

**Neutral Citation Number: [2002] EWCA Civ. 1075
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHANCERY DIVISION
HIGH COURT (HHJ McGonigal)**

**Royal Courts of Justice
Strand, London, WC2A 2LL**

Monday 29 July 2002

Before :

LORD JUSTICE RIX

LORD JUSTICE JONATHAN PARKER

and

MR JUSTICE NELSON

Between :

ESTHER CHAN PUI CHUN
Claimant/ Respondent

- and -

GILBERT LEUNG KAM HO
1st Defendant/Appellant

MELODIOUS CORPORATION
2nd Defendant

Simeon Thrower (instructed by Messrs Fenwick) for the Claimant/Respondent
Rosalind Nicholson (instructed by Messrs Penningtons) for the Defendant/Appellant

Judgment

Lord Justice Jonathan Parker

INTRODUCTION

1. This is an appeal by Mr Gilbert Leung Kam Ho ("Mr Leung") against an order made by HHJ McGonigal, sitting in the Chancery Division, Companies Court, on 30 November 2001. Before the judge

were three sets of proceedings, as follows:

1. An action (ref. no. HC 2000 0745) brought by Miss Esther Chan Pui Kwan (formerly Esther Chan Pui Chun) ("Miss Chan") against Mr Leung, seeking firstly an order under section 33(3) of the Family Law Act 1996 ("the FLA") to enforce Miss Chan's entitlement to remain in occupation of a residential property known as Hill House, Roundhill Drive, Woking, Surrey, further or alternatively a declaration under section 33(4) of the FLA (alternatively under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 ("the TLATA")) as to Miss Chan's beneficial interest in Hill House. Joined as second defendant in the action is Melodious Corporation (a company incorporated in the British Virgin Islands) ("the Company"), which is the registered proprietor of Hill House at HM Land Registry. The Company is beneficially owned as to 51 per cent by Miss Chan and as to the remaining 49 per cent by Mr Leung. Miss Chan is currently in sole occupation of Hill House, in which she and Mr Leung previously lived together.

2. A winding up petition (no. 004911 of 1998) presented by Mr Leung on 29 August 1998 against the Company in his capacity as a creditor of the Company, on the ground that the Company is unable to pay its debts.

3. A winding up petition (no. 00282 of 1999) presented by Mr Leung on 18 January 1999 against the Company in his capacity as a contributory of the Company on the ground that it is just and equitable that the Company should be wound up.

2. By his order dated 30 November 2001, which was made in the action and in the petitions, the judge declared that the Company holds the freehold title of Hill House as trustee for Miss Chan and Mr Leung in the proportions 51:49. He further ordered that Hill House be sold (but with the proviso that, save with the consent of Miss Chan, no sale should take place before the end of the academic term in the summer of 2003, when Miss Chan was due to complete her studies at the University of Surrey, or the earlier cessation of her studies), and that the net proceeds of sale be distributed as to 51 per cent to Miss Chan and, following payment to the Company of £180,000 in discharge of a debt owed to it by Mr Leung, the balance (if any) to Mr Leung; and he declared that until sale Miss Chan is entitled to occupy Hill House as her residence. The judge dismissed both the winding-up petitions, and directed that an account be taken:

... in order to ascertain the sums (if any) that are due and ought to be paid or distributed by the Company to its creditors (including Mr Leung and Miss Chan) and its contributories.

3. The judge's order went on to give directions as to evidence on the taking of the account. The judge awarded Miss Chan her costs of the action and the company its costs of the petitions. He refused permission to appeal, but permission was granted by Chadwick LJ on the papers on 25 February 2002.

4. No steps have been taken in relation to the account ordered by the judge, pending the outcome of the appeal.

THE FACTUAL BACKGROUND

5. In September 1992 Miss Chan, who was then aged 26, started working as political assistant to Mr Leung. Mr Leung was then a member of the Hong Kong Legislative Council. He was also a Chartered Surveyor and carried on a property business. When Miss Chan entered Mr Leung's employment, Mr Leung was under investigation for corruption in connection with a local government election. In November 1992 he was charged with bribery, and in June 1993 he was convicted and sentenced to three years in prison.

6. In 1993, prior to Mr Leung's conviction, a relationship had developed between Mr Leung and Miss Chan. Marriage was discussed, but Mr Leung's conviction and sentence meant that, as the judge put it, the couple's nuptial plans had to be deferred.

7. On 1 September 1993 Miss Chan began working for Ho & Chan, a legal firm used by Mr Leung. At the time of his conviction, Mr Leung was engaged in various property development projects, including two

projects which are referred to in the evidence as, respectively, Wo Mei and Ho Chung. While Mr Leung was in prison, Miss Chan assisted him in progressing these two projects. On 21 June 1993 Mr Leung gave Miss Chan a general power of attorney over his affairs.

8. At some date in 1993 Mr Leung gave Miss Chan HK\$700,000 so that she could buy out her brother's interest in a flat which was registered in her parents' names.

9. In October 1994 Miss Chan left Ho & Chan and went to work for a Dr Sam Wong, another Hong Kong legislator, for whom she had worked previously. Whilst working for Dr Wong, Miss Chan continued to assist Mr Leung in relation to the Wo Mei and Ho Chung projects.

10. During Mr Leung's sojourn in prison, he wrote a large number of letters to Miss Chan, many of which were put in evidence. I shall make further reference to these letters later in this judgment: for the moment, I merely note that they testify to the existence of not merely a strong personal relationship, but also a high degree of collaboration on commercial matters - in particular the Wo Mei and Ho Chung projects - and that it is clear from the letters that Mr Leung was looking forward not merely to living with Miss Chan but also to setting up in business with her.

11. In March 1995 Mr Leung was allowed out of prison during the day, and was once again able to conduct his business affairs personally.

12. In early May 1995 Miss Chan came to England to stay with Mr and Mrs Oscar Lai, who were friends of Mr Leung, in Guildford. Mr Lai, who is a lawyer, had also been convicted of bribery in Hong Kong, and he and Mr Leung had become acquainted in prison. Miss Chan's purpose in coming to England was to look for a suitable house in which she and Mr Leung could live together.

13. On 18 May 1995 contracts were exchanged for the purchase of Hill House by Miss Chan, at the price of £360,000. Hill House is a large 4-bedroom family property with a substantial garden, a swimming pool and a fish pond.

14. A deposit of £40,000 was paid on exchange of contracts, the funds being remitted from Mr Leung's personal account in Hong Kong.

15. On 1 June 1995 Mr Leung was released from prison, having served two years of his three-year sentence.

16. Completion of the purchase of Hill House took place on 11 June 1995. On completion, Hill House was transferred into the sole name of the Company (which had earlier been bought off the shelf for the purpose). Payment of the balance of the purchase price (amounting to £320,000) was funded by a loan of £360,000 made to the Company by Bank of East Asia, London, repayable by monthly instalments. The loan was secured by a legal charge over Hill House, and by a charge over a cash deposit of £360,000 made with Bank of East Asia, Singapore Branch, by Mr Leung. The cash deposit was in turn funded partly out of Mr Leung's own resources and partly from a loan made to him by Goldface Finance Ltd, a company owned by a Mr Tai, a business associate of Mr Leung. Miss Chan joined Mr Leung in signing a letter to the nominee director of the Company (East Asia Corporate Services Nominees Ltd) asking that the necessary resolutions be passed to accept the loan from the Bank of East Asia and to grant the legal charge over Hill House.

17. The balance of the Bank of East Asia loan of £360,000 remaining after completion was paid (with Mr Leung's consent) to Miss Chan. No issue arises in the action as to that payment, and the judge made no reference to it in his judgment beyond recording that it was made.

18. Following completion, Miss Chan and Mr Leung moved into Hill House and set up house there together. Monthly repayments were made under the Bank of East Asia's charge. The evidence before the judge did not disclose the source of the funds with which the repayments were made, and he made no finding as to that.

19. In September 1995 the loan of £360,000 was refinanced on revised terms by the Bank of East Asia, and the cash deposit in Singapore was reduced to £180,000 in exchange for a joint personal guarantee by Miss Chan and Mr Leung limited to £180,000.

20. In 1996 Miss Chan was contacted by the Bank of East Asia in connection with a monthly repayment which had for some reason been missed. This brought home to her that Hill House was still subject to a mortgage to secure a debt of £360,000. She pressed Mr Leung for the mortgage debt to be repaid in full, but Mr Leung persuaded her to agree that only half the debt should be repaid, so that funds would be available for the acquisition of a portfolio of investment property.

21. Accordingly on 2 July 1996, the remaining cash deposit of £180,000 was remitted to the London Branch of the Bank of East Asia, thereby reducing the Bank of East Asia loan to £180,000.

22. In December 1996 the Company embarked on the acquisition of a portfolio of investment properties. Over the ensuing period it acquired nine investment properties in Surrey. The purchases of these properties were made in the name of the Company, and were financed by loans to the Company. The Company received what the judge describes (at page 61E) as "significant rental income" from these properties. All the properties have since been sold, and the Company's outstanding indebtedness to the Bank of East Asia (after giving credit for mortgage repayments) has been discharged out of the net proceeds of these sales. Accordingly Hill House is now free from mortgage. The final payment to clear the loan was made in October 1999 and amounted to £78,939.95. The net proceeds of the sales of the investment properties amounted to some £1.3M, showing a capital profit of some £108,000 subject to deduction of the costs of sale.

23. Before the judge, it was accepted by both Miss Chan and Mr Leung that the Company was the beneficial owner of the investment properties, although in the course of his judgment the judge expressed doubt as to whether that was the true position.

24. In 1998 the relationship between Miss Chan and Mr Leung broke down irretrievably, and in June 1998 Miss Chan obtained a non-molestation order against Mr Chan. Since then, Miss Chan has remained at Hill House on her own, pursuing her studies at the University of Surrey.

25. Subsequently the nominee director of the Company resigned, since joint instructions from Miss Chan and Mr Leung could no longer be obtained, and Miss Chan was appointed sole director of the Company in its place.

THE ISSUES IN THE ACTION

26. In support of her claim to relief in the action, Miss Chan alleges in her Particulars of Claim:

- That prior to Mr Leung's conviction, and subsequently during his prison sentence, Mr Leung promised her that he would marry her and that he would buy her a house abroad (paras 3 and 4).
- That in about mid-1993 Mr Leung told her that if she looked after his interest in the Wo Mei and Ho Chung projects she would have a half share in the profits of those projects, and that the proceeds would be applied in buying her a property abroad where they could live together after his release and in purchasing property abroad as an investment for their future (para 5).
- That on that basis she agreed to look after his interests in the two projects (para 5), and duly did so (paras 7 and 8).
- That in about March 1995, after the two projects had been completed, Mr Leung asked her to go to England and find herself a house where they would live together as soon as he was released (para 9).
- That the initial plan was that Hill House should be purchased in her name, but that Mr Lai and Mr Leung persuaded her that it should be purchased in the name of an offshore company (i.e. the Company) (para 10).
- That she "was concerned that if Hill House was in the name of a company it could be sold without her consent when it was intended to be a home for ever and she had given up her life and connections in Hong Kong", and that "it was then agreed that [she] should have 51 per cent of the shares in Hill House [sic] so that it could never be sold without her consent" (para 10).

- That the deposit of £40,000 was funded out of the proceeds of the Wo Mei and Ho Chung projects (para 11).
- That she did not know that Hill House was charged to the Bank of East Asia (para 12).
- That she and Mr Leung built up and maintained a property portfolio almost exclusively through the work which she did, and that she also made substantial payments towards expenses in relation both to the portfolio and to Hill House (para 13).
- That in the circumstances there was at all material times a common intention between her and Mr Leung that she should have a beneficial interest in Hill House, and that by agreement the extent of that interest was quantified at 51 per cent; and that it was further agreed that Hill House would not be sold without her consent (para 14).
- That in reliance on that common intention she left her job in Hong Kong and set up a home for herself and Mr Leung in England (para 14).
- That in the premises Hill House is held by the Company on trust for her and Mr Leung as beneficial owners in the proportion 51/49 (para 16). And
- That Mr Leung is not entitled to force her to sell Hill House; that if it is sold Mr Leung is not entitled to make a deduction of £360,000 before the proceeds are divided; and that even if in principle such a deduction could be made she is entitled to be credited with one half of the £360,000 as part of the proceeds of the Wo Mei and Ho Chung projects (para 16).

27. By his Defence, Mr Leung alleges:

- That he and Miss Chan are interested in Hill House only indirectly, by virtue of their shareholdings in the Company, and that their entitlements in respect of properties owned by the Company are accordingly limited to such distributions as the Company may lawfully make to its contributories following payment of its debts and other liabilities (para 1).
- That he never represented to Miss Chan that she would acquire any interest in any of his assets as a result of her assistance to him during the period of his imprisonment or otherwise (para 2.9).
- That in any event Miss Chan's involvement in his property projects was insubstantial (para 2.11).
- That Miss Chan "never had, nor was she expected to have or otherwise promised any interest at all in the [property projects] or in their proceeds" (para 2.12).
- That at no time was it contemplated that Hill House would be anything other than a home for him and Miss Chan, and that it was never suggested or agreed that the house should be solely a home for Miss Chan in the absence of Mr Leung (para 3.3).
- That "it was expressly understood between the parties at the time that Hill House was to be acquired in the name of an offshore company which would hold the title to the property beneficially" (para 3.7).
- That no part of the purchase price of Hill House, or of the cash deposit, was derived from the Wo Mei and Ho Chung projects (para 4.10).
- That the funds which enabled the Company to repay £180,000 of the loan from the Bank of East Asia were advanced to the Company by way of loan and did not derive from the Wo Mei and Ho Chung projects (para 5.2).
- That the Company is indebted to him in a sum of not less than £644,366, and that, demand having been made for payment of that sum, it is immediately due and payable (para 11.1).
- That the Company is a "quasi-partnership" between him and Miss Chan (para 11.2). And
- That in any event even if (contrary to his case) the Company holds Hill House on trust for him and

Miss Chan, the purpose for which the trust was established has come to an end and/or is no longer capable of being achieved, and consequently the trust should be wound up and Miss Chan's occupation of Hill House terminated (para 11.3).

THE CREDITOR'S PETITION

28. The creditor's petition presented by Mr Leung is in common form. In paragraph 7 it alleges that the Company is indebted to him in the sum of £644,366, being the aggregate of several sums advanced by him to the Company by way of loans as at the date of the petition (28 August 1998). Paragraph 10 alleges that the Company has neither paid nor satisfied that debt or any part of it nor made any offer to secure or compound it, and paragraph 11 alleges that the Company is insolvent and unable to pay its debts.

THE CONTRIBUTORY'S PETITION

29. The contributory's petition alleges (in para 1.3) that the Company has assets within the jurisdiction (including Hill House). Paragraph 4 of the contributory's petition, which is headed "Basis of the Parties' Participation in the Company", alleges that at all material times between 1995 and June 1998 Miss Chan and Mr Leung cohabited as man and wife, and that the Company has at all material times been a quasi-partnership between him and Miss Chan in the sense that their participation in the Company was based on mutual affection, trust and confidence and was premised on the continued subsistence of the personal relationship between them. Paragraph 6 of the petition alleges that since 22 June 1998 the personal relationship between them has irretrievably broken down. Paragraph 7 of the petition alleges that in the premises it is just and equitable that the Company should be wound up. Paragraph 8 alleges that in a winding up there would be a surplus available for distribution to the members of the Company (a necessary allegation in the case of a contributory's petition).

THE RELEVANT STATUTORY PROVISIONS

30. It is convenient at this point to set out the relevant provisions of the FLA and the TLATA.

The FLA

31. Section 33 of the FLA provides as follows (so far as material):

(1) If -

(a) a person ("the person entitled") -

(i) is entitled to occupy a dwelling-house by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving him the right to remain in occupation, or

(ii) ..., and

(b) the dwelling-house -

(i) is or at any other time has been the home of the person entitled and another person with whom he is associated, or

(ii) was at any time intended by the person entitled and any such

other person to be their home,

the person entitled may apply to the court for an order containing any of the provisions specified in subsections (3), (4) and (5).

(2) ...

(3) An order under this section may -

(a) enforce the applicant's entitlement to remain in occupation as against the other person ("the respondent");

(b) require the respondent to permit the applicant to enter and remain in the dwelling-house or part of the dwelling-house;

(c) regulate the occupation of the dwelling-house by either or both parties;

(d) if the respondent is entitled as mentioned in subsection (1)(a)(i), prohibit, suspend or restrict the exercise by him of his right to occupy the dwelling-house;

(e) ...;

(f) ...; or

(g) ...

(4) ...

(5) ...

(6) In deciding whether to exercise its powers under subsection (3) and (if so) in what manner, the court shall have regard to all the circumstances including -

(a) the housing needs and housing resources of each of the parties and of any relevant child;

(b) the financial resources of each of the parties;

(c) the likely effect of any order, or of any decision by the court not to exercise its powers under subsection (3), on the health, safety or well-being of the parties and of any relevant child; and

(d) the conduct of the parties in relation to each other and otherwise.

...

The TLATA

32. Section 12 of the TLATA provides as follows (so far as material):

(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time -

(a) the purposes of the trust include making the land available for his occupation (or for the occupation of beneficiaries of a class of which he is a member or of beneficiaries in general), or

(b) the land is held by the trustees so as to be so available.

(2) Subsection (1) does not confer on a beneficiary a right to occupy land if it is either unavailable or unsuitable for occupation by him.

(3) This section is subject to section 13.

33. Section 13(1) of the TLATA empowers trustees of land, where two or more beneficiaries are (or would be but for the section) entitled under section 12 to occupy land, to exclude or restrict the entitlement of any one or more (but not all) of them. The following subsections limit the extent to which the power may be exercised and set out the matters to which the trustees are to have regard in exercising the power.

34. Section 14 of the TLATA provides as follows (so far as material):

(1) Any person who is a trustee of land or has an interest in property subject to a trust of land may make an application to the court for an order under this section.

(2) On an application for an order under this section the court may make any such order -

(a) relating to the exercise by the trustees of any of their functions (including an order relieving them of any obligation to obtain the consent of, or to consult, any person in connection with the exercise of any of their functions), or

(b) declaring the nature or extent of a person's interest in property subject to the trust,

as the court thinks fit.

(3) ...

(4) ...

35. Section 15(1) of the TLATA provides as follows (so far as material):

The matters to which the court is to have regard in determining an application for an order under section 14 include -

(a) the intentions of the person or persons (if any) who created the trust,

(b) the purposes for which the property subject to the trust is held,

(c) ...

(d) ...

THE TRIAL

36. The trial of the action occupied some five court days. The judge heard oral evidence from Miss Chan and Mr Leung, both of whom were extensively cross-examined.

THE JUDGMENT

37. In resolving the numerous conflicts of evidence which arose, the judge accepted the evidence of Miss Chan in preference to that of Mr Leung. The judge found Miss Chan to be an impressive and convincing witness. By contrast, he found Mr Leung to be an unimpressive and unconvincing witness, with a tendency to lie when it suited his purpose. There is no challenge to the judge's conclusions in this respect.

38. In the course of his long and detailed judgment, the judge made the following findings in relation to events occurring prior to the purchase of Hill House (references are to pages in the transcript of the judgment):

- In about April 1993 Mr Leung promised Miss Chan that he would divorce his wife, marry Miss Chan and give her a house in Chuk Kuk (in the New Territories) which he owned (page 7D-E).
- In the event, the house in Chuk Kuk was sold (with Miss Chan's concurrence) in order to raise money for legal expenses incurred by Mr Leung in connection with an application for bail and an unsuccessful appeal against conviction and sentence (pages 8F-9D).
- The gift of HK\$700,000 by Mr Leung to Miss Chan in 1993 was made out of natural love and affection, and is not to be taken into account in considering whether Miss Chan acted to her detriment in assisting Mr Leung in relation to the Wo Mei and Ho Chung projects (pages 37E-F and 41A-B).
- Mr Leung asked Miss Chan to help with his legal and business affairs in return for a share in the business he had built up (page 35A-B).
- On 2 June 1993, in the course of a prison visit by Miss Chan, Mr Leung told her that no one could or would help him except her; that he wanted her to help run his business affairs and organise his bail and appeal; and that if she did these things for him, everything he had would be shared with her (pages 9F-10A).
- At an early stage of his prison sentence, Mr Leung repeated his promise to marry her, said he would buy her a better house than Chuk Kuk in the future and told her she was to be, in effect, his business partner (page 10B-C).
- Mr Leung expressly promised Miss Chan a share in his development business in return for her assistance in running that business (page 39E-F).
- Miss Chan's assistance in progressing the Wo Mei and Ho Chung projects "went far beyond what an intended wife could be expected to do for an intended husband out of love" (page 40A-B).
- Miss Chan "was induced to work on the projects by the promise of a share in them, on the basis that the money made [from] those projects would be the funds that would enable Miss Chan and Mr Leung to set up a new life together, including a new home and a new jointly owned business of some kind after Mr Leung left prison" (page 40B-C).
- Miss Chan "altered her position by remaining with Mr Leung and not pursuing her political career and by all the work she did, and did so to her significant detriment ..." (page 40D-E).
- Accordingly, the judge concluded (at page 41D-F) that:

Mr Leung was, therefore, a constructive trustee of whatever interests he had in [the Wo Mei and Ho Chung] projects, whether directly or through nominees and in whatever funds he obtained from those projects, whether directly or through any interests in any company.

- The judge went on to hold that since the general tone of the letters written by Mr Leung to Miss Chan while he was in prison was that they would share everything equally, Miss Chan's beneficial interest in the two projects amounted to 50 per cent.

39. As to the purchase of Hill House and events occurring thereafter, the judge made the following findings:

- The background to the purchase of Hill House was that it was:

[t]he common expectation of the parties ... that when Mr Leung was released from prison he would buy Miss Chan a house to be their home as man and wife and as a

replacement for the intended gift of [the house in] Chuk Kuk, and that, separately from that, they would be in some sort of business venture together (page 43D-E).

40. The £40,000 used to pay the deposit on exchange of contracts for the purchase of Hill House came from the proceeds of the Wo Mei and Ho Chung projects (page 47B-C).

- In late May 1995 (that is to say after exchange of contracts but before completion) Miss Chan had doubts about whether Mr Leung would divorce his wife. She flew to Hong Kong and confronted Mr Leung with these doubts, but did not receive a straight answer. She decided that it was all over between them and that she would start a fresh life without him. She subsequently returned to England to stay with Mr and Mrs Lai. (Pages 48E-49B).
- On his release from prison, Mr Leung flew to England and also stayed with Mr and Mrs Lai (page 49B-D).
- Mr Lai advised Miss Chan and Mr Leung that there were benefits in holding Hill House in an offshore company and that an offshore company would be useful if other UK properties were to be acquired, and accordingly on completion Hill House was transferred into the name of the Company (pages 47G-48B).
- On 3 June 1995 (that is to say, prior to completion) a meeting took place at Mr and Mrs Lai's house between Miss Chan, Mr Leung, and Mr Lai. The judge describes this meeting as follows (on pages 49E-50D):

Mr Leung confirmed that he wanted to marry Miss Chan but asked her to agree that he would own 80 per cent of the shares in the Company. Miss Chan pointed out [that] if Mr Leung had 80 per cent of the shares, he could force a sale of Hill House against her will. She was concerned that he could change his mind about marrying her, sell Hill House and leave her with very little, if convenient to him. She was unwilling to put herself in a position where she could be treated like that. Mr Leung acknowledged that Miss Chan had supported him through bad times. After the intervention of Mr Lai it was agreed that in return for Miss Chan's agreement to set up home with Mr Leung at Hill House Miss Chan would be entitled to 51 per cent of the value of Hill House and it would never be sold unless both Miss Chan and Mr Leung agreed. To reflect this, it was agreed that Miss Chan would have 51 per cent of the shares in [the Company] and Mr Leung 49 per cent. She was told by Mr Lai that with her having a majority shareholding in the [Company] Mr Leung could not force a sale of Hill House. The now happier couple moved into Hill House and lived there as man and wife.

Miss Chan's account of the events of 3 June 1995 set out above is not really challenged by Mr Leung in his evidence, save that he asserts that [the Company] owns Hill House beneficially. The first issue is whether [the Company] is the beneficial owner of Hill House or a trustee. In view of Miss Chan's evidence, which I accept, of what was agreed on 3 June 1995, it is clear that the agreement was that the parties would be beneficial owners of Hill House in the proportions of 51 to 49. Accordingly, [the Company] is a trustee and a shareholding of 51 to 49 in [the Company] reflects the parties' interests in the sole asset of [the Company] at that time, namely Hill House.

It was a term of the agreement that Hill House could not be sold without the consent of both. It is clear that this term was agreed to meet Miss Chan's concern that Mr Leung might decide to leave her and that she might then lose her home. The discussion on 3 June 1995 has more of the flavour of a commercial negotiation than one normally finds between parties setting up home together in anticipation of married bliss. That is because mutual confidence had been badly dented by Mr Leung's earlier failure to say he would definitely divorce his wife and marry Miss Chan. Ownership of Hill House, albeit less than 100 per cent ownership of the dream home previously envisaged, and control over whether it would be sold, were clearly important parts of the agreement. The express agreement of 51:49 ownership is determinative of the question of the interests of the parties in Hill House and of the terms on which [the Company] held the house as trustee ... I also hold that it was a term of the trust that Hill House should not

be sold without the consent of both parties.

- At the meeting on 3 June 1995 Miss Chan was "willing to accept less than she had been promised for the work she did". (pages 51G-52A)
- By devoting herself to Mr Leung's affairs in reliance on his promise of 100 per cent of a "dream house", Miss Chan altered her position to her detriment. (page 51F-G)
- Hill House was the "dream house" promised by Mr Leung in 1993. (page 52C-D)
- Miss Chan moved into Hill House with Mr Leung in the belief that he intended to marry her. (page 52D-E)
- Miss Chan acted to her detriment by agreeing to live with Mr Leung at Hill House since he was deceiving her when he said he was intending to marry her. (page 52D-E)
- "... Miss Chan acted to her detriment in relying both on the promise in 1993 to buy her a house to replace [the house in] Chuk Kuk if she helped with Mr Leung's affairs and on the express arrangement in June 1995 that she should have 51 per cent of Hill House". (pages 52F-53A)
- Miss Chan was accordingly beneficially entitled to 51 per cent of Hill House. (page 53A)
- As to the financing of the purchase of Hill House, Miss Chan did not know the amount of the loan from the Bank of East Asia, nor did she know about the back-to-back deposit. Mr Leung was responsible for organising the finance. (Page 54C-G)
- The back-to-back deposit and the £360,000 secured loan on Hill House was a device by which Mr Leung hoped that, if he and Miss Chan split up, he could engineer matters so that the bank forced a sale or took possession of Hill House and sold it, recovered its loan and costs from the proceeds of sale and returned the cash deposit to Mr Leung. (page 55C-D)
- The parties' intention was that Miss Chan's share of the profits of the Wo Mei and Ho Chung projects should go into Hill House, although in the event only the deposit of £40,000 was funded from such profits (page 58F-G). The transaction was structured in a different way simply for convenience. (pages 58G-59A) The judge continued (at page 59A-C):

I find, therefore, that the $\text{€}180,000$ paid to reduce the loan is a payment to Miss Chan of her share of the Wo Mei and Ho Chung monies which she insisted should be used to reduce the mortgage loan to $\text{€}180,000$. $\text{€}20,000$ of her money had already been used to buy Hill House. Sufficient of the $\text{€}180,000$ to achieve a position in which she had paid 51 per cent of the total cost of Hill House is to be treated as a contribution by her to the purchase of Hill House; any balance is a contribution by Mr Leung.

- Referring to the payment made by the Company in discharge of the outstanding indebtedness to the Bank of East Asia (such payment being made out of the net proceeds of sale of the investment properties) (page 61A-B), the judge said:

... the amount involved is a debt from Mr Leung and Miss Chan to [the Company]. It is a good debt. As between Mr Leung and Miss Chan, Mr Leung is responsible for paying this debt as Miss Chan has discharged her share of the mortgage debt with the $\text{€}180,000$ in July 1996.

41. As to the creditor's winding-up petition presented by Mr Leung, the judge declined to make a winding up order since he was not satisfied on the balance of probabilities that the Company was unable to pay its debts as they fell due. He said (at page 64E) that the figures were insufficiently clear and complete to enable him to be so satisfied. He continued:

If I had been satisfied that it is insolvent I would have declined to wind it up because [it] is a company which is the vehicle for the investments made by Mr Leung and Miss Chan. It was a quasi-partnership, and only Mr Leung and Miss Chan have any interest in it. No public

purpose appears to be served by winding it up. I am told by counsel that there are no outside creditors; there is no evidence that it ever prepared accounts. The parties have put their case on the basis that [the Company] was the beneficial owner of the investment properties but I consider that to be doubtful. In these exceptional circumstances it is appropriate to exercise the limited discretion given by section 122 [of the Insolvency Act 1986] and to consider the question of winding-up solely under the just and equitable ground.

42. As to the contributory's petition presented by Mr Leung, the judge said this (at page 62D):

[The Company] was the vehicle by which Mr Leung and Miss Chan held investment properties. Section 125(2) of the Insolvency Act [1986] provides that a court should not make an order on the just and equitable ground if some other remedy is available and the petitioner is acting unreasonably in seeking to have the company would up instead of pursuing some other remedy.

The only people interested in [the Company] as contributories or creditors appear to be Mr Leung and Miss Chan. The financial position between them can be sorted out in the main action, if necessary by taking an account. That is likely to be a quicker and cheaper means of resolving matters than the appointment of a liquidator, who will charge fees for finding out and checking what the parties to the action already know. There is no question of the assets having been sold at an undervalue. Mr Leung raises an issue that Miss Chan has had the benefit of rental income which should have been shared with him. That can be dealt with on any account, but I would hope that the parties might be able to agree most, if not all, of the figures.

An account in the action would be able to encompass all the financial issues between the parties.

43. Later, at page 65B-C, the judge said this:

I find that an account in this action is the appropriate remedy for the parties and that, now that all the properties have been sold and turned into cash, it is unreasonable to seek the winding up of [the Company].

44. The judge accordingly dismissed both petitions.

45. The judge then went on to consider Miss Chan's claims to relief under the FLA and the TLATA. He turned first to Miss Chan's claim for a declaration under section 14 of the TLATA as to her beneficial interest in Hill House, and held (at p.67B) that the extent of her beneficial interest was 51 per cent. He then turned to the question of her continued occupation of Hill House. In this connection, he concluded (at page 70G) that each of Miss Chan and Mr Leung was entitled to occupy Hill House in right of their respective beneficial interests, save only for the fact that Mr Leung's right of occupation had been terminated by the non-molestation order.

46. In reaching that conclusion, the judge rejected a submission by Miss Rosalind Nicholson (who appeared for Mr Leung before the judge, as she does on this appeal) that Miss Chan had no subsisting right to occupy Hill House since (a) it was not a purpose of the trust of Hill House (assuming that such a trust existed) that Hill House should be available for occupation by Miss Chan alone, and (b) that in any event Hill House was "unsuitable for occupation by [Miss Chan]" within the meaning of section 12(1) on the ground that it was too large for her needs, that it was falling into disrepair, and that Miss Chan's income was such that she could not afford to keep it in repair. As to (a), the judge held (at page 76A) that the purpose of the trust of Hill House included a purpose to provide a home for Miss Chan after the relationship between her and Mr Leung had come to an end; as to (b) his view was that the expression "unsuitable for occupation" in section 12(2):

... must mean something more than a house being unnecessarily large, particularly when coupled with [the expression] 'unavailable for occupation' (see pages 71G-72A).

47. The judge then considered the various factors relevant to the question whether Miss Chan's right of occupation should be protected. He summarised them in the following passage in his judgment (at page 77A to 78C):

To summarise, the factors favouring Miss Chan's continuing occupation of Hill House are her need for a house here; her relative poverty; the disruption of her studies by a sale; Mr Leung's conduct; the intention of the parties that Hill House would be a home for one of them if the relationship ended; and Miss Chan's wish as a majority beneficiary.

Factors favouring a sale of the property are to enable Mr Leung to get his share of the money tied up in Hill House, though this factor is nullified by the fact that Mr Leung has the use of Miss Chan's remaining share of the Hong Kong developments; when Miss Chan finishes her studies her visa will expire and she will have no need for a house; the desirability for a clean break; the deteriorating condition of Hill House; the fact that Hill House is unnecessarily large for Miss Chan; and that with her share of the proceeds of sale of Hill House Miss Chan could buy a suitable alternative property.

Where the parties have expressly agreed what is to happen if they split, the court should be slow to interfere with that arrangement and should not do so merely because one party no longer likes it. Here, there are factors favouring continued occupation by Miss Chan. But the factors in favour of a sale include matters, such as the considerable deterioration of [the] property and the effect on its value and the benefit of a clean break, which benefit Miss Chan as much as Mr Leung.

The determinative factor in my mind in this case is that Miss Chan's need for a house, and indeed her right to live here, will come to an end when her studies come to an end. The end of her current course appears to me to be an appropriate time for the house to be sold. It may be that Miss Chan will want to embark on further studies, but that is too speculative. The factors in favour of a sale fairly soon outweigh catering for that possibility.

I will make an order, therefore, under section 33 of the [FLA] that Miss Chan is entitled to remain in occupation of Hill House and Mr Leung is excluded from occupation until the house is sold. I will make an order under section 14 of the [TLATA] for the sale of the house. The house is not to be put on the market, unless Miss Chan wants to sell it earlier, until Miss Chan has completed her current course of studies. She is to continue to occupy it without the disruption of a sale until then.

48. The judge went on to conclude that in the circumstances of the case it would not be appropriate for Miss Chan to have to pay anything for her continued occupation of Hill House.

THE GRANT OF PERMISSION TO APPEAL

49. In granting general permission to appeal, Chadwick LJ identified two specific issues which seemed to him to be arguable. Those issues were:

1. whether the promises made by Mr Leung to Miss Chan were insufficiently precise to give rise to any trust in relation to the Wo Mei and Ho Chung projects (or the profits generated by those projects); and
2. whether the parties intended that the Company should be the beneficial owner of Hill House, their respective interests being reflected in their shareholdings in the Company.

THE GROUNDS OF APPEAL

50. Mr Leung challenges the judge's conclusion that Miss Chan acquired a beneficial interest in the Wo Mei and Ho Chung projects, given the absence of any agreement or promise relating specifically to those assets (the first of the two specific issues identified by Chadwick LJ).

51. As to the judge's finding that Miss Chan acted to her detriment in assisting Mr Leung in relation to those projects, it is contended that the judge ought to have taken into account the benefits which Miss

Chan received directly or indirectly in consequence of her assistance with Mr Leung's affairs, and in particular the sum of HK\$700,000 which she received from Mr Leung to enable her to purchase a half share in a flat in Hong Kong.

52. As to the judge's conclusion that Miss Chan has a beneficial interest in Hill House, it is contended that a promise by Mr Leung that he would buy Miss Chan a "dream house" in the future was not sufficient in law to give rise to such a beneficial interest either under a constructive trust or by the application of the doctrine of proprietary estoppel, particularly where the trust property (Hill House) was not identified or identifiable by the promisor or by the promisee either at the time the promise was made or at any time during the period during which the detriment suffered in reliance on the promise was incurred.

53. As to detriment, it is contended that the judge was wrong to conclude that in moving into Hill House in circumstances where Mr Leung had deceived her into believing that he intended to marry her, Miss Chan suffered detriment capable of founding an entitlement to a beneficial interest in Hill House. It is further contended that the judge was wrong to treat Miss Chan's work on the Wo Mei and Ho Chung projects as constituting detriment referable to an agreement or promise that she should have a beneficial interest in Hill House.

54. As to the funding of the purchase of Hill House, it is contended that in finding that the £40,000 remitted by Mr Leung on 15 May 1995 as the deposit on Hill House came from the Wo Mei project the judge ought to have taken into account evidence before him which showed that at that date only the equivalent of some £35,000 had been received from that project, and that none of the payments representing the proceeds of that project could be matched to corresponding payments into Mr Leung's account from which the deposit was paid. It is further contended that to the extent that the judge found that the deposit moneys included moneys coming from the Ho Chung project there was no, alternatively there was insufficient, evidence to support such a finding. In this connection it is pointed out that Miss Chan did not assert that any part of the deposit moneys came from the Ho Chung project.

55. As to the £180,000 applied in reducing the mortgage debt to the Bank of East Asia, it is contended that the judge was wrong to conclude that that payment represented, or was intended to represent, a contribution by Miss Chan out of her share of the proceeds of the Wo Mei and Ho Chung projects. It is contended that such a finding was not supported by the evidence of either party, and was inconsistent with Miss Chan's own case (which was to the effect that her belief and understanding was that the entirety of the Bank of East Asia loan was repaid and a new loan obtained for the purpose of funding future investments through the Company).

56. As to Miss Chan's right of occupation (should she succeed in establishing a beneficial interest in Hill House), it is contended that the judge wrongly construed the statutory provisions; and that in any event he ought to have concluded that Miss Chan should be chargeable with an occupation rent in respect of her continued occupation of Hill House.

57. As to the contributory's petition, it is contended that the judge was wrong to conclude that the taking of an account in the action was or was capable of constituting a sufficient alternative remedy, for the purposes of section 125(2) of the Insolvency Act 1986, so as to render Mr Leung's claim to a winding up order unreasonable.

58. As to the creditor's petition, it is contended that the judge was wrong to conclude that the Company was not insolvent, given the figures for its assets and liabilities contained in an accountant's report adduced by Miss Chan (and accepted by Mr Leung), which showed that (leaving Hill House out of account for this purpose) its liabilities exceeded its assets by at least £259,425.

59. It is to be noted that the second of the two specific issues identified by Chadwick LJ as being arguable (viz. whether the parties intended the Company to be the beneficial owner of Hill House) does not appear in the grounds of appeal.

THE ARGUMENTS

The arguments of Miss Nicholson for Mr Leung

60. Miss Nicholson made clear at the outset of her submissions that (save in certain limited respects) she does not challenge the findings of fact which the judge made. In particular, she does not challenge the judge's finding (at page 50E-F), in relation to the agreement reached on 3 June 1995, that:

... the agreement was that the parties would be beneficial owners *of Hill House* in the proportions of 51 to 49.(My emphasis.)

61. Hence the absence from the grounds of appeal of the second of the two specific issues identified by Chadwick LJ.

62. Rather, Miss Nicholson's argument in relation to Hill House concentrates on what she submits is a requirement that Miss Chan should have altered her position to her detriment on the faith of the express oral agreement which the judge found to have been made.

63. Starting at the beginning of the factual history, however, Miss Nicholson submits that the evidence before the judge was insufficient to justify the imposition of a constructive trust in relation to the Wo Mei and Ho Chung projects. She points out that there is no question of Miss Chan having made any direct financial contribution to either of those projects. As to the agreement which the judge found to have been made, under which Miss Chan was to have a share in these projects, she submits that the evidential basis for the agreement is unclear on the face of the judgment, and that an intention that she should have some share in the two projects does not justify the conclusion that Miss Chan should have a half share in them. Moreover, Miss Nicholson submits that a further element of uncertainty is introduced by the possibility that the agreement may have included interests in other, unspecified, projects which were on foot at the material time.

64. As to detriment, Miss Nicholson submits that the existence of the requirement for an alteration of position to the detriment of the claimant is well-established on the authorities. She referred us in particular to a much-quoted passage from the speech of Lord Bridge of Harwich in *Lloyds Bank plc v. Rossett* [1991] 1 AC 107, 132E, where Lord Bridge said this:

The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. ***Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.*** (My emphasis.)

65. Miss Nicholson submits that on the findings of the judge in the instant case Miss Chan cannot satisfy that requirement, so far as the Wo Mei and Ho Chung projects are concerned. Whilst acknowledging that comparison with the facts of other reported cases is not always helpful, Miss Nicholson nevertheless invites a comparison between what Miss Chan did in the instant case and the actions of, for example, those of Mrs Lesnoff in *Ungarian v. Lesnoff* [1990] Ch 206. Miss Nicholson points out that Miss Chan's work in relation to the two projects took place over a period of some two years, during which she was being remunerated by Ho & Chan. She further submits that the judge ought to have taken account of the payment of HK\$700,000 in considering whether Miss Chan had suffered any detriment in reliance on Mr Leung's vague promise of a share in his business interests.

66. Miss Nicholson further submits that it is clear on the evidence that the relationship between Miss Chan and Mr Leung was not merely a personal relationship but was also a commercial one. She submits that (as she puts it in her written skeleton argument) "the tender exchanges of a courtship [an expression borrowed from Waite J in *Hammond v. Mitchell* [1991] 1 WLR 1127 at 1139B] which might suffice as evidence of an agreement where the matrimonial or quasi-matrimonial home is concerned will not survive the more rigorous scrutiny which is applicable in a more commercial context".

67. Miss Nicholson submits that if the evidence before the judge was sufficient to justify the intervention of a court of equity, that intervention should take the form of the application of the doctrine of proprietary estoppel, rather than the imposition of a constructive trust. She submits that the flexibility of the doctrine of proprietary estoppel would enable the court to tailor the extent of Miss Chan's beneficial interest in the two projects to fit the facts of the case, and that on that approach Miss Chan's beneficial interest should be much less than a half share.

68. As to Hill House, as noted earlier Miss Nicholson does not challenge the judge's finding that there was an express oral agreement that Miss Chan should have a 51 per cent beneficial interest in Hill House; rather, she concentrates on the requirement of detriment.

69. She submits firstly that Miss Chan's act of moving into Hill House cannot be regarded as an alteration of her position referable to Mr Leung's agreement that she should have a 51 per cent beneficial interest in Hill House. She relies on a passage from the judgment of Nourse LJ in **Grant v. Edwards** [1986] Ch 638, 648, where he said:

It would be possible to take the view that the mere moving into the house by the woman amounted to acting upon the common intention. But that was evidently not the view of the majority in **Eves v. Eves** ... And the reason for that may be that, in the absence of evidence, the law is not so cynical as to infer that a woman will only go to live with a man to whom she is not married if she understands that she is to have an interest in their home.

70. Miss Nicholson submits that the relevant finding in this connection is that Miss Chan moved into Hill House in the belief that Mr Leung intended to marry her. That finding, she submits, negatives any suggestion that in moving into Hill House Miss Chan relied on any agreement that she should have a beneficial interest in it. In any event, she submits, any element of detriment to Miss Chan in moving into Hill House with Mr Leung is outweighed by the benefit of being able to enjoy several years' rent-free occupation of a substantial and desirable property.

71. Secondly, Miss Nicholson submits that any acts of detriment on the part of Miss Chan in relation to the Wo Mei and Ho Chung projects cannot be prayed in aid as being referable to her expectation of a beneficial interest in Hill House since when those acts were done Hill House was neither identified nor identifiable. Accordingly, she submits, acts done by Miss Chan in relation to the two projects cannot be linked to any promise or agreement in relation to Hill House.

72. As to the funding of the purchase of Hill House, Miss Nicholson submits that it was clear on the evidence before the court that none of the payments emanating from the Wo Mei project could be matched to payments into the account from which the funds were drawn by Mr Leung to provide the deposit. As to the Ho Chung project, Miss Nicholson points out that in her witness statement Miss Chan abandoned her case that moneys from that project were used to pay the deposit, and it was not contended before the judge that any of the deposit funds could have come from that source.

73. As to the reduction of the mortgage debt in July 1996, Miss Nicholson points out that there is no finding that any part of the £180,000 cash deposit represented, directly or indirectly, the proceeds of either the Wo Mei or the Ho Chung project, and no evidence to suggest that that was the case. Nonetheless, the judge concluded that the £180,000 ought to be regarded as representing the payment to Miss Chan of her share of the proceeds of the two projects. Miss Nicholson submits that the judge erred in law in reaching that conclusion. She further asserts that at trial neither party contended that the £180,000 was intended to be a payment to Miss Chan of her share of the proceeds of the two projects; and that neither party was cross-examined about the character which the payment was intended to bear. Miss Nicholson also submits that the judge's conclusion in relation to the £180,000 is inconsistent with Miss Chan's own case, in that her contention at trial was that the whole of the outstanding mortgage debt was repaid and a fresh loan taken out to fund future investments through the Company.

74. As to the right of occupation claimed by Miss Chan, Miss Nicholson repeats the submissions which she made to the judge; her primary submission being that Hill House is "unsuitable for occupation by Miss Chan" within the meaning of section 12(2) of the TLATA, for the reasons indicated earlier.

75. As to the creditor's petition, Miss Nicholson submits that even if one brings into account the debt of £180,000 which the judge found was payable by Mr Leung to the Company (and which is specifically

referred to in his order) the available figures establish with sufficient clarity that the Company is insolvent on a balance sheet basis. Accordingly, she submits, the judge ought to have found that the Company was insolvent and unable to pay its debts, and ought to have exercised his discretion under section 122 of the Insolvency Act 1986 to make a winding-up order on the ground that it is unable to pay its debts.

76. As to the contributory's petition, Miss Nicholson submits that the judge was wrong in principle in treating the remedy of an account in the action as being an alternative remedy, the existence of which justifies the refusal of a winding-up order under the proviso to section 125(2) of the Insolvency Act 1986. She further asserts that the question of an alternative remedy was not raised by either party before the judge, and no submissions were made on that question. In consequence, the judge did not have the benefit of argument on the question; nor did he have the advantage of considering whether the approach which he adopted was consistent with precedent.

77. Miss Nicholson points out that there are actual or prospective third party creditors of the Company in respect of the Company's costs of the proceedings, to the extent that such costs are not recoverable in full from Mr Leung.

78. Mr Simeon Thrower, for Miss Chan, naturally relies on the judge's findings in relation to the Wo Mei and Ho Chung projects and in relation to Hill House.

79. In relation to the Wo Mei and Ho Chung projects, Mr Thrower submits that in making his findings as to promises made by Mr Leung, the judge had regard, as he was entitled to do, to the totality of the evidence before him. Mr Thrower relies in particular on the letters written by Mr Leung to Miss Chan while he was in prison, many of which were quoted by the judge in the course of his judgment. He submits that the judge's findings of promises by Mr Leung that Miss Chan would have a half share in the two projects are unchallengeable on appeal. He further submits that the judge clearly identified the relevant acts of detriment on the part of Miss Chan, and that the judge was fully entitled to conclude that they "went far beyond what an intended wife could be expected to do for an intended husband out of love".

80. In relation to Hill House, Mr Thrower submits that there was ample evidence before the judge of repeated express promises by Mr Leung to buy Miss Chan what came to be called "the dream house", and that the judge was fully entitled to find that there was an express agreement that Miss Chan would have a 51 per cent interest in it. As to Miss Nicholson's submissions in relation to uncertainty, Mr Thrower submits that the promises of a beneficial share continued up until the time when Hill House was purchased. In any event, he submits (relying on **Re Basham** [1987] 2 FLR 264) that a promise of a share in future property may suffice to found a claim to a beneficial interest in that property.

81. As to detriment, Mr Thrower submits firstly that detriment is not a requirement where, as here, there is an express agreement between the parties (albeit oral) that Miss Chan is to have a beneficial interest. In support of this submission he relies on **Goodman v. Gallant** [1986] Fam 106 and **Mortgage Corporation v. Shaire & Ors** [2001] Ch 743.

82. In any event, he submits that on the findings of the judge in relation to the entirety of the course of conduct of Miss Chan and Mr Leung from 1993 onwards there are ample grounds for concluding that Miss Chan acted to her detriment in the expectation that she would have a beneficial interest in the property in which they would in due course live together.

83. As to the funding of the deposit on Hill House, Mr Thrower submits that on the available evidence the judge was entitled to make the finding he did, viz. that the funds represented the proceeds of the Wo Mei and Ho Chung projects, and that this court cannot interfere with that finding.

84. As to the payment of £180,000 in reduction of the mortgage debt, Mr Thrower submits that in the circumstances as he found them to be (and in particular his finding that it was the parties' intention that the proceeds of the Wo Mei and Ho Chung projects should be used for the purchase of Hill House), the judge was entitled to conclude that as between Mr Leung and Miss Chan that payment fell to be treated as being a contribution by Miss Chan sufficient to bring her contribution up to 51 per cent.

85. As to Miss Chan's right of occupation, Mr Thrower supports the judge's reasons for rejecting Miss Nicholson's submissions.

86. As to the petitions, Mr Thrower submits that a winding up would be an unnecessary expense, given that (as he submits) Mr Leung and Miss Chan are perfectly capable of reaching agreement as to the sale of Hill House (as they have in relation to the sale of the investment properties). He submits that the costs of a compulsory winding up, at least at this stage, would be completely unjustified and unnecessary. On behalf of the Company and of Miss Chan as its director, he offered an undertaking that the Company would not resume trading.

CONCLUSIONS

The Wo Mei and Ho Chung projects

87. In my judgment the judge was entitled on the evidence before him to find (a) that Mr Leung promised that Miss Chan should have a share in the proceeds of those projects, (b) that Miss Chan had acted to her detriment in reliance on that promise, and (c) that in all the circumstances her beneficial share should be quantified at one half.

88. As to (a), the existence of a degree of uncertainty as to whether Mr Leung's promise extended to other projects on foot at the material time does not seem to me to lead to the conclusion that the promise in relation to the Wo Mei and Ho Chung projects (being the two projects which were specifically mentioned in this context) should be treated as so uncertain as to preclude the court from granting equitable relief in respect of it.

89. As to (b), it was essentially a matter for the judge to evaluate whether the acts in question amounted to an alteration of Miss Chan's position to her detriment in reliance on Mr Leung's promise. The judge having heard the witnesses over a considerable time, inevitably had a feel for the case which this court cannot have. In the circumstances, I can see no ground on which this court should interfere with the judge's evaluation. In particular, the judge was in my judgment entitled to take the view that the gift of HK\$700,000 was a separate matter, which should not be taken into account in this connection.

90. As to (c), once again it was essentially a matter for the judge to determine the extent of Miss Chan's beneficial share in the two projects, since no specific share was mentioned. As the judge rightly observed, the letters written to Miss Chan by Mr Leung when he was in prison clearly envisage equality of ownership between them.

91. Nor do I accept Miss Nicholson's submission that on the facts of the instant case the application of the doctrine of proprietary estoppel might, on the judge's findings, have produced a result more favourable to Mr Leung. Whilst I accept Miss Nicholson's submission as to the flexibility of the doctrine of proprietary estoppel, the result in the instant case would in my judgment have been the same whether the claim was framed in terms of proprietary estoppel or of constructive trust. The promises made by Mr Leung in the instant case, and Miss Chan's reliance on them, have what Robert Walker LJ (in *Jennings v. Rice* [2002] EWCA Civ 159 at para 45) described as "a consensual character falling not far short of an enforceable contract". In such cases, as Robert Walker LJ went on to observe, "the proprietary estoppel may become indistinguishable from a constructive trust". That is the position in the instant case, in my judgment.

92. As Sir Nicholas Browne-Wilkinson V-C said in *Grant v. Edwards* [1986] Ch 638 at 656:

I suggest that in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in *Gissing v. Gissing* [1971] AC 886. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions.

Hill House

93. As to detriment, I accept Miss Nicholson's submission that a party claiming a beneficial interest in land, either by way of constructive trust or by way of proprietary estoppel, must establish that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the alleged promise or agreement. Lord Bridge makes that clear in the passage from his judgment in **Lloyds Bank plc v. Rossett** quoted earlier. The cases of **Goodman v. Gallant** and **Mortgage Corporation v Shaire & Ors**, on which Mr Thrower relied as authority for the proposition that where there is an express oral agreement that the claimant shall have a beneficial interest it is unnecessary for the claimant to prove detrimental reliance, do not in my judgment support that proposition (which would in any event be at odds with **Lloyds Bank plc v. Rossett**).

94. In **Goodman v. Gallant** the conveyance expressly declared that the property should be held upon trust for the parties as joint tenants. The Court of Appeal confirmed, following **Pettitt v. Pettitt** [1970] AC 777 (see per Lord Upjohn at p. 813), that absent fraud or mistake that declaration was conclusive: see per Slade LJ at 110F-111D. The issue then arose as to the effect of a notice of severance of the beneficial joint tenancy. As to that, the Court of Appeal held that the effect of severance was to leave each party with an equal half share. In the instant case there is no express declaration of the beneficial interests in the Transfer of Hill House, hence the need for equitable principles to come into play.

95. In **Mortgage Corporation v. Shaire & Ors** at p.750C ff Neuberger J summarised the principles to be applied in determining the beneficial interests of two persons living in a house together, in the absence of any express declaration in the relevant deed as to their beneficial interests. Citing Lord Bridge in **Lloyds Bank plc v. Rossett** at p.132F, Neuberger J said (at p.750C) that "where parties have expressly agreed the shares in which they hold, that is normally conclusive", and that "such an agreement can be in writing or oral". In my judgment, there can be no possible basis for the submission that in summarising what Lord Bridge said in **Lloyds Bank plc v. Rossett**, Neuberger J was intending to depart in any way from or to qualify the principles which Lord Bridge set out. On the contrary, Neuberger J was expressly accepting those principles and applying them to the particular facts of the case before him, as, indeed, he was bound to do.

96. However, the judge in the instant case was in my judgment entitled on the evidence before him to find that the requirement of detriment was met in relation to Hill House. In particular, the judge was in my judgment entitled to find that Miss Chan's actions in relation to the Wo Mei and Ho Chung projects were also referable to Mr Leung's promise that he would buy her a house (as yet unidentified) in which they would live together, that house in the event being Hill House. There was a continuous and developing relationship between Mr Leung and Miss Chan from 1993 onwards, on both a personal and a business level. The judge was in my judgment entitled to have regard to the entirety of that relationship, and to the promises made by Mr Leung in the course of it, in determining whether Miss Chan had altered her position to her detriment in relation to the promise of an interest in the house in which they would live together.

97. In any event, it seems to me that there was sufficient detriment to Miss Chan, on the judge's findings, in the fact that she participated in carrying the agreement of 3 June 1995 into effect by procuring the Company to accept the Bank of East Asia loan and to take the transfer of Hill House in its name. On the judge's findings, that was done by Miss Chan on the faith of the agreement reached with Mr Leung.

98. As to the funding of Hill House, once again I can for my part see no scope for interfering with the judge's findings. In particular, there was in my judgment no error of law in the judge's finding that the funds to provide the £40,000 deposit were funds in which Miss Chan had a beneficial half share. Further, the judge was in my judgment entitled to find that it was the common intention that the £180,000 reduction in the Bank of East Asia loan should be made out of Miss Chan's share in the proceeds of the projects, and to conclude that, although the £180,000 was paid by Mr Leung, it should nevertheless be treated as between them as a contribution by Miss Chan, and that in consequence of that payment Miss Chan's 51 per cent beneficial interest was, in effect, paid up in full.

99. I accordingly reject those grounds of appeal which seek to challenge the judge's conclusion that Miss Chan is entitled to a 51 per cent beneficial interest in Hill House.

Miss Chan's right of occupation

100. Given the judge's finding that one of the purposes of the trust of Hill House was to provide a home for Miss Chan should her relationship with Mr Leung come to an end, the short issue on this aspect of the case is whether Hill House is "unsuitable for occupation by [Miss Chan]" within the meaning of section 12(1) of the TLATA.

101. There is no statutory definition or guidance as to what is meant by "unsuitable" in this context, and it would be rash indeed to attempt an exhaustive definition or explanation of its meaning. In the context of the present case it is, I think, enough to say that "suitability" for this purpose must involve a consideration not only of the general nature and physical characteristics of the particular property but also a consideration of the personal characteristics, circumstances and requirements of the particular beneficiary. This much is, I think, clear from the fact that the statutory expression is not simply "unsuitable for occupation" but "unsuitable for occupation **by him**", that is to say by the particular beneficiary.

102. In the instant case Mr Leung's complaint, in substance, is that Hill House is too large for Miss Chan's needs and too expensive for her to maintain. However, taking into account that Miss Chan's requirement under the terms of the judge's order (which she has not cross-appealed) is for a right of occupation only until Summer 2003, I agree with the judge that Hill House is not "unsuitable for occupation by [her]" within the meaning of section 12(1). In any event I would have taken some persuading that a property which was on any footing suitable for occupation by Miss Chan and Mr Leung whilst they lived together should be regarded as unsuitable for occupation by her alone once Mr Leung had left.

103. I would accordingly reject Miss Nicholson's arguments on the issue of Miss Chan's right of occupation.

The winding up petitions

104. I cannot see any sufficient ground for interfering with the judge's exercise of his discretion in refusing to make a compulsory winding up order on either of the petitions, and in taking the view that the outstanding issues between the parties can be resolved more efficiently and cheaply on the taking of an account. In the light of the Company's offer of an undertaking not to resume trading, and of the fact (according to the evidence) that apart from prospective creditors in respect of legal costs which the Company may be unable to recover from Mr Leung the only creditors of the Company are Miss Chan and Mr Leung, I, like the judge, can see no benefit in ordering a compulsory winding up on either of the present petitions, whether or not the Company is insolvent on a balance sheet basis.

105. I would accordingly reject Miss Nicholson's arguments on this aspect of the case.

Occupation rent

106. Lastly, in so far as Miss Nicholson seeks to challenge the judge's conclusion that in all the circumstances it would not be appropriate to charge Miss Chan an occupation rent, I am unable to find any basis for such a challenge. The judge carefully weighed the relevant factors, and his conclusion cannot be criticised.

107. I would dismiss this appeal.

Mr Justice Nelson

108. I agree.

Lord Justice Rix

109. I also agree.

ORDER: Appeal dismissed. The appellant to pay the costs of Miss Chan and the Company, such costs to be the subject of a detailed assessment if not agreed. Application for permission to appeal to the House of Lords dismissed.