SHERIFFDOM OF NORTH STRATHCLYDE AT DUMBARTON

[2020] SC DUM 52

DBN-A113-15

JUDGMENT OF SHERIFF F. McCARTNEY

in the cause

MRIDU MARWAHA (AP)

Pursuer

against

PAMELA KUMRA, residing at 17 Hillfoot Drive, Bearsden, Glasgow, G61 3QQ

Defender

Dumbarton, 27 November 2020

Findings in Fact

[1] The pursuer is Mridu Marwaha and lives in Bearsden with her children. The defender is Pamela Kumra, and lives at 17 Hillfoot Drive, Bearsden (referred to as "the property") with her mother Kamlesh Marwaha.

[2] The pursuer was formerly married to the defender's brother, Aksha Marwaha. The pursuer and Aksha Marwaha separated prior to 2009 and thereafter divorced in or around 2012.

[3] The pursuer arrived from India in September 1994 following her marriage to Aksha Marwaha in India. She arrived in Scotland and originally lived with her then husband, her husband's parents Rugbinder and Kamlesh Marwaha and the defender at an address in Great Western Road, Glasgow.

[4] Around the same time, the defender was married, or due to be married to an Indian citizen. The defender's then husband subsequently was refused a visa to enter the UK, and the defender and he divorced.

[5] The cultural norm for many families from the Indian subcontinent is that parents often live with one of their sons and their daughter-in-law. Whilst the extended family was living at Great Western Road, it was not expected to be a long term arrangement that the defender would live there, and that the defender would move from the family home to live with her husband once he arrived from India.

[6] Shortly after the pursuer's arrival in the UK, Rugbinder Marwaha (the pursuer's then father-in-law) had enforcement action taken against him by HMRC for outstanding debts.

[7] As a consequence of the debts owed to HMRC, the property at Great Western Road was no longer going to be available to the family as a home. Rugbinder Marwaha looked for other properties for himself, his wife Kamlesh Marwaha, the pursuer and Aksha Marwaha to stay in on a long term basis. He found a property at 17 Hillfoot Drive, Bearsden (hereinafter referred to as "the property") which would be suitable.

[8] Rugbinder Marwaha was unable to obtain a mortgage or credit given his debt owed to HMRC. The pursuer was told that either Kamlesh Marwaha or Aksha Marwaha were also unable to obtain a mortgage. The pursuer was able to obtain a mortgage but not for the sum required to purchase the property. The pursuer understood that this was partly on the basis of her limited income and partly on the basis of her recent arrival from India, and thus the limited documentation she could provide.

[9] Rugbinder Marwaha arranged an appointment with a mortgage broker. He asked the pursuer and the defender to attend. The pursuer and defender were asked to apply for a mortgage to secure the purchase the property in Bearsden at the cost of £66,000. It was

agreed that the defender would also apply for the mortgage and take title to the property jointly with the pursuer. It was expected that the defender would not be residing in the property on a long term basis, and that she would have a different family home once her husband arrived in Scotland.

[10] There was no agreement that neither the pursuer nor the defender would seek to modify their rights as joint owners of the property in any way. In particular, there was no agreement that the property was to be principally for Rugbinder Marwaha and Kamlesh Marwaha to live in, principally for the defender to live in, or that the property would be retained for a certain period of time or in certain circumstances.

[11] Entry to the property was taken on 28 May 1995. The defender's husband had not yet arrived in Scotland. The defender therefore moved to the property with the other members of her family. Within a matter of days, the defender's behaviour towards the pursuer deteriorated to the extent that the pursuer and her husband felt compelled to move out. The defender removed the pursuer's personal belongings from the property and left them in the garden. The defender made threats against the pursuer.

[12] The pursuer and her then husband initially stayed with other relatives, then rented a room close to the shop that the pursuer ran in Glasgow. Subsequently, sometime later, they purchased a family home for themselves in Dorchester Avenue, Glasgow. The pursuer and Aksha Marwaha subsequently sold the property at Dorchester Avenue and bought the pursuer's current home in Glasgow.

[13] Rugbinder Marwaha died in 1998. For a period after leaving the property, and the death of Rugbinder Marwaha, the pursuer made some payments towards the outgoings for the property. The pursuer remained in touch with her father-in-law by telephone, and

would drop money to him at the restaurant where he worked in Great Western Road, Glasgow. These payments tailed off prior to the death of Rugbinder Marwaha.

[14] The pursuer and Aksha Marwaha purchased a family home in Bearsden for themselves and their children. Subsequent to moving there, they separated. They then divorced in 2012. The pursuer and the children remained in the family home after the divorce, but the pursuer was unable to obtain a mortgage in her sole name. The pursuer's brother assisted the pursuer by agreeing to also have the mortgage and title jointly in his name along with his sister, to allow her and her children to remain in the family home. Due to the level of the pursuer's income, she is unable to have the mortgage of the family home in her sole name whilst she still remains on the mortgage account for the property.

[15] The pursuer has attempted to seek resolution to her name being on the title for the property for a considerable period of time. After she learned of the death of Rugbinder Marwaha, and realised that she would not able to return to the property, the pursuer wanted the defender to obtain alternative accommodation for herself and the defender's mother.

[16] After many wider family discussions to try and persuade the defender to agree to the resolution of the joint ownership of the property, the pursuer instructed solicitors in late 2005 or early 2006. The defender instructed Hannay Fraser. Hannay Fraser wrote to the pursuer's agents on 25 January 2006 advising that the defender was in London for some months and they would not have instructions until March 2006. Correspondence was entered into.

[17] In or around April 2009, the defender initially agreed to a surveyor inspecting the property to value it. The pursuer wished to obtain the survey to help focus on whether the property should be sold, or whether a transfer of title was possible. The defender did not

co-operate. The pursuer's agents subsequently wrote to the defender noting that lack of co-operation. The defender was pressed to agree matters failing which court proceedings would be raised. The defender was by then unrepresented.

[18] Subsequently, at dates unknown, the defender instructed Campbell Mair solicitors in relation to the ownership of the property.

[19] In March 2014 the defender then instructed Brunton Miller solicitors to represent her interests. Correspondence was sent on the defender's behalf indicating that Brunton Miller were making investigations including obtaining files from a previous agent.

[20] The pursuer raised the current proceedings in October 2015.

[21] The defender has continually delayed in instructing solicitors and negotiating an agreement in relation to the ownership of the property.

[22] Since the death of Rugbinder Marwaha, the outgoings for the property have been made by Kamlesh Marwaha, including the mortgage payments. The defender has only made limited contribution to other household expenditure, such as food, despite residing there since it was purchased in 1995. The pursuer has only made limited payments towards the mortgage.

[23] The pursuer and defender are joint owners of the property. There is no agreement between the parties which prevents the pursuer from insisting on the sale of the property. The pursuer has not acted in a way which would infer that she does not intend to seek to exercise her rights of ownership of the property, including that of division and sale. The defender has not acted in a way that would infer the defender relies on any such actions of the pursuer.

Finds in fact and law

[24] That the pursuer and the defender did not enter into an agreement in relation to the disposal of the property;

[25] That the pursuer is not contractually barred from insisting on the division and sale of the subjects;

[26] That there being no agreement between the parties relative to the disposal of the property, there are no implied terms of an agreement regarding the sale of the property;

[27] That the pursuer is not personally barred from seeking the sale of the subjects;

Finds in law

[28] That the pursuer's pleas in law 1, 3 and 4 are upheld, and the pursuer's second plea and the defender's pleas in law 2, 3 and 4 are repelled;

[29] That the pursuer is entitled to part of the order sought in terms of crave 1 and is entitled to insist in an action of division and sale of All and Whole the subjects known as 17 Hillfoot Drive, Bearsden, Glasgow G61 3QQ registered in the Land Register under Title Number DMB54567; and appoints a surveyor to report to the court

(a) whether the property is capable of division in a manner equitable to the interests of the *pro indiviso* proprietors and, if so, how such division may be effected; and

(b) in the event that the property is to be sold –

(i) whether the property should be sold as a whole or in lots and, if in lots, what those lots should be;

(ii) whether the property should be exposed for sale by public roup or private bargain; whether the sale should be subject to any upset or minimum price and, if so, the amount;

(iii) the manner and extent to which the property should be advertised for sale; and

(iv) any other matter which the reporter considers pertinent to a sale of the property.

[30] Orders parties' to lodge written submissions within 14 days as to the identity of the surveyor to be appointed, and if parties are unable to agree as to the surveyor, assigns a procedural hearing on a date and time to be agreed to take place by way of telephone conference call; meantime reserves consideration of the remainder of the pursuer's crave 1 and reserves all question of expenses.

Note

[31] This process has had a lengthy procedural history, which finally came to proof on 20 January 2020. A continued date in February 2020 had to be discharged as I was unavailable, and dates in March and May 2020 were discharged due to the coronavirus pandemic. The evidence was concluded on 14 September. The telephone hearing on submissions had to be continued on 5 October and submissions finally concluded on 30 October 2020.

[32] The sole crave before the court is the pursuer's crave for division and sale. In support of the pursuer's crave, I heard evidence from her. For the defender I heard from the defender and her mother, Kamlesh Marwaha.

[33] It is not in dispute that Kamlesh Marwaha and the defender currently live in the property and have done since it was purchased, and that Rugbinder Marwaha lived in the property from its purchase to his death in 1998. Neither is it disputed that Kamlesh Marwaha has solely paid the mortgage for a substantial period of time, despite the fact that the pursuer and the defender are the joint owners. However, the defender avers that, notwithstanding that title is in joint names, the pursuer is not entitled to the remedy of division and sale as either (i) there was an express agreement that the pursuer had agreed not to seek the sale of property, or (ii) on an esto basis, it was an implied term of the agreement between the parties that the pursuer would not seek to sell the property whilst either Rugbinder or Kamlesh Marwaha were alive, or that (iii) the pursuer is personally barred from seeking the remedy of division and sale due to her words and actings relative to the property.

[34] The defender's averments regarding an agreement are to the effect that whatever the title said, the pursuer and defender would not consider themselves the true owners of the property, but rather the true owners would be Kamlesh & Rugbinder Marwaha. Alternatively the defender says that if that is not proved, then the pursuer and defender implicitly agreed that neither of them would seek to sell the property whilst either Kamlesh & Rugbinder Marwaha were alive. And lastly, the defender says that in any event the pursuer has acted in such a way as to create the legal circumstances sufficient for the pursuer to be personally barred from seeking division and sale.

The evidence

The pursuer

[35] The pursuer arrived in the UK in September 1994, having travelled from India. She had married her then husband in India. On arrival in the UK, she moved in with her husband and parents in law at Great Western Road in Glasgow. At that time, the defender was residing in a flat in Woodlands Road. Rugbinder Marwaha ran a restaurant and got into financial difficulties; he may have been declared bankrupt but in any event proceedings were taken by the then Inland Revenue. Her father-in-law wanted to purchase a house for herself, her husband, himself and her mother in law. The plan was all four of them would stay in this new property. It was to be her and her husband's family home, and it was the tradition for Indian families, which included her husband's family, that parents stay with a son and that son's daughter. Kamlesh & Rugbinder Marwaha were unable to obtain a mortgage. Her husband Aksha could not obtain a mortgage; he might have been bankrupt. Although the pursuer was working, she could not obtain a mortgage in her sole name, having not long arrived from India. Rugbinder Marwaha told her that the defender would also apply for the mortgage. The defender was married at that time, but her husband was still in London at that point. The discussion was that the defender would not stay in the property, as she would live elsewhere with her husband and as the daughter, would not be expected in terms of Indian culture to be living with her parents. The defender agreed to be on the mortgage, although it was never expected or discussed that the defender would live in the property. The only agreement about the purchase of the property was about who was to live there. It was never agreed, either at the time of purchase or subsequently, that it was to be a home just for her parents-in-law, or that the pursuer was not to be treated as an

owner but still have her name on the mortgage. There was no agreement about circumstances in which the property would or would not be sold.

[36] The pursuer moved into the property at the date of entry with her husband and Kamlesh & Rugbinder Marwaha. The defender subsequently arrived at the property. About seven or eight days after the date of entry, the defender told the pursuer to leave. There had been an argument. The defender was being unreasonable. She shouted and swore at the pursuer. She was acting in a threatening way. The pursuer was frightened. The defender put the pursuer's belongings out of the house into the garden. The pursuer and her husband left in the middle of the night, and temporarily stayed with relatives until they had alternative accommodation. The pursuer has never returned to the property. She stayed in touch with her father-in-law, who was a protective influence over the defender's behaviour to the pursuer. The pursuer made some contributions to the mortgage by giving the money direct to her father-in-law at the restaurant where he worked. She and her husband had bought a shop and had an income. Her father-in-law would phone and say he was short of money.

[37] She had not immediately known about her father-in-law passing away in 1998. Following his death, there were discussions about the title, including whether the defender could obtain another property. The defender's marriage had already broken up – the defender's husband had difficulties with his visa, and the pursuer was unsure that the defender had ever lived with her husband for any period. The defender was still staying at the property. It was agreed that the property would be surveyed. A survey was obtained at some stage, but the defender then refused to enter discussions about the sale or transfer of the property. The pursuer would have agreed to the defender remaining in the property, but wanted her name taken off the title. She spoke to the various solicitors' letters lodged

at 5/2/2 to 5/2/5, dated variously between 2006 and 2014. She had been trying to reach agreement for years. She wanted to be released from the mortgage obligations of the property; she divorced Aksha Marwaha in about 2012 (having separated some time before that) and could not have the title to the family home in her sole name because she was still on the title to the property. Her brother had had to assist her but that could not be a long term solution and matters needed resolved. If the property was sold then she could have the title to her own home in her sole name.

[38] She accepted in cross-examination that the past discussions with the defender had included either the property being sold or money being paid to release her from the title. It was true that the defender had been sequestrated and later had that sequestration recalled, causing delay for this matter resolving.

[39] She maintained her position that it was to be her, her husband and his parents who were to move into the property. The only reason she left was due to the defender. Her father-in-law said he would try and protect her, but she had no option. She denied that there was any agreement about the property as a result of a meeting between family members in the shop she and her then husband owned (after the purchase of the property). There was no dispute that she had not made payments towards the property for some years, but had at the beginning. When challenged as to why she had not made payments, money was tight but in any event she was not allowed to go to the property because of the behaviour and attitude of the defender.

[40] The mortgage broker who helped them apply for the mortgage at Hillfoot spoke to them all in Punjabi. The pursuer, defender and Rugbinder Marwaha were all present. There was no discussion or agreement at that meeting, or at any time, that the true owners of the property were to be her parents-in-law. She accepted there was a delay in seeking legal

advice but she had hoped to resolve matters without formal legal proceedings. She had also hoped for a number of years that her and her husband would be able to return to the property, possibly by her and the defender resolving their differences, or the defender leaving the property, which might have happened if the defender had settled in a marriage. She later clarified that her and her husband bought a new family home when it became clear they were unlikely ever to move back to the property. She gave evidence about the involvement of her brother in the mortgage and title to the family home following her eventual divorce from her husband. There was a short re-examination.

The defender

[41] The defender does not work, suffering from leg problems and mental health problems. She has lived at the property with her mother since 1995. She had been married twice. The pursuer had never lived at the property.

[42] The property was taken in the names of her and the pursuer because her father had been made bankrupt. Her father arranged the meeting at the mortgage brokers. Her mother was not present. At that meeting Rugbinder Marwaha told the pursuer and defender they were to pay the mortgage between them. Both said no. The loan papers were signed shortly after that discussion. That discussion was in Punjabi. She thought her father paid the legal fees for the conveyancing. It was not true to say it was also a home for the pursuer and her then husband.

[43] There had been solicitors' letters going back and forward. She would not agree to the property being sold and monies divided. That would be unfair; Rugbinder Marwaha had already helped the pursuer and his son obtain the shop they ran for a number of years.

It was not true to say that the pursuer kept in touch with Rugbinder Marwaha; to the contrary, there was ill-feeling between them.

[44] She referred to the pursuer as "this girl". The pursuer had a number of businesses and other properties. This action was unfair; her mother had solely paid the mortgage after her father died. She sometimes contributed something to the household outgoings. She did not herself know what the exact mortgage payment was. Her mother didn't want to leave. She was elderly, frail and had psychiatric problems. The pursuer told a pack of lies to the court. The pursuer was making things up to suit herself.

[45] In cross-examination she appeared to be reluctant to answer some questions, saying she could not remember about discussions in 2015 to reach an agreement, but was adamant she could accurately recall events in 1995 regarding the purchase. There was no agreement between her and her parents about what was to happen. She was clear about that; she objected to being asked this question again as she had already answered it. The property was bought in a hurry. There were no discussions about how things would operate in the longer term regarding the title.

[46] She agreed she had refused to allow a surveyor access in 2009 to value the property. She was taken through the correspondence at 5/2/2 to 5/2/5. She accepted there was no mention in that correspondence of an agreement that the property would never be sold. She accepted solicitors' letters had been sent to her for around 8 years before proceedings were raised. Although the property was surveyed on one occasion, that was simply to find out its condition. It was true she lived there without having to make regular payments. When asked why the title was also in the pursuer's name if it was never intended the pursuer would stay there, the answer was that the pursuer had signed the papers. The question was asked again, and a similar answer given. The defender referred to the discussion between

herself, the pursuer and Rugbinder Marwaha about the pursuer and defender paying the mortgage. She was asked some questions about where her and her then husband intended to live, and reacted angrily that her husband then had nothing to do with her. There was a short re-examination.

Mrs Kamlesh Marwaha

[47] The Defender's mother gave her evidence via an interpreter. She is 77 years of age and has lived at the property continuously since 1995. Her husband had lived there until his death in 1998. The defender had never lived anywhere else since 1995.

[48] Her son Aksha (the pursuer's ex-husband) occasionally now stays for a few days at a time. However, when Aksha was still married to the pursuer, they never lived in the property together, although the witness also referred to the pursuer and Aksha leaving that night (which appeared to refer to the date of moving in to the property). The witness denied having a poor memory, and could remember clearly that the pursuer and Aksha had not ever stayed the night when the property was bought. She could not remember when the pursuer and her son divorced. No-one threw the pursuer out of the property. The witness said the pursuer left of her own accord, but also that the pursuer had not stayed in Hillfoot Drive. The pursuer and Aksha had lived in Great Western Road for about 5 or 6 months with her, her husband and her daughter (the defender). They did not move to Hillfoot but to somewhere else, but she did not know the address.

[49] A deposit of £3,000 had been paid on the property. The pursuer had not paid the deposit. There was a mortgage with the Halifax. The payments fluctuated but were around £315 to £415 which she made after her husband's death. Up until his death, her husband had made the payments. The mortgage account had never been in arrears. The

defender helped from time to time with contributions towards the finances, sometimes paying a bill and sometimes buying food. The pursuer had never paid anything nor offered to pay anything. She had never asked the pursuer to pay towards the household expenses and didn't think the defender had either.

[50] Her husband did not take the title in his name as he had been, or was bankrupt at the time. She had never been bankrupt herself, but she had another property in her name and could not have any more loans in her name as a result. That other property in her name, at Woodlands Road, Glasgow was eventually sold.

[51] She was not involved in any discussions about the title to the property or in whose name the title was to be taken. She knew her husband, the pursuer, the defender and her son Aksha were involved in discussions but she was not present at the time. The property was purchased as they needed somewhere to stay. Previously her and her husband stayed at Great Western Road, Glasgow. The pursuer and Aksha lived elsewhere. She got on well enough with the pursuer, but the pursuer and the defender did not get on well together.

[52] She expected to stay in the property for as long as she lived, and expected the defender to stay with her for as long as she (the witness) lived. She only expected to have to leave if she stopped paying the mortgage. It was her home, and she did not want to leave it.

[53] In cross-examination, she was asked about whether the pursuer had lived in India before marrying her son. She denied the pursuer had travelled from India to marry her son. She was asked a number of questions about the title to the property and why it showed the pursuer and defender having lived at Woodlands Road at the time the property was bought. She replied to say that her husband had told her they (referring to the pursuer and the defender) would pay towards the property. She repeated her evidence that the pursuer never stayed a single night in Hillfoot Drive. She initially denied that the property was

surveyed but then said it was in a bad state and everything needed fixed. She did not speak to the pursuer about matters after her husband died. There was no re-examination.

Submissions

[54] Both agents lodged written submissions (numbers 31 and 33). A hearing on submissions took place by telephone conference call on 5 October but had to be continued to 30 October 2020. Both parties lodged written submissions in the intervening period in the form requested by the court, but shortly before the hearing on 30 October, additional submissions were sent to the court on behalf of the defender. Those submissions were not before the court on 30 October, and both agents were content that Mr Joseph read those submissions out.

[55] The pursuer sought decree as craved in terms of crave one, and a remit to a surveyor to examine the property and report to the court in terms of OCR 47.1. The court should bear in mind that an action of division and sale had been described as an "absolute remedy" (*Upper Crathes Fishing Ltd* v *Baileys Executors* 1991 SLT 747). Despite the stark way that the remedy of division and sale was described, Ms Robb accepted that the defender's case on record had valid defences, that the pursuer had contracted out of her right to insist on selling the property, and that the pursuer was personally barred from being allowed to raise the action. However, there was no evidence to support any such defences. There was no evidence before the court that there was an agreement as to any sale of the property, nor was the defender's case on personal bar made out by the facts. Neither defence arose on the facts. Ms Robb submitted that where the evidence of the pursuer differed with that of the defender or the defender's mother, I should prefer the evidence of the pursuer, and should find her a reliable and credible witness.

[56] Mr Joseph adopted his written submissions. He sought decree of absolvitor. The pursuer's crave for division and sale ought not be granted. It was not correct to label division and sale as an "absolute" remedy, as Ms Robb had (paragraph three of page one of her submission). The defender had defences insofar as his pleas-in-law 2, 3 and 4 were concerned. Notwithstanding pleas-in-law 2 and 3 (regarding an express or implied agreement by the pursuer not to sell the property), the focus of the defender's case centred on personal bar. Without departing from the defender's second plea-in-law (whether there was express agreement about the disposal of the subjects) he conceded that on the basis of the evidence, the defender may have difficulty in having such a plea upheld. Mr Joseph also conceded that if there was no evidence of an express agreement, it may be difficult to argue that there was an implied agreement that neither the pursuer nor defender would seek the sale of the subjects whilst the defender's parents were alive.

[57] On personal bar, Mr Joseph argued that the pursuer's delay was such that she was not entitled to seek decree. It was undisputed that the pursuer had made few, if any, payments towards the house, and it was not disputed that she had not made any payments for the majority of the period of ownership of the house. That was an important factor to take into account – she had not acted in a manner consistent with an interest in the house. She had only briefly lived in the property. The letters sent by agents for the pursuer were not sent until 2006 (5/2 of process), some 11 years after the house was purchased. The action was not raised until 2015. Reference was made to *Maclaine* v *Gatty* 1921 SC (HL) 1, and Lord Birkenhead's definition of personal bar. The defender's mother had incurred considerable expense. It was inequitable to allow the sale to proceed. That inequity, or unfairness, was another matter to take into account. Mr Joseph had lodged supplementary submissions past the deadline for doing so, but these were not received by the court prior to

the hearing. Ms Robb had no objection to him reading those out. The question of personal bar should be thought of as unfairness. It was simply not fair to order the sale of the property to take place all these years later.

[58] It was accepted that this was a proof rather than a proof before answer, and that the defender's first plea in law should have been formally repelled at an earlier stage. Mr Joseph was content for it to be treated as not having been insisted upon.

Analysis

[59] An action for division and sale is often referred to as an absolute remedy (see for example Rankine on *Land Ownership*, 4th edition, at 591). But as Lord President Hope said in *Upper Crathes Fishing Ltd* v *Bailey's Executors*:

> "the right to insist on an action for division and sale is no different from any other right of an absolute nature which an individual may enjoy. It is always open to a person to deprive himself of his rights by contract, and I think that he may also be deprived of them, according to the ordinary principles of law, by the operation of personal bar." (1991 SLT 747 at 749 para D).

Ultimately agents were agreed that the defender was entitled to argue that the remedy not should be granted because (i) there was an express agreement not to sell the property, failing which (ii) there was an implied term of the agreement that the property would not be sold whilst either of the defender's parents occupied it; or (iii) that the pursuer was personally barred from pursuing this action.

[60] Considering firstly (i) on whether there was an agreement between the parties regarding the sale of the property, that question is easily resolved on the evidence of the defender alone. The defender's oral evidence departed markedly from her written case. On more than one occasion the defender's evidence was that the purchase was rushed and there was no agreement prior to the purchase regarding any future disposal. Taken at its highest,

the defender's evidence was that the property was not bought for the pursuer and her then husband to stay in. However, her evidence did not go beyond that – it was simply that the pursuer and her husband would not be living there. If the court were to accept that passage of the defender's evidence, all that shows is the intention of the parties as to who would live in the property. That might give rise to circumstances, or an expectation that the pursuer would have sought agreement about the longer term intention for a property that she was not anticipating living in. However, the defender's evidence, at its highest, is not the same as evidence as to what such an agreement was. Evidence on who it was anticipated would live in the subjects is not the same as an agreement as to restrictions on disposal of the subjects.

[61] Similarly the defender's mother's evidence was that she was not involved in any discussions about any agreement over the property prior to the purchase. She said she would not be involved in such matters, being busy running the home.

[62] In that respect the evidence led on behalf of the defender was on all fours with the pursuer's evidence, who also said there was no agreement regarding the circumstances in which the property could be sold, or restrictions as to the right to seek a sale. Accordingly, the defender's second plea-in-law must be repelled. There was no evidence that there was an agreement on disposing of the subjects.

[63] The defender's third plea-in-law also requires to be repelled. This seeks decree of absolvitor on the basis of an implied term within an agreement that neither party would seek to sell the property whilst the defender's parents were in occupation of it. Mr Joseph did not depart from either plea, but conceded that if there was no evidence of an agreement, it would be difficult for him to argue that there was an implied term.

[64] The defender's third plea in law cannot succeed. There was no evidence before the court of an agreement between the parties as to restrictions on either party to seek the sale of the property. In the absence of the existence of the agreement, there cannot be an implied term of such an agreement. Accordingly I repel the defender's third plea in law.

[65] That leaves the defender's fourth plea in law. That seeks decree of absolvitor on the basis that the pursuer is personally barred from seeking decree of division and sale. The defender relies on the following features in answer 2 of her pleadings in support of her plea of personal bar: (a) the absence of payments by the pursuer towards the mortgage and other outgoings for the property; (b) the absence of any offer by the pursuer to make such payments; (c) the pursuer's knowledge about the intention of who would live in the property, and for whose benefit the property was being acquired; (d) that the pursuer had never lived in the property, and lastly, (e) a more general averment as to the absence of any attempts to exercise rights of ownership by the pursuer.

[66] Personal bar has been defined as "the capacity of controlling the rights of others either in the exercise of a real right in property or as the creditor in an obligation, may be in particular circumstances be limited or abrogated …" (Gloag & Henderson *The Law of Scotland* 14th ed, para 3.05, referred to as *"Gloag & Henderson"*). There must be both inconsistency and unfairness; the inconsistency is by the person now seeking to exercise the right, and as a result of now exercising the right, there would be a resulting unfairness. At the hearing on submissions Mr Joseph suggested that personal bar ultimately came down to a matter of only fairness. I do not accept that submission.

[67] I consider that both inconsistency and unfairness must be present. The pursuer's inconsistency could be by her words, action or inaction when she knew of the right to seek division and sale (see *Gloag & Henderson* at para 3.05). The exercise now of the pursuer's

right to sell must affect the defender (*Gloag & Henderson* at para 3.05 at line 14; though as it was disputed as to whether it was sufficient for the defender to show impact on her mother, this feature is discussed further below).

[68] *Gloag & Henderson* suggest a number of factors to show unfairness. It could be by the pursuer's blameworthy conduct, or that the defender reasonably believed the right to sell would not be exercised, that as a result of that belief, causing her to act in a certain way. Another feature could be that the sale now causes prejudice to the defender, or that the value of the pursuer's right to sell is disproportionate to the question of the pursuer's inconsistent acts.

[69] Considering the defender's pleadings on personal bar, and the averments in chronological order, firstly I consider the defender's evidence that the pursuer had never lived in the property and had no intention of ever living in the property (points (c) and (d)). On the evidence, I reject that proposition. I prefer the evidence of the pursuer. The pursuer gave clear and concise evidence that the intention of purchasing the property was as a home for herself, her husband, and her husband's parents. She explained why; it was the cultural norm within her community that parents lived with a son and that son's wife. The pursuer's evidence was logical. She gave a coherent account of moving into the property for a short period, the defender's behaviour quickly deteriorating, and being forced to move out.

[70] By contrast, the defender's evidence was that the pursuer had never lived in the property. The defender, when asked where the pursuer was living at the date of entry for the property, gave a muddled answer referring to an address in Dorchester Avenue but also that the pursuer had a shop and she started stealing money from the shop. There were several references to the pursuer "stealing" and having had a shop gifted to her by the defender's father. It is fair to say that the impression left by the defender's body language

and choice of phrase showed not just a dislike of the pursuer but a deep seated resentment. The defender, at various points, had to be reminded to listen to the full question and not interrupt (including in examination in chief). She appeared to be frustrated at wider family disputes. She had to be reminded not to refer to the pursuer as "this girl". She was frequently argumentative, even in examination in chief. I formed the opinion she was neither a reliable nor credible witness.

[71] Mrs Kamlesh Marwaha's evidence was muddled. She referred to the pursuer and her husband Aksha leaving "that night" (which appeared to refer to the date of entry to the property) but also that they (the pursuer and her son Aksha) had never stayed one night. In answer to a question as to whether the pursuer was thrown out of the property, her response was that the pursuer left of her own accord. However, she said that the pursuer and her husband left the Great Western Road address to live elsewhere, although she could not give the address. Her evidence on this point was not clear but one interpretation might suggest the pursuer and her husband were in the property for a short period of time. I noted she accepted discussing the case with her daughter (the defender) prior to her evidence. She was unable at times to remember significant dates or places (such as when the pursuer separated from her son, or where the pursuer and her son were living after the family moved out of Great Western Road).

[72] Where the evidence of the witnesses diverge, I prefer the evidence of the pursuer. She answered the questions in a straightforward fashion. She was able to give detail when asked. She was credible as to the evidence on how the property came to be purchased and the party's intentions. It was her position that the property was bought with the intention of being a family home for her, her then husband, her parents in law and whilst the defender was originally to move in, she would be leaving once her husband arrived from India. The

pursuer had a noticeable warmth to her when speaking about her late father-in-law. I accept the pursuer's evidence, which was not fundamental to the success of her case, that she had a fond regard for her father-in-law, that her father-in-law tried to assist over a number of years in patching up the difficulties between the pursuer and the defender so that the pursuer could return to the family home, and also that the pursuer contributed some monies to the mortgage and other outgoings for Hillfoot Drive by giving those monies directly to her father-in-law before his death.

[73] In relation to point (a) from the defender's pleadings regarding the payment of the mortgage, I accept the pursuer's evidence that she made some limited payments towards the mortgage. Whilst this was denied by the defender and Mrs Marwaha, those payments were made by the pursuer directly to Mr Rugbinder Marwaha. By the pursuer's own evidence, such payments were limited both in amount and time. The payments started after the pursuer and her husband left the property, although the pursuer could not give the date of when such payments stopped. It might be that neither the defender nor Mrs Marwaha would have known about those payments (though the defender flatly denied any such payments were made). The pursuer went to Mr Rugbinder Marwaha's place of work to pass over the money given the situation between her and the defender. For what is it worth, I accept some limited payments were made.

[74] I also accept, dealing with point (b) from the defender's pleadings that the pursuer did not offer payments towards the mortgage to the defender (or to Mrs Marwaha who was, as a matter of fact, paying the mortgage). It might be that on the particular facts of this case, there is little weight to be placed on the absence of any such payments and the absence of an offer to make such payments. The pursuer did make some payments in the early stages of having left the property, generally at the request of her father-in-law. At that time, she

hoped to be able to return to live in the property if matters were resolved. That might have been in circumstances where the defender moved out, or there was a successful brokering of the fall out between the pursuer and defender. It is likely that such payments will have stopped well in advance of the pursuer instructing solicitors to force the sale of the property in 2006. Given the other family circumstances, and the relationship between the pursuer and her then father-in-law where he hoped to resolve the situation for the pursuer, the pursuer could not be expected to take any action prior to his death. She had not immediately known about his death. Even so, there is a not insignificant gap between the death of Rugbinder Marwaha in 1998 and the pursuer's first instruction to solicitors in 2006. However, I consider it reasonable that the pursuer's determination to take action to have the property sold would have resolved over time. From the pursuer's perspective, continued discussion and dialogue was preferable. At that point she was still married. In the circumstances of a family dispute, her attempts to discuss matters, to try and resolve matters so she and her husband could move back in were all reasonable. But to that end, if she had voluntarily paid the mortgage, she would have been assisting the defender and the defender's mother to remain in the property. The very act of paying the mortgage might be viewed as being contradictory to her insistence of wishing the property sold.

[75] The defender lastly relies on a more general averment (labelled (e) above) as to whether the pursuer exercised rights of ownership. I find the factual position as follows.

[76] Firstly, the property was purchased with the intention that it would be the pursuer's home. Through no fault of her own, the pursuer was unable to live there, and in fact, that was due to the behaviour of the defender. Whilst the pursuer could have taken formal legal action at that stage, in reality, the pursuer was relatively new to the UK, newly married and the difficulty arose from her sister-in-law. For some time after leaving the property, the

pursuer hoped her father-in-law would be able to resolve matters to allow her and her husband to move back in. In that context, it is both understandable and unrealistic to expect the pursuer to have taken action immediately after 1995. Some limited payments towards the outgoings of the property were made by the pursuer following her departure from the property. She remained on good terms with her father-in-law. She had not immediately known about her father-in-law passing away. She first instructed solicitors in 2006 to seek a solution to the ownership of the property. She raised proceedings in 2015, but the delay in bringing the matter to proof does not rest with the pursuer given the lengthy delays due to the defender's sequestration and subsequent recall of that sequestration. Whilst there was a substantial delay between 2006 until the raising of these proceedings in 2015, I accept that at points the defender appeared to be co-operating with finding a solution, including agreeing that a survey was undertaken. From 2006 onwards, the pursuer did not communicate, or act in a way that would give the defender reasonable cause to consider that the pursuer was not intending to seek the sale of the property. The survey must have been obtained to inform the parties as to the market valuation of the property and allow negotiation. The alternative explanation about the survey from the defender lacks credibility. The defender said the survey was obtained because she and her mother were thinking of having some work done on the property. A survey would not normally be obtained for such a reason.

[77] I have dealt with the facts that the defender relies upon in her pleadings. But dealing with the matters more generally, and considering the formulation of the test for personal bar broken into the headings of inconsistency and unfairness (as set out in *Gloag & Henderson* at paras 3.05 onwards), I find as follows.

[78] On inconsistency, all five parts of the test must be satisfied. Parts (1), (3) and (4) are not in dispute (that the pursuer has the right to seek division and sale, that she knew about

that right and that she is now seeking to exercise that right. I did not hear any evidence from the pursuer that she was unaware of her right to seek division & sale of the property at any stage).

[79] On part (2), that is whether there is inconsistent behaviour by the pursuer on seeking sale of the property, I find against the defender. Between 1995 and sometime around 1998 the pursuer was relying on a hope she could return to the property. For periods from 1998 to 2006, when it became clear the defender would never agree to the pursuer living in the property, and the defender was intent on continuing to live there, the pursuer sought agreement informally. The pursuer then formally instructed solicitors to seek agreement in 2006. The delay between 2006 and raising proceedings in 2015 arose against the background that the parties were still related for at least some of that time, and the defender continually delayed matters. The defender would negotiate to a certain point, but then pull back or delay. It was reasonable for the pursuer to be reluctant to raise court proceedings against a family member (at least until the pursuer's divorce in 2012). But the test for personal bar is not just to look at the question of when the action was raised; it is a wider question of examining the actings of the pursuer to ascertain or infer that she has been inconsistent in relation to her right. It is for the defender to establish that inconsistency. I did not hear any evidence that suggests that the question of the property was never a live issue. It is clear that at points it was not a pressing issue, but the question of the pursuer's acting has to be judged against the factual background and in particular of the family dynamics.

[80] Part (5) of the test for inconsistency is whether the exercise of the right at this stage would affect the defender. Miss Robb made reference to the fact that the defender's evidence was that she had not paid the mortgage, and accordingly the sale would not

prejudice the defender in respect that she has no financial relationship with seeking the sale. However, that might be putting matters too narrowly. Ultimately the evidence is that the defender has resided in the property since its purchase in 1996. It is her home. The forced sale of someone's home must be a matter that impacts on the defender.

[81] Accordingly I do not find that the defender has made out part (2) of the test for inconsistency. All elements must be proved by the defender. But for the sake of completeness, I also deal with the question of unfairness.

[82] The defender does not have to prove all the factors that might indicate unfairness. It is a matter of fact and degree according to the circumstances. But where the inconsistency is failure to speak up or assert a right (inaction as opposed to action), then indicators of unfairness must be stronger (*Gloag & Henderson* para 3.07).

[83] Unfairness can be shown by (1) the pursuer's blameworthy conduct; (2) the defender's reasonable belief that the pursuer would not seek the sale; (3) reliance by the defender on that belief; (4) the sale would cause prejudice to the defender; and (5), the balance of proportionality regarding the pursuer's right to seek the sale and the inconsistency by the her inaction. On the facts, I do not consider that (1) can apply. The pursuer had to leave the property due to the defender's actions. The circumstances by which she became the joint owner are not due to blameworthy conduct by her.

[84] That leads to whether the defender had a reasonable belief that he pursuer would not seek the sale of the property. On the facts, the defender has known since 2006 that the pursuer wishes the property to be sold, or at least her name removed from the mortgage account and title deeds. Whilst there was a delay between the purchase of the property in 1995 and the pursuer's instructions to solicitors in 2006, the period between 1995 and just after 1998 is explained by the pursuer's assurances by Rugbinder Marwaha that he was

trying to resolve the situation. I did not hear any evidence by the defender or her mother suggesting that the pursuer's acts (as opposed to inaction) would give rise to a reasonable belief by the defender that the pursuer would not seek the sale. The pursuer's evidence was that the instruction of solicitors in 2006 was not out of the blue. Her instruction of solicitors was as a result of wider family negotiations breaking down. Accordingly, given that finding on point (2) on the facts, point (3) cannot arise. Accordingly I do not consider that on the facts an inference can be drawn that the pursuer has acted in a way that she is personally barred from seeking the sale of the property.

[85] Dealing with (4) and (5), I find there would be prejudice to the defender in respect that she would be forced to leave her home where she has lived for a considerable period. There would be no financial prejudice to her arising from the sale. She has not paid the mortgage or outgoings. She effectively lives rent free. Whilst she might have to pay rent or similar for a future property, I did not hear evidence as to whether she would continue to live with her mother, or whether she would continue to pay household outgoings on the defender's behalf. But on the basis that the defender does not wish to leave what she is entitled to regard as her home, that leads to a consideration of the balance between the value to the pursuer of her right to seek the sale, against her earlier inconsistency (or inaction) in seeking the sale. In *William Grant* v *Glen Catrine Bonded Warehouse* regarding an 8 year delay in raising interdict proceedings against a company used the Grant name, the balancing exercise was described as:

> "where there is a clear disproportion between the benefit to be conferred by granting the interdict, on the one hand, and the consequences of not granting it, on the other, so that it could not be seen to be equitable to grant the interdict." (2001 SC 901)

[86] I am not satisfied that the defender has showed prejudice. *Reid & Blackie* note that:

> "[p]rejudice in a broad sense is almost always present, or the obligant would not trouble to oppose the rightholder. But there is a further causal connection to be made out here, which links the rightholder's inconsistency with the prejudice ultimately suffered. Thus the prejudice which is relevant is not that caused by the ordinary enforcement of the right, but by the enforcement of the right *following on from the rightholder's inconsistency*." (Reid & Blackie, Personal Bar at para 4-30).

It is difficult to see how, on the facts, the defender has satisfied that test in relation to her own prejudice. There has been no evidence of steps the defender took as a result of her alleged response to the pursuer's alleged inconsistency.

[87] Whilst the defender's case on personal bar was formulated differently to the way the test is set out in the authorities referred to, Mr Joseph did address that particular point by reference to *Gatty* v *Maclaine*:

> "[w]here A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such a belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time" (1921 SC (HL) 1 at 7).

I do not consider the defender can claim that she has relied upon the pursuer's actings to her own prejudice. The defender's case fails to acknowledge that it is her mother, and not her, that has made the payments for the mortgage. The prejudice she might suffer now is having to leave her home. Any inconsistency by the pursuer in delaying the raising of these proceedings makes no difference to that prejudice, in that it would have arisen at whatever stage the pursuer insisted on the sale. The defender cannot claim financial prejudice, and as such cannot claim she has paid the mortgage for years and may be prejudice by the proceeds of the sale being divided in a certain way.

[88] Mr Joseph also cited an earlier edition of *Gloag & Henderson* as authority for the proposition that reliance by the defender's mother, as opposed to the defender, was sufficient for the test to be satisfied. In the 11th Edition, at para 4.11, it is said

> "… In Lord Birkenhead's definition above, B must be either a person with whom A had actual relations, or a person whom A, as a reasonable man, is bound to regard as interested, not merely a member of the general public. A man has no general duty so to regulate his conduct that third parties may not be justified in believing, and acting on the belief, that a certain state of matters exists……"

This passage does not appear in later editions of *Gloag & Henderson*. It appears to assume that Lord Birkenhead defined B as being capable of being any person, rather than the person holding the right to be enforced. It is not clear from *Gatty* v *Maclaine* that Lord Birkenhead necessarily meant such a definition. But assuming that such an interpretation is correct, it is equally difficult to see how the defender's mother can satisfy that test. The facts regarding the pursuer's wish to have the title and mortgage remain the same, whether it is the defender or her mother. The defender and her mother have been living in the same household throughout the relevant period of time. Mrs Kamlesh Marwaha was clearly aware of the survey that had been agreed at one stage. That survey could only have been with a view to finding a legal resolution to the issue of the title being in the pursuer and defender's names. It is difficult to see how she could have come to a different conclusion about the pursuer's intention from her daughter, unless her daughter was giving her incorrect or false information. There is no factual merit in Mr Joseph's argument that Mrs Kamlesh Marwaha succeeds, where the defender does not, because of her payment of the mortgage. There was no evidence before me that Mrs Marwaha paid the mortgage on the basis of her reaction to the pursuer's actions or inaction regarding the joint title.

[89] Accordingly I do not consider either limb of the test for personal bar is made out for either the defender, or, if legitimate to consider it, the defender's mother. The defender's plea in law on personal bar fails and falls to be repelled.

[90] I therefore grant the first part of the order sought in crave one, and remit to a surveyor to provide a report in terms of OCR 47.1 (1). I invite agents to agree the identity of

the surveyor who should be appointed within 14 days of today's date, failing which a hearing by way of telephone conference call will be arranged.