with Ground 2.

## 2. GROUND 2

### *Background*

9. The background to the appeal under Ground 2 is as follows.

10. In 2003, on the Judge's findings, Mr Ratnasingham and Mr Hunt both contributed to the acquisition of Northdown for £138,000. Of this sum, Mr Hunt provided £99,000 and Mr Ratnasingham provided £39,000. This was not given in cash, but by way of a charge in favour of the vendor over a property owned by Mr Ratnasingham.

11. Northdown was put into the name of Mr Hunt's company Property Estates Ltd ("**PEL**"). PEL gave Mr Hunt a charge over Northdown to secure his £99,000 advance.

12. The Judge found that the intention had been that PEL and Mr Ratnasingham would have a share in Northdown, commensurate with their contributions. Thus he ordered that Mr Ratnasingham had a 28.25% share in Northdown and the remaining 71.25% interest, originally vested in PEL, was now vested in the Second Defendant, Kent Property Estate Limited ("**KPEL**").

13. In early 2010, KPEL used Northdown as security for a loan taken out by it for the acquisition of the Albion. Originally, a first legal charge over both Northdown and the Albion was given to a commercial lender named HandF in respect of a bridging loan for £203,000. This was additionally supported by a personal guarantee given by Mr Hunt. This borrowing was later replaced by a loan from Lloyds TSB Bank plc for £195,000, again supported by security over Northdown and (I understand, although this is not clear from the documents provided) the Albion and possibly also by a personal guarantee from Mr Hunt.

14. Mr Andrew Butler KC, on behalf of Mr Ratnasingham, argues that because Northdown, in which he had a beneficial interest, was used to acquire the Albion, then either:

    i) Mr Ratnasingham has a commensurate share in the Albion under a constructive or resulting trust (the "**Commensurate Share Argument**"); and/or

    ii) he is entitled to an account of profits in relation to the Albion (the "**Account of Profits Argument**").

### *The "Commensurate Share Argument"*

15. The reasoning supporting the Commensurate Share Argument is based principally on the logic behind *Foskett v McKeown* [2001] 1 AC 102 ("***Foskett***"). In that case, purchasers in a proposed property development scheme entrusted money to a dishonest property developer who unlawfully took money held on trust for those developers and used it towards payment of a life insurance policy, the benefit of which he appointed to his children. He died (by his own hand) and the policy paid out to his children. The House of Lords found (Lords Steyn and Hope dissenting) that:

    i) where a trustee wrongfully used trust money to provide part of the cost of acquiring an asset, the beneficiary was entitled, at his option, either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal

claim against the trustee for the amount of the misapplied money (see Lord Millett at page 131 next to letter G); and

ii) it was immaterial whether the trustee mixed trust money with his own in a single fund before using it to acquire the asset, or made separate payments, either simultaneously or sequentially, out of the differently owned funds to acquire a single asset;

iii) accordingly, since the purchasers could trace trust money through the premiums into the policy money, and since the beneficiaries of the policy were volunteers and had not themselves contributed to the premiums, the purchasers were entitled to a share in the policy proceeds proportionate to the extent that the premiums were paid out of the trust money.

16. The case was decided on the basis that the purchasers could by means of tracing and following demonstrate a proprietary interest in the policy monies.

17. I see no scope for tracing or following in relation to the current facts. Whilst Mr Ratnasingham's share in Northdown was put at risk by the creation of a charge over the property, the property itself has never been transferred to another person and remains held on the same trusts. In my view, the fact that the charge may have contributed to the willingness of the lender to lend does not give rise to any ability to trace into the proceeds of that loan or into the property that was purchased using that loan. It is telling that Mr Butler has been unable to find a single case where a court had followed such an analysis. I think this is because the point follows from first principles – you cannot trace an asset into another asset if the original asset is still in the same place and held under the same trusts.

18. I reject, therefore, the argument that Mr Ratnasingham has any interest in the Albion (and, on the same basis, that he has any interest in any other property purchased using Northdown or the Albion as security).

***The Account of Profits Argument***

19. I do agree with Mr Butler, however, that as Mr Ratnasingham did not acquire an interest in the Albion, it follows that KPEL was using Northdown as security for its own private advantage. This is a clear breach of trust and this breach entitles Mr Ratnasingham to an account of profits.

20. Mr Butler referred me to Article 58 of *Underhill & Hayton, Law Relating to Trusts and Trustees*, 20th Edn., 2022 ("***Underhill***"). Amongst the principles stated at Article 58.1 is the following:

> "(1) A trustee must not use or deal with trust property or exploit his position for his own private advantage for he will be strictly liable to account for his profits of which he will be constructive trustee and he will also be personally accountable for losses arising where there is a real sensible possibility of a conflict between his beneficiaries' interest and his self interest."

21. This principle is so well established that there is no need to quote any further authority for the point, but to underline it, Mr Butler referred the court to *Recovery Partners v Rukhadze* [2023] Bus LR 646 ("***Recovery Partners***") (fairly noting that the case was under appeal), where, at [34], the Court of Appeal referred to the "stringent rule" that a fiduciary:

> "must not make an unauthorised profit from his fiduciary position, requiring an errant fiduciary to account to his principal for all unauthorised profits falling within the scope of his fiduciary duty. The court emphasised that the rule is intended to have a deterrent effect, and to ensure that no defaulting fiduciary can make a profit from his breach of duty, echoing the opinion of Lord Hodson in *Phipps v Boardman* [1967] 2 AC 46, 105D".

22. At [37] the court held that:

> "The strict enforcement of an errant fiduciary's liability to account for all profits is mitigated only by the separate power of the court to make an allowance for the fiduciary's work and skill in generating those profits, as in *Phipps v Boardman*."

23. Mr Paul Tapsell, representing Mr Hunt and KPEL, makes the argument that there was no dealing with or affecting Mr Ratnasingham's interest in Northdown on the basis that the loans from Lloyds and before that from HandF were amply covered by the security over the Albion itself and by KPEL's own interest in Northdown (particularly as there was also a guarantee from Mr Hunt) and so there was no danger of Mr Ratnasingham's interest in Northdown being impugned. This is no answer to the breach of trust. Creating the security was clearly a breach of trust and clearly put Mr Ratnasingham's interest in Northdown at risk as the lenders could always choose against which asset they would enforce security.

24. Mr Tapsell also made an argument on the basis that Mr Ratnasingham was aware of the lending and security arrangements and must be taken to have consented to them. Mr Ratnasingham might well have been aware of the lending and security arrangements, but it is highly unlikely that Mr Ratnasingham understood that the property in which he had an interest was to be offered as security for a property in which he would have no direct or indirect interest. I consider that it is apparent that it was intended by Mr Hunt and by KPEL that, Mr Ratnasingham would be denied any interest in the Albion. It is apparent from the fact that Mr Hunt did not follow through on a proposal that Mr Ratnasingham would be provided with a shareholding in KPEL. On the basis that Mr Ratnasingham did not understand these facts at the time that he had knowledge of or was involved in making the loans, I do not think it could be said that any consent that may be inferred from his conduct could be regarded as informed consent.

25. I see, therefore, no defence to the basic proposition that KPEL in creating security over Northdown was acting in breach of trust for its own benefit and should be obliged to give an account of the profits that it has made that are attributable to this breach.

26. As is noted in *Recovery Partners* (at [77] and in the discussion leading up to that paragraph), the assessment of an account of profits is discretionary but the court should act in accordance with settled principles having regard to the justice of the case

(including any delay by the claimant in seeking relief). This being the case, and as the matter is to be referred to the County Court, I will not go too far in predetermining how that account of profits should be assessed. However, I consider that it is right that I should draw attention to certain matters that may be relevant to the court's exercise of discretion in this regard.

27. Mr Butler argues that, in assessing a breach of profits, KPEL is liable to account for 28.25% of any profits arising from the Albion. I consider that this may be overstating the position. As noted in the passage from *Recovery Partners* immediately above, the court may make an allowance for the fiduciary's work and skill in generating those profits. In the current circumstances, where the breach of trust relates to granting security over an asset held on trust, and where the trustee (KPEL) has offered further security over the Albion itself, and through arranging for Mr Hunt to provide a personal guarantee, I consider that this too may be a factor taken into account in any account of profits alongside any work and skill provided by KPEL or Mr Hunt.

28. As regards the account of profits, once the appropriate share of the profits is fixed then this applies both to income profits and to any capital gain, unless there proves to be some good reason to distinguish between these two types of profit.

29. As regards income profits, these will need to be calculated having regard to both the income generated for KPEL from the Albion and the expenses of KPEL both as lessor and as borrower (including in that regard as well as interest, arrangement fees and any exit fees, and legal costs). From the figures available to the court at the appeal hearing, this may be quite a slim margin, particularly as the loan was at a variable rate and interest rates will have risen over the period.

30. As regards a capital profit, this will be difficult to assess as the property has not been sold. Ideally the parties will agree the current value of the Albion and this may be used to calculate a capital profit – having regard to the capital payments made by KPEL in respect of the loans, any further payments of a capital nature made by KPEL or Mr Hunt towards the purchase or the improvement of the property and any outstanding capital repayments due on the loan. Failing agreement on this point, there may be a need for expert valuation evidence.

## 3. GROUND 4

### *Background*

31. The background relevant to Ground 4 also can be stated shortly.

32. Mr Bernard Smith was a friend of Mr Hunt. Mr Smith died leaving Mr Hunt as his executor and as the beneficiary of the residue of his estate after paying costs and some specific bequests. In consideration of assistance given by Mr Ratnasingham to Mr Hunt in relation to the management of Mr Smith's estate, Mr Hunt agreed (orally) that Mr Ratnasingham should be given a 40% share in Mr Hunt's interest in the residue of the Estate.

33. The Judge found (at [41] of the Judgment) that there was such an agreement; that the solicitors recommended that this would best be given effect to by a deed of variation to Mr Smith's will and that the resulting Deed of Variation was good evidence of the terms of the agreement.

34. The Judge found (at [49] of the Judgment) that in September 2009 Fosters (the solicitors handling the estate) wrote to Mr Hunt about finalising the estate accounts and that the accounts were finalised and settled in accordance with the Deed of Variation. Fosters provided a cheque to Mr Ratnasingham and to Mr Hunt representing the balance of their respective portions and it appears that there was no complaint about this from Mr Ratnasingham.

35. What the Judge does not mention, is that the distributions made of the estate included a distribution made to Mr Hunt of the Folkestone Road property and that in the accounts drawn up by the solicitors handling the estate (the "**Distribution Accounts**") sent to Mr Hunt on 9 September 2009, the value of the property distributed to Mr Hunt was taken as being £50,775. Mr Hunt was registered as the proprietor of the Folkstone Road property as of 15 September 2009.

36. This figure was taken from a valuation (the "**Valuation Report**"). The Valuation Report was a detailed report dated 21 October 2008. It was made by Mr Richard Galbraith, a Chartered Surveyor. Mr Galbraith had been commissioned for the purpose of valuing the estate in connection with the grant of probate.

37. Mr Ratnasingham now has essentially two complaints about these arrangements:

    i) first, that the amount at which the Folkstone Road property was transferred, at the time of transfer was an undervalue, because:

        a) the valuation was by then almost a year old; and

        b) the figure of £50,775 within the Valuation Report assumed there was a sitting tenant (a Ms Potter, who under the will had a right to occupy the property rent-free for life) causing him to discount the value by some £69,258 and by the time of this distribution she was no longer in occupation; and

    ii) secondly, that making a distribution *in specie* (that is, of the property itself rather than selling it and distributing the cash) was a breach of the Deed of Variation and therefore also a breach of the agreement about these matters between the Appellant and Mr Hunt which was reflected in the terms of the Deed of Variation.

***Was the distribution of the Folkstone Road property at an undervalue?***

38. As regards the first complaint, I do not agree that there is any evidence that the valuation at which this property was transferred out to Mr Hunt was inappropriately low. In particular:

i) there is no evidence before the court that the housing market either generally or in the Dover area improved between the date of the Valuation Report (in late November 2008 - the year of the 2008 financial crash) and 9 September 2009, the date of the estate accounts which the Judge considered to be final accounts.

ii) as is discussed further below, what evidence there is before the court does not suggest any significant improvement in the state of the property, rather the opposite; and

iii) as is also discussed further below, the evidence that Ms Potter had vacated the property by this date is scant and contradictory.

39. As regards the state of the property, what evidence there is suggests that the property was in a deteriorating state, and that the estimates in the Valuation Report as to the sums that needed to be spent on it (which, as the Valuation Report clearly states, were not based on a full structural survey) may not have fully captured the extent of what needed to be done. In particular, the Appeal Bundle includes:

i) a letter dated 4 November 2009 where a Mr Matthews is writing to Fosters on behalf of Ms Potter noting that there had been a report by Social Services suggesting that the property should be condemned and complaining of various matters including that:

> "It is blatantly obvious that no maintenance was carried out at any time to keep the property in even the remotest form of habitability";

ii) a letter from the District Council dated 8 January 2010 listing hazards, including serious hazards requiring urgent remediation;

iii) evidence that by October 2011 the property was in such a state that the Ground Floor and First Floor flats were removed from the valuation list for the purposes of council tax as they were no longer dwellings for council tax purposes; and

iv) evidence that when the property was eventually sold in November 2015 the price was only £60,000 (from which some £486 in sale costs was deducted).

40. Mr Ratnasingham suggests that the 2015 sale was at an undervalue, but in the absence of evidence I will make no finding on this point. I will note however that the Valuation Report, was by then was some seven years out of date and that there is no evidence that the sale was to a related party of Mr Hunt and no reason why Mr Hunt would sell at an undervalue an asset that he considered to be his own (or that of his company, KPEL).

41. As regards the question whether Ms Potter had vacated the property at the time that the property was apportioned to Mr Hunt, I am accepting the ruling of the Judge that the witness evidence (and by extension any facts pleaded) on both sides is unreliable unless substantiated by documentary evidence. As to documentary evidence, the only (substantially) contemporary evidence is at best ambiguous.

42. The first item of documentary evidence is the letter dated 4 November 2009 where Mr Matthews is writing to Fosters on behalf of Ms Potter complaining that Mr Hunt as executor had breached the will in relation to the section headed "Specific Gifts and Legacies" by failing to set aside a sum of no more than £50,000 to maintain the Folkestone Road property in a sound and habitable condition for Ms Potter's benefit and complaining also of the conduct of Mr Ratnasingham towards Ms Potter.

43. This letter does not state in terms that Ms Potter has vacated the building but the sense of this, referring to incidents of Ms Potter's occupation in the past tense and stating that:

> "The 'executor' will no doubt profit from the fact that she no longer resides in the said property",

provides a strong indication that Ms Potter had moved out by 4 November 2009 but provides no evidence of whether she had moved out (or had agreed to move out) by the date of the Distribution Accounts.

44. Secondly there is the letter from the District Council dated 8 January 2010 suggesting that someone (which might or might not have been Ms Potter) was occupying the ground floor of the property.

45. Thirdly there is another letter from the District Council, this time to KPEL dated 23 April 2010, informing the latter that the building is insecure and noting it had the powers to secure the building and charge the owner (which by this time was KPEL). According to this letter the property was now unoccupied.

46. None of this evidence demonstrates that Ms Potter had vacated the property by the time of the Distribution Accounts or had by then agreed to do so, and still less that she had agreed to do so without any compensation for giving up her right to occupation under the will (and her right under the will for money to be spent on the property to make the property habitable for her).

47. I conclude that there is no evidence that the Distribution Accounts, in attributing £55,000 to the value of the property, were falsely understating the value of the property. This conclusion is fortified by the observation that Mr Ratnasingham made no complaint about the Distribution Accounts at the time and accepted a cheque for his share the size of which must have reflected two points:

    i) that he was being paid out a share that reflected his portion of the value of the property (and not that the property was being left in the estate for later distribution); and

    ii) that that value was calculated by reference to the Valuation Report on the assumption that there was a sitting tenant.

    If he had considered that these accounts were false because the value of the property was greater, he might be expected to have complained at the time and therefore the fact that he did not do so is another indication that he did not at that time consider that the valuation at which the Distribution Accounts had valued the property was incorrect.

48. A related point is the question whether the Distribution Accounts were incorrect in including a provision for maintaining the property while Ms Potter was still in residence. It was correct to include this when she was in residence and so these accounts cannot be shown to be incorrect on this point. However, if this later proved an incorrect assumption Mr Ratnasingham may be able to show that he is entitled to 40% of any such released provision.

***Was the distribution of the Folkstone Road property a breach?***

49. The Deed of Variation created a trust:

> "to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as he shall in his absolute discretion think fit without being liable for loss".

50. I agree with Mr Butler KC that by taking the property for himself at a valuation, rather than selling it as required by these terms, Mr Hunt was in breach of that trust. Neither the will itself nor the Deed of Variation contained any language that would oust the normal rule in equity that would prevent a trustee from self-dealing with trust assets – a rule going right back to 1726 and the celebrated case of *Keech v Sandford* (1726) Sel Cas King 61.

51. What consequences flow from this are more difficult to assess in this case, given my finding that the value at which the property was transferred to Mr Hunt was (as far as the court can tell some many years later) fair and proper in the circumstances, and in the circumstances that the property has since been sold in an arm's length sale.

52. Mr Ratnasingham has consistently argued his case on the basis of an agreement, (referred to within the Judgment as the "**Second Agreement**"). The Judge found that there was such an agreement and that this was on the terms of the Deed of Variation. Viewed as a breach of the terms of an agreement, Mr Ratnasingham's remedy for a breach of the agreement is his loss from the breach. The natural measure of that loss would be based on the difference between his share of the value of the Folkestone Road property and the amount of cash given to him in the Distribution Accounts in respect of his share. On the basis of my finding that the value of the Folkestone Road property in the Distribution Accounts has not been established to be incorrect that loss would be zero.

53. Viewed as a breach of trust, however, Mr Ratnasingham has the alternative remedy of an account of profits. These would need to be assessed, but given my finding that the 2015 sale has not been demonstrated to be anything but an arm's length sale at market value, any capital gain would be extremely small. The account would need to reflect that Mr Ratnasingham had received in September 2009 a sum representing his share of a £55,000 valuation of the property (and probably also that Mr Hunt had thus lost income in relation to that share of that amount) and that the sale price in an arm's length sale less solicitors' costs was only £59,514.

54. As regards income, it seems doubtful whether there would have been any rent for the property – if there was, this appears to have been only until a period sometime between 8 January and 23 April 2010, having regard to two letters from the District Council. There would have likely been legal costs in dealing with the council, possibly some council tax and water rates, possibly some insurance costs and perhaps some costs in maintaining or securing the property, so it is likely that the outcome would be a small profit or perhaps a loss as regards income and expenditure.

55. There may also be a question whether Mr Ratnasingham is entitled to an equitable remedy, since there are some suggestions that he may not be coming to equity with clean hands, in that it appears that he held and refused to give up share certificates belonging to Mr Smith's estate.

56. These are all questions that were not adequately addressed in the hearing of the Appeal. It is appropriate that they are considered more fully in the County Court, and I will give directions accordingly. However, given the way this matter has dragged on, it is appropriate that any further proceedings in relation to Ground 4 should be limited to these open questions and should not be a forum to re-examine matters settled by the Judgment or by this judgment and in particular the question whether the sale in 2015 was at a proper value.

57. Given the likely small scope for argument in what the profit may entail, and the doubts whether an account of profit is in any case appropriate, I would hope that the parties could negotiate a settlement on this point or reach a settlement through mediation or some other means of alternative dispute resolution.

## 4. CONCLUSION

58. It will be apparent from the above that:

i) As regards Ground 2, I have dismissed the argument that Mr Ratnasingham has a share in the Albion; but have accepted his argument that the action of KPEL in creating security over Northdown to procure finance to acquire the Albion was a breach of trust and entitles Mr Ratnasingham to an account of profits arising from that breach.

ii) As regards Ground 4, I do not accept there was any error in the Judgment in accepting the valuation of the Folkestone Road property at the time of its distribution to Mr Hunt as being £55,000 or that there is any evidence before the court to show that the sale of that property to a third party for £60,000 in November 2015 was a sale at an undervalue. However, I find that the distribution by Mr Hunt as executor of the property to himself was a breach of the trust under which the property was held and as such should entitle Mr Ratnasingham to an account of profits (absent any argument that Mr Hunt or KPEL is able to establish as to why Ratnasingham might be unable to avail himself of an equitable remedy). I also consider that of the provision for maintenance of the property during Ms Potter's lifetime was later released, this may also justify a further payment to him.

59. As none of the points that I have found in Mr Ratnasingham's favour were taken into account by the Judge, I consider that the case should be referred back to the County Court so as to work out the consequences of the above findings.

60. I will ask the parties (if they cannot agree the consequences themselves or by means of alternate dispute resolution, given my comments above regarding the likely low quantum of an account of profits on either point) to agree a form of order reflecting this judgment and dealing with directions to refer this matter back to the County Court, or if they are unable to agree fully such a draft, to produce a draft showing the matters on which they agree and their alternative wording in relation to the points on which they do not agree.