Neutral Citation Number: [2022] EWCA Civ 28

Case No: CA-2021-000383
CA-2021-000747
(Formerly :A3/2021/0096
A3;/2021/1625)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS
Mr Michael Green QC (sitting as a Deputy High Court Judge of the Chancery Division)
PT/2018/000426

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2022

Before :

LORD JUSTICE LEWISON
LORD JUSTICE ARNOLD
and
LORD JUSTICE SNOWDEN

- -

Between :

THE MAYOR & BURGESSES OF THE LONDON BOROUGH OF BRENT	**Claimant/ Respondent**
- and -	
(1) LEONARD JOHNSON (claiming to be a Trustee of 'Harlesden Peoples Community Council')	**1st Defendant/ Appellant**
(2) STONEBRIDGE COMMUNITY TRUST (HPCC) LIMITED	**2nd Defendant/ Appellant**
(3) HER MAJESTY'S ATTORNEY GENERAL	**3rd Defendant/ Respondent**

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Katharine Holland QC and Matthew Smith (instructed by **Bevan Brittan LLP**) for the **Respondent**

The 3rd Respondent did not appear and was not represented
Michael Furness QC and Stephen Cottle (instructed by **Hogan Lovells International LLP)** for the **1st Appellant**
Peter Crampin QC (instructed by **Axiom DWFM Solicitors**) for the **2nd Appellant**

Hearing dates : 14 and 15 December 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and released to BAILII. The date and time for hand-down is deemed to be 10am on 18 January 2022.

Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Brent LBC holds land wholly or partly on charitable trusts; either because such a trust arose when it acquired the land or because of the way in which money was raised for its conversion into a community centre. There was a dispute about whether the second way of putting the case was a legitimate argument to be put before this court in view of the way in which the case was put below.

2. The context in which these issues arise is a claim by Brent that it is the sole legal and beneficial owner of the land. It brought that claim in response to an application for a restriction to be entered against its title. Mr Michael Green QC, sitting as a judge of the Chancery Division, held that Brent was the sole legal and beneficial owner of the land. His judgment is at [2020] EWHC 2526 (Ch).

The background facts

3. I can take the background facts, none of which may be challenged in this appeal, from the judge's comprehensive judgment.

4. Bridge Park was an old London Transport bus depot. In about 1981 Mr Johnson founded the Harlesden Peoples Community Council ("HPCC"). The vision in 1981 was to establish a centre in the London Borough of Brent that was owned and managed by the local black community for themselves, not beholden to anyone else, and which, by its very nature, would empower that community and would prevent unrest. It was a high profile project in the wake of the Brixton riots of 1981; and attracted much high-level political support.

5. Mr Johnson and HPCC identified Bridge Park as a site and pursued its acquisition as a place where they could realise their vision. Because it had no financial resources of its own, HPCC involved Brent in the project. Brent acquired the site on 5 May 1982 for £1.8 million and legal title was transferred into its name. The purchase consideration was made up by a number of grants from the Department of the Environment ("DofE") and the Greater London Council ("GLC"), with the balance, an agreed amount of £834,500, being paid by Brent itself.

6. Brent now wishes to redevelop the site as a leisure and community facility that would incorporate a swimming pool. In order to do this, Brent wishes to sell part of the site. Mr Johnson and HPCC object to that sale. The interests of HPCC are advanced by Stonebridge Community Trust (HPCC) Ltd ("Stonebridge"). The Attorney-General has been joined as a party to the proceedings. But she has adopted a neutral position, and has played no part in them.

7. At the trial Mr Johnson and Stonebridge put forward a number of arguments leading to the conclusion that Brent held the site on a trust of one kind or another, or that they had acquired a proprietary interest in it by reason of equitable principles. All those arguments failed before the judge. Only one is now pursued

on this appeal; namely that Brent holds the site wholly or partly on charitable trusts. This was the sixth of the issues that the judge considered.

Details of the acquisition and funding of the conversion

8. Although it was the subject of dispute at trial, the judge found that the offer of £1.8 million, which London Transport accepted, was the best market price offer taking into account other issues, in particular the planning status of the property. In formulating its plans for the future use of the property, Brent involved a steering group of the HPCC. That group produced a report in December 1981, which the judge described as an "inspiring document". In it, Mr Johnson wrote:

> "The Bus Depot project is based on the philosophy of community self-help and co-operative enterprise. But the project must have outside help as well.
>
> This is a unique opportunity. Unless the Bus Depot is bought for community purposes by 31st March 1981, London Transport will sell it on the open market. Unless the new community spirit that has emerged in Stonebridge over the last few months is given practical support and encouragement it could die. Far worse, it will become frustrated."

9. Mr Bryson, the leader of Brent Council, contributed a preface in which he wrote:

> "This report outlines a project proposal to use the vacant Stonebridge Bus Depot for community purposes. The proposal is that Brent Council, with assistance from other agencies, should buy the Bus Depot and Harlesden People's Community Council should then establish a Community Co-operative to manage it. Local enterprises, training workshops and leisure and social activities would be based at the Depot….
>
> The long term aim of the project is that it should become self-financing and that the Community Co-operative should buy the Bus Depot back from Brent Council. In the short term the project must have an injection of hard cash. This is needed first to help Brent Council buy the Bus Depot from London Transport for the community and secondly to help the Community Co-operative establish all the activities described in this report at the Bus Depot."

10. As the judge observed, the plan was for Brent to buy the property with assistance from other agencies, and for HPCC subsequently to buy the property from Brent. It was also contemplated in the alternative that Brent would grant a lease of the property to HPCC. In the event neither of these came to pass.

11. Section 4 of the report dealt with costs. Paragraph 4.1 stated:

> "The Project costs will take a variety of different forms and, in the first instance, will be incurred either by Brent Council, the

> Community Co-operative (the CC) or individual member co-operatives or tenants. Each of these bodies will however be receiving income through its activities or grant aid from other bodies to help pay these costs. For example, Brent Council will be looking in particular to the Greater London Council, Central Government and the European Economic Community to assist with the initial acquisition cost of the Bus Depot. Then over a period of years it will receive rental payments from the CC and perhaps ultimately payment for the freehold."

12. The judge commented that the words of the report left little room for doubt that the property would be acquired by Brent; but that it would be managed by the community co-operative which would receive all the income generated and might eventually become self- financing.

13. A subsequent report was presented to Brent's Policy and Resources Committee in February 1982. It recommended that Brent should purchase the bus depot provided financial assistance was forthcoming from the Department of Environment and the GLC. The report made it clear, however, that if insufficient financial assistance was available, Brent should consider selling the whole or part of the property.

14. By 13 March 1982 contracts for the sale and purchase of the property at the price of £1.8 million had been exchanged, with completion set for 5 May 1982. Completion did indeed take place on that date. The transfer contained the following statement:

> "(5) It is hereby agreed and declared as follows:
>
> (i) …
>
> (ii) the land hereby transferred is being acquired by [Brent] for the purpose of the provision of Community facilities being a purpose for which the Council is authorised by Section 120(1) of the Local Government Act 1972 to acquire property."

15. The source of monies for the overall purchase price was made up as follows:

	£
DofE Industrial Urban Aid (the residue of Brent's original 1981/82 allocation)	36,000
DofE Industrial Urban Aid (an additional 1981/82 allocation specifically for the Bus Depot)	243,000
DofE Traditional Urban Aid Grant to [HPCC] 1982/83	75,000
GLC's Capital Programme 1982/83	700,000

London Borough of Brent Capital Programme 1981/82	746,000
Total	£1.8 million

16. But, as the judge explained, this is not properly reflective of the actual situation as the Urban Aid grants from the DofE only covered 75% of relevant eligible expenditure; and the remaining 25% had to be paid by Brent. There was no dispute that the actual total contribution from Brent towards the acquisition was £834,500.

17. Although the judge included as part of the acquisition costs the £700,000 paid by the GLC, it was in fact paid pursuant to a deed made between GLC and Brent on 21 June 1982. That deed recited the transfer to Brent on 5 May 1982 and stated:

> "(2) Brent proposes to carry out improvement works to the property and thereafter to use the property for the purposes described in the Schedule hereto ('the Community Project') and the GLC being of the opinion that the provision of such a Community Project is in the interests of Greater London or some part of it or all or some of its inhabitants is desirous of contributing the sum of Seven hundred thousand pounds (£700,000) to Brent towards the expenses of providing the property for the Community Project."

18. The Community Project was defined in a Schedule to the deed as "a project for the provision of a Community Centre with workplaces and leisure educational cultural social and advisory facilities and office services therefor all for the use and benefit of the local community to be managed on behalf of the local community by a community co-operative". Given the political background to the project, and Mr Johnson's vision, it was crucial to the definition of the Community Project that it be managed by a community co-operative, rather than by Brent.

19. Clause 1 of the deed contained a covenant by Brent to repay the GLC the higher of either the sum of £700,000 or seven eighteenths of the open market value of the land together with interest in a number of events. One was that the property should cease to be vested in Brent or if Brent were to enter into a contract to sell the property. Another was that "the property or any part thereof shall not within one year from the date hereof commence to be used for or shall thereafter cease to be used for the purposes of the Community Project." In addition, by clause 2 of the deed Brent "as beneficial owner" charged the property with payment of those sums.

20. The conversion works for the property were undertaken in two phases. Phase 1 comprised the refurbishment of the office block for occupation by a local information technology project and also a crèche and changing rooms. Phase 1 was carried out during 1983 and was completed in December 1983. The cost of the Phase 1 works was £424,000, of which Brent contributed £118,600 and the GLC £202,400.

21. The Phase 2 works were to convert the Bus Garage into 32 business units, conference and seminar rooms, a sports hall, a music-recording studio, squash courts, a disco hall, a restaurant and bar. The judge did not go into any further detail of the Phase 2 works, as that detail was not relevant to the way in which the issues

had been put before him. The original plans for Phase 2 proved to be more costly than had first been anticipated and came under careful scrutiny from those who were funding it, in particular the DofE. The overall funding requirement was some £3.7 million and this was achieved. The official opening of Phase 2 of the Bridge Park project took place in December 1988, and it was conducted by HRH the Prince of Wales, who had taken a keen interest in the project following several conversations that he had with Mr Johnson. The source of funds for the Phase 2 works, tabulated by the judge at [103], was made up as follows:

DofE (Urban Aid Programme)	£1,550,000
Brent Council	£1,500,000
Midland Bank Loan (guaranteed by Brent)	£350,000
Tudor Trust	£150,000
London Marathon Trust	£54,000
Sports Council	£50,000
National Westminster Bank	£25,000
British Petroleum	£15,000
City Parochial Trust	£10,000
National Council of Voluntary Organisations	£10,000
Total	£3,714,000

22. The judge elaborated on the sources of funding as follows:

> "[104] The Urban Aid grant from the DofE was, as before, funded as to 25% by Brent. That meant that Brent paid £387,500 on top of its own contribution of £1.5 million. Brent also guaranteed the Midland Bank loan of £350,000. According to Mr Wood, the DofE remained concerned about releasing sums to the Steering Group Company or HPCC as they had no experience of handling such amounts or managing such a project. The DofE wanted Brent to supervise the works and Brent's Assistant Director of Development was appointed as the nominated Architect in the building contract for the Phase 2 works. It appears that the DofE felt more secure in the knowledge that Brent ultimately owned the Site. In an internal DofE note dated 4 August 1983 to the Minister, Sir George Young, the following was said:
>
> "The major safeguard for public funds invested in the project is that the ownership of the property, which would represent a substantial capital asset, rests with Brent."
>
> [105] The Midland Bank loan of £350,000 was eventually entered into on 3 June 1987 by the Steering Group Company, guaranteed by Brent. On the same day Brent entered into an agreement with the Steering Group Company governing the ongoing arrangements at the Property and giving the Steering Group Company the right to manage and collect the rents from

> the business units but that it would be responsible for making all repayments of the loan."

23. He concluded this section of his judgment by saying:

> "[107] In my view, it is reasonably clear that Brent was indeed very supportive of the project and wanted HPCC and the Steering Group Company to succeed in their ambitions for the Site. It put large amounts of money into the project. Brent was also willing to grant a lease to the community co-operative that HPCC intended to set up, possibly also with an option to purchase the freehold on terms. But wanting the project to succeed is very different from giving up ownership of a valuable capital asset and there is no evidence before me that Brent ever agreed to give up any interest in the Site. As the note above says, ownership of the Site was Brent's security in the case of a failure of the project."

24. The centre subsequently got into financial difficulties, and Brent was called upon under its guarantee to the Midland Bank. Ultimately, the centre ceased to operate under community management; and Brent recovered possession of the property in the mid-1990s. Since then it has managed the property directly.

The proceedings

25. Brent issued its claim form in June 2018. It sought a declaration that it was the sole legal and beneficial owner of the property; and an injunction restraining the registration of any restriction against its title.

26. The defence to the claim reached its final form in the draft re-amended Defence. As I have said, it pleaded a number of grounds for disputing Brent's claim, only one of which remains live. Paragraph 8 of the Defence addressed the question of charitable trust. Paragraph 8.1 alleged that Brent held this land as trustee "because it is the asset of the Charitable Trust (HPCC). The Defendants [maintain] that the said Land must be an asset of Charitable Trust because the funds were granted to HPCC." "Funds" (with a capital "F") were defined earlier in the Defence as meaning:

> "monies given to the HPCC and/or the London Borough of Brent for the common purpose of acquiring and developing the Land … it is used interchangeably with the word Grants they mean one and the same thing."

27. Despite this wide definition, there was no plea that related to the funds used for the Phase 2 works, as opposed to the initial purchase. Paragraph 8 of the Defence goes on to explain what a charity is; the characteristics of a charity, and the responsibility of charity trustees.

28. At the end of the trial both parties filed written closing submissions. The defendants addressed the question of charitable status in paragraph 29. The first point made

was that the evidence overwhelmingly pointed to "an acquisition" for charitable purposes. That contention was then further elaborated. Paragraph 29 (c) asserts:

> "Alternatively, see the *Dore* case, Brent could not have obtained title for the amount of money it contributed to the acquisition and it is equitable to conclude that a proportion of the current value of the equity is held on trust for the charitable purposes for the community."

29. A straightforward reading of that passage (particularly in the context of the paragraph as a whole) is that it is referring to the initial acquisition (obtaining title) and the amount that Brent contributed to the acquisition, rather than to any independent trust arising out of the funding of the Phase 2 works. The only (rather oblique) reference to the Phase 2 works is found in paragraph 29 (s) which says:

> "HPCC did fundraising and there were other private funders, the other 4% to Mr Wood's 96%, see also the evidence from the Defendants' first witness, and the evidence regarding Wimpey laying the car park, and from Mr Anderson regarding the Sperry sponsoring of the ITeC and from other non-governmental sources, much more than raised by BOTHCA in the *Dore* case."

30. The judge dealt with the charitable trust issue at paragraphs [251] to [294] of his judgment. At [251] he said that the defendants' closing submission concentrated principally on that issue. He observed at [252] that it was not entirely clear from the Re-Amended Defence what the defendants' case was. But he quite clearly regarded it as tied to the initial acquisition of the property; and dealt with the issue on that basis. At [279] to [284] the judge considered the decision of Sales J in *Dore v Leicestershire CC* [2010] EWHC 1387 (Ch) (which is the case to which the defendants had referred in their closing submissions). Since the grounds of appeal complain of a defect in paragraph [283] of the judge's judgment, I should set it out in full:

> "[283] As it was agreed [in *Dore*] that this was a constructive charitable trust, there did not need to be any detailed analysis as to how that was so. It was categorised as a constructive trust so as to avoid the written record requirements if it was an express charitable trust. There was no citation of the *Richmond* and *Liverpool* cases and this was not a contest between land being held by a local authority for its statutory purposes or on charitable trusts. Sales J actually concluded that the premises were held wholly by LCC on charitable trusts:
>
> "115. This is by way of an aside since, in my judgment, the true position is that from 1963 LCC held the beneficial interest in the property on charitable trusts, to provide for the use by and benefit of the community in the parish and also for educational charitable trust purposes to provide a Church of England primary school in the parish.""

31. After a comprehensive review of the authorities, the judge concluded at [289]:

> "After this review of the authorities I can summarise my conclusions in the following propositions:
>
> (1) In order to establish that a property is held on charitable trust, it is insufficient to say that the property was acquired or to be used for charitable purposes;
>
> (2) The prior question … is whether the owner of the property is holding it on trust;
>
> (3) … in order to create a trust there has to be an intention to do so;
>
> (4) That intention can be proved by reference to a number of factors, including and probably most importantly, whether the documents of or relating to the transfer indicate that the registered proprietor does not hold the property beneficially and instead holds it on trust;
>
> (5) I do not consider that a charitable constructive trust can come into existence merely because a property was acquired for arguably charitable purposes if the parties do not intend it to be held on such a trust; in the *Dore* case, the constructive charitable trust was conceded but that was on the basis that charitable money had actually been contributed to the overall acquisition and construction costs."

32. He then turned to apply his conclusions on the law to the facts. His ultimate conclusion was:

> "[294] In all the circumstances, because of the lack of any evidence of an intention on the part of Brent and, so far as I can tell, HPCC that Brent would hold the Property on trust for charitable purposes, I reject the Defendants' charitable trust arguments."

33. Paragraph 1 (v) of the grounds of appeal asserts:

> "… a defect in appreciation or material mistake of fact arises from paragraphs 103 [which is where the judge tabulated the source of funds for the Phase 2 works] and 283 of the judgment because the nature of funding for the works carried out in Phase 2 … was overlooked or the reasoning is inadequate because it is not clear that those contributions were the at forefront of the judge's mind before he concluded "Furthermore there was a direct contribution of charitable funds towards the construction costs, which is very different to HPCC's so-called contribution"."

The grant of permission to appeal

34. On 5 March 2021 Rose LJ granted permission to appeal on the grounds set out in the grounds of appeal, on the understanding that there was no challenge to the judge's findings of primary fact.

35. Mr Johnson's skeleton argument originally sought to argue that Brent's initial acquisition of the property was as trustee upon charitable trusts. But that argument was abandoned in the replacement skeleton argument of 13 August 2021, because it was perceived to be weak. The sole argument he sought to rely on in the replacement skeleton argument was the contention that by reason of the contributions raised by the Appellants from charities and other sources, which were then expended on the Phase 2 works after Brent had acquired the property free from any trust, Brent thereafter held the legal title in part for its own benefit and in part on charitable trusts for the benefit of the community. Mr Furness QC (who did not appear below) presented that case on his behalf.

36. Brent's procedural objection to that argument was that it fundamentally changed the way the case was put at trial.

Change of case on appeal

37. The mere fact that permission to appeal has been given does not preclude Brent from advancing its procedural objection: *Mullarkey v Broad* [2009] EWCA Civ 2 at [29].

38. In *Singh v Dass* [2019] EWCA Civ 360 Haddon-Cave LJ set out the principles which this court applies in deciding whether a new point may be advanced on appeal:

> "[16] First, an appellate court will be cautious about allowing a new point to be raised on appeal that was not raised before the first instance court.
>
> [17] Second, an appellate court will not, generally, permit a new point to be raised on appeal if that point is such that either (a) it would necessitate new evidence or (b), had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial…
>
> [18] Third, even where the point might be considered a 'pure point of law', the appellate court will only allow it to be raised if three criteria are satisfied: (a) the other party has had adequate time to deal with the point; (b) the other party has not acted to his detriment on the faith of the earlier omission to raise it; and (c) the other party can be adequately protected in costs."

39. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 Snowden LJ (then sitting in this court as Snowden J) amplified these criteria. He pointed out that there was a spectrum of cases, at one end of which is a case in which there has been a full trial involving live evidence and cross-examination in

the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. At the other end of the spectrum are cases where the point sought to be taken on appeal is a pure point of law which can be run on the basis of the facts as found by the judge in the lower court. This case is plainly at the first end of the spectrum where there has been a nine-day trial, with both sides represented by counsel, involving live evidence and cross-examination, and a defence that had gone through multiple iterations, not to mention extensive disclosure.

40. It is, to my mind, clear that the point sought to be argued was not pleaded by way of defence. In *Prudential Assurance Co Ltd v HMRC* [2016] EWCA Civ 376, [2017] 1 WLR 4031 in the judgment of this court (Lewison, Christopher Clarke and Sales LJJ) it was stated at [20]:

> "Our procedural system is and remains an adversarial one. It is for the parties (subject to the control of the court) to define the issues on which the court is invited to adjudicate. This function is the purpose of statements of case. The setting out of a party's case in a statement of case enables the other party to know what points are in issue, what documents to disclose, what evidence to call and how to prepare for trial. It is inimical to a fair hearing that a party should be exposed to issues and arguments of which he has had no fair warning. If a party wishes to raise a new point, he should do so by amending a statement of case."

41. The judgment continued:

> "[23] In our procedural law a trial is intended to be the final resolution of all matters in dispute between the parties. Although a party who is dissatisfied with the outcome of a trial may appeal to this court (usually with permission) the appellate process is, in general, limited to a review of the first instance decision. It is thus the starting point that parties are expected to put before the trial judge all questions both of fact and of law upon which they wish to have an adjudication.
>
> [24] There are a number of reasons for this. First, parties to litigation are entitled to know where they stand and to tailor their expenditure and efforts in dealing with (and only with) what is known to be in dispute…. Second, it is a disproportionate allocation of court resources for the Court of Appeal (which usually sits in panels of three judges) to consider for the first time a point which could have been considered, and correctly answered, by a single judge at first instance. Moreover if the Court of Appeal deals with a point for the first time, it is neither a review nor a rehearing; which are the two processes contemplated by the CPR. Third, if resolution of a new point entails the re-opening of the trial it not only entails inevitable further delay, which is itself a reproach to the administration of justice, but is also wasteful of both the parties' and the court's

> resources and unfair to a party who conducted a trial on what has turned out to be a false basis. Fourth, there is a general public interest in the finality of litigation. It is for similar reasons that the Court of Appeal applies stringent criteria for the reception of fresh evidence on appeal.
>
> [25] If the point is a pure point of law, and especially where the point of law goes to the jurisdiction of the court, an appeal court may permit it to be taken for the first time on appeal. But where the point, if successful, would require further findings of fact to be made it is a very rare case indeed in which an appeal court would permit the point to be taken. In addition before an appeal court permits a new point to be taken, it will require a cogent explanation of the omission to take the point below."

42. There was no explanation in this case of why the point was not expressly pleaded.

43. Mr Furness suggested that the point was taken in paragraph 29 of Mr Johnson's closing submissions at trial to which I have already referred. The written submissions, read in context do not, to my mind, take the point. But even if they had, it will generally be too late to raise a new point after the close of evidence if (a) evidence relevant to the point could have been but was not called or (b) there was no cross-examination on the point because it was not thought to be in issue or (c) both.

44. If the argument had really been run at trial and the judge had failed to deal with it, counsel would surely have raised the point on receipt of the judge's draft judgment which must have been circulated in the usual way. There is nothing to suggest that he did.

45. It is also quite clear from Mr Johnson's own skeleton argument that if the point were allowed to be taken (and if it were to succeed), further findings of fact would need to be made. As the skeleton argument put it: because there was no counterclaim, and Brent did not seek directions as to the possibility of any outcome other than their own beneficial ownership "the quantum of any interest of charity" in the property would have to be remitted. The failure to advance a counterclaim is not something for which Brent was responsible. If it were to have been contended that the court should conduct some form of enquiry into quantum, it would have been expected (a) that a counterclaim would have been raised to that effect and/or (b) that a split trial would have been directed. Neither happened.

46. In addition, Ms Holland QC, for Brent, pointed out that in substance the ambit of disclosure ordered for the trial was limited to the acquisition of the property rather than its subsequent conversion. Had the point now sought to be raised been properly raised at trial, further investigation into and evidence about how and from whom the funds were procured, and how they were treated in Brent's accounts would have been necessary. The skeleton argument in support of this new point asserted in blanket terms that the monies contributed to the Phase 2 works "were already held on charitable trusts before the contribution". That is by no means self-evident from the judge's findings, especially since the bulk of the cost was met by a grant from the DofE and by Brent itself. It would have been necessary to

investigate which of the other donors (who included a clearing bank and a multi-national oil company) were indeed charities; and on what terms (if any) donations were made. HPCC's involvement in the subsequent fund raising would also have been a matter for further evidence. If and to the extent that contributions were made by charities, it might also have been necessary to examine the nature of the charitable trusts in question and what expenditure was permitted by way of outright grant under the terms of those trusts. It might also have been relevant to consider on what precisely the monies were spent. If, for example, they were spent on loose furniture for the conference or seminar rooms, carpets, equipment for the contemplated music recording studio or kitchen equipment with a limited life, the effect of such expenditure might be very different from expenditure on the fabric of the building itself.

47. It is not usually profitable for the appeal court to speculate as to what other questions might have been asked of those who did give evidence, or what other evidence might have been adduced from other witnesses, or by way of other documents, if it had been made clear, at least before the evidence was called, that the point now sought to be relied on was a plank in the defence on which the judge had to rule: compare *Mullarkey v Broad* at [48]. But in any event I do not consider that this court (or for that matter Mr Johnson) is in any position to gainsay what Ms Holland has told us.

48. Having heard argument from both sides, we announced our decision not to allow the new point to be taken. In consequence, we dismissed Mr Johnson's appeal.

A charitable trust on acquisition?

49. As I have said, Mr Johnson abandoned this argument. He recognised that Brent bought the property with its own money and did so under a statutory power to do so for its statutory purposes.

50. Stonebridge, however, continues to advance it. The judge said at [255] that the fact that property is held for charitable *purposes* does not necessarily lead to the conclusion that it is held on charitable *trusts*. In my judgment, that is undoubtedly correct. A local authority may, for example, acquire land on which to build a swimming pool. The provision of a public swimming pool is a charitable purpose; but it does not inevitably follow that the local authority is a charitable trustee of the land on which the pool is built. If it was doing no more than providing the pool in pursuance of its statutory powers (see Local Government (Miscellaneous Provisions) Act 1976 s. 19), it could at a subsequent date, if necessary, appropriate the land for different purposes. If, on the other hand, it held the land on charitable trusts, it would need the consent of the Charity Commission or the court before the property could be put to a different use. Examples of this kind could be multiplied, particularly in the case of a local authority many of whose statutory functions (the promotion of recycling, the provision of social care for the needy or aged, the provision of crematoria, libraries, and sports facilities, or the provision of accommodation for the homeless) could all be said to be charitable purposes.

51. Nor does the fact that a charity contributes to the acquisition or improvement of property necessarily mean that the property owner is a trustee of that property (whether wholly or partly) for charitable purposes. Ms Holland gave an apt

example. Suppose that a charity established for the benefit of the disabled made a grant for the purpose of improving access to a building by the disabled, or even for the installation of additional facilities in a private home (such as the adaptation of a bathroom). It could hardly be supposed that thenceforth the building or the private home was held even partially on charitable trusts. Although the making of the grant would have been within the powers and charitable purposes of the charity, once it left the hands of the charity, the grant would cease to be impressed with the charitable trusts.

52. In support of its argument that from the moment of its acquisition Brent held the land on charitable trusts for the Community Project, Mr Crampin QC on behalf of Stonebridge filed a new skeleton argument on Wednesday 8 December 2021, three working days before the appeal was due to be heard (beginning on Tuesday 14 December 2021). It was accompanied by a bundle of 12 supplementary authorities. Neither the skeleton argument nor the authorities were served on Brent at that time. The reason given for the late skeleton argument was that Mr Crampin was not instructed until 2 December 2021. It is important to have well in mind that the argument sought to be raised is said to support the proposition that "*from the moment of its acquisition* by Brent the Site has been held on charitable trust for "the Community Project" as described in the Deed of Covenant between Brent and the GLC."

53. Practice Direction 52C relevantly provides:

> "32(1) A party may file a supplementary skeleton argument only where strictly necessary and only with the permission of the court.
>
> (2) If a party wishes to rely on a supplementary skeleton argument, it must be lodged and served as soon as practicable. It must be accompanied by a request for permission setting out the reasons why a supplementary skeleton argument is necessary and why it could not reasonably have been lodged earlier.
>
> (3) Only exceptionally will the court allow the use of a supplementary skeleton argument if lodged later than 7 days before the hearing."

54. The skeleton argument was not accompanied by any application for permission to rely on it; but Mr Crampin made that application at the outset of the appeal.

55. Although Ms Holland objected that the new skeleton argument was raising a new case, I do not think that it was. Paragraph 1 of the grounds of appeal sought permission to appeal against the judge's rejection of the case that the property was held by Brent "for charitable purposes and on a charitable trust". Rose LJ granted that permission. Ground (ii) of the grounds of appeal relies on the terms on which Brent accepted monies from the GLC. Paragraphs 17 and 18 of Stonebridge's original skeleton argument also rely on the terms of the deed of covenant. But what can be said is that the new skeleton argument attempts to give more legal substance to that bare contention. Ms Holland did, however, fairly point out that the argument that Brent held the property on trust from the moment of its acquisition has been

expressly abandoned by Mr Johnson because the argument was weak. But that does not preclude Stonebridge from continuing to advance it.

56. Stonebridge has always relied on the deed between the GLC and Brent. We decided, therefore, that despite its late appearance, we should engage with the substance of the new argument; but on the basis that the understanding of the GLC and Brent at the time when Brent acquired title was as reflected in the deed between them, taken as a whole.

57. Mr Crampin relied in particular on the recitals to the deed which, he said, showed that the (sole) purpose of the monies advanced by the GLC was to provide the Community Project (as defined). That project was a charitable purpose. Since the monies were not at Brent's free disposal, that necessarily meant that Brent held them on trust. This species of trust is usually described as a *Quistclose* trust: see *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Twinsectra Ltd v Yardley* [2002] 2 AC 164.

58. The judge rejected the case on charitable trust, which was not put on this legal basis below, largely on the basis that Brent and the GLC had no intention to create a trust. Mr Crampin submitted with force that the judge's approach needed qualification. The type of trust for which he argues is a constructive trust; that is to say a trust which a court of equity will impose on a person irrespective of their intention whenever the circumstances so require. It is true that in some circumstances, particularly where there has been some form of wrongdoing, equity will impose a constructive trust on a person, irrespective of their intention. One extreme example is the constructive trust imposed on an agent who takes a bribe. Plainly such an agent has no intention of holding the bribe on trust; but equity compels them to.

59. But where, as in this case, there is no suggestion of wrongdoing, and the arrangements alleged to give rise to the trust are contained in writing, whether they do give rise to a trust of any kind depends on the proper interpretation of those written arrangements: *Quistclose* at 579H-580C; *Brisbane City Council v Attorney-General for Queensland* [179] AC 411 at 421. As Lord Hoffmann put it in *Twinsectra* at [17] where the question was whether an undertaking created a trust:

> "Whether a trust was created and what were its terms must depend upon the construction of the undertaking."

60. Lord Millett said the same thing at [71]:

> "A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them. Whether paragraphs 1 and 2 of the undertaking created a *Quistclose* trust turns on the true construction of those paragraphs."

61. The question for us, then, is whether on the proper interpretation of the deed, a trust of that kind was created. It is in that sense that the parties' intentions (objectively

ascertained) are relevant. That fits with Lord Millett's description of the ultimate question at [74]:

> "The question in every case is whether the parties intended the money to be at the free disposal of the recipient."

62. I consider that that is precisely the approach that the judge adopted in paragraph [289] (4) of his judgment. When he referred at [294] to the lack of evidence of "intention" to hold the property on charitable trusts, that is the sense in which he used that word. I do not, therefore, consider that the judge's legal approach was wrong.

63. In this case, however, the argument is that not only were the monies provided by the GLC not at Brent's free disposal, but also that the underlying property asset was and remains similarly encumbered. It is important to distinguish between the two.

64. It is true that the second recital to the deed states that Brent proposed to carry out improvements to the property and "thereafter to use it for [the Community Project]". But when one looks for the GLC's intention in making the grant, the recital states that it was "desirous of contributing the sum of [£700,000] *to Brent* towards the expenses of *providing the property* for the Community Project". There is nothing said there about the continuing operation of the Community Project once the building had been provided; still less anything about the fate of the building if, for whatever reason, the Community Project (as defined) came to an end. Although Mr Crampin suggested that the GLC's purpose was a continuing one, we were shown no materials that could lead to such a conclusion.

65. Brent acquired the land on 5 May 1982; and that fact was recited in the deed. It was not until a few days later that the GLC agreed, subject to covenant, to make any monies available; and not until 21 June 1982 that the deed was made. An agreement subject to covenant, like an agreement subject to contract, could not have imposed any legal obligation on Brent. Nor is it possible to see how the coming into existence of this deed some six weeks after Brent acquired the property could retrospectively have altered the basis upon which Brent had acquired it. That is not a promising start; but Mr Crampin sought to surmount this obstacle by submitting that the mutual understanding of the GLC and Brent at the date of the acquisition was as evidenced by the deed, despite the fact that it only came into existence some weeks later. I am content (for the purposes of the argument on this appeal) to proceed on that basis. Even so, I cannot see how a trust could have arisen before the monies were paid over. It is, to my mind, clear from Lord Millett's approval of *Gibert v Gonard* (1884) 54 LJ Ch 439 in *Twinsectra* at [76] that the trust arises out of the receipt of the monies on terms, and not before. Mr Crampin suggested that the monies might have been paid over before actual completion, which gains some support from the fact that the judge found that the £700,000 was part of the initial acquisition cost. But that is too slender a point on which to found a submission that the monies were actually paid over before completion. The precise mechanics of the payment were not in issue before the judge; and doubtless that is why he made no finding.

66. In addition, in my judgment the argument faces a number of other insuperable legal hurdles. First, clause 1 of the deed specifies the powers under which the GLC paid over the monies. The relevant one for present purposes is section 136 of the Local Government Act 1972, which enables two or more local authorities to make arrangements for the defraying of expenditure incurred by one of them in "exercising functions" exercisable by all or some of them. Those functions must be the functions of local government. Accordingly, use of that power to make the payment ties the purpose of the monies to the exercise by Brent of local government functions, rather than the creation of an independent charitable trust.

67. Second, the deed contains a charge in favour of the GLC made by Brent "as beneficial owner". The recognition of Brent's beneficial ownership is inconsistent with its being a charity trustee. In addition, at the time of that charge, section 29 of the Charities Act 1960 would have precluded the grant of a charge over land held by a charity without the consent of the Charity Commissioners. No such consent was obtained.

68. Third, the nature of a *Quistclose* trust was closely analysed by Lord Millett in *Twinsectra*. He said of *Quistclose* itself at [69]:

> "When the money is advanced, the lender acquires a right, enforceable in equity, to see that it is applied for the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt."

69. Having examined a number of different theories, he concluded that the best analysis was that it was "an entirely orthodox example of the kind of default trust known as a resulting trust": see [100]. It arises when the payer parts with his money on terms which do not exhaust the beneficial interest: see [102]. In other words, the payer does not part with the entire beneficial interest in the money; and in so far as he does not it is held on resulting trust for him. That analysis does not, in my judgment, sit well with the terms of the deed.

70. Moreover, the principle upon which the argument rests is that it is unconscionable for a person to receive money on terms as to its application and then disregard the terms on which they received it: *Twinsectra* at [76]. But in this case Brent *did* apply the money it received from the GLC on the purposes for which it agreed to apply the money; namely to contribute to the provision of the building for the Community Project. Once the monies have been applied to the agreed purpose, the *Quistclose* trust comes to an end: *Twinsectra* at [69] and [100]; *Challinor v Juliet Bellis & Co* [2015] EWCA Civ 59, [2016] WTLR 43 at [62].

71. Mr Crampin drew some comfort from the decision of Henderson J in *Charity Commission for England v Framjee* [2014] EWHC 2507 (Ch), [2015] 1 WLR 16. That case does show that where A pays money to B for the express purpose of passing the money on to C, B may thereby be constituted a trustee of the money for C. But like other such cases, it was one in which the money had not been applied for the agreed purpose. So it does not, in my judgment, advance this case.

72. Fourth, even if the monies provided by the GLC were not at the free disposal of Brent, it does not follow that the property itself was subject to any equitable constraints. To put the point a different way, the trust property (if there was any) was the monies, rather than what it was spent on, where it was spent for the agreed purpose.

73. Fifth, I do not consider that it is inequitable or unconscionable for Brent to assert an unencumbered title to the land in circumstance where, on failure of the agreed purpose to which the monies have actually been applied, it has entered into a legal obligation to repay not merely the original sum contributed by the GLC, but an agreed percentage of the open market value of the land, if higher. In this respect, equity will follow the law.

74. Sixth, the terms of the deed show that the property itself was indeed at Brent's free disposal. It required the monies (or the agreed share of market value) to be repaid in the event that Brent were to sell the property. Plainly, therefore, it was contemplated that the land might not be devoted to the specified purpose for ever. That shows both that Brent did not commit itself to retaining the property for the agreed purpose; and, more importantly, the GLC knew that when it paid over the monies. That (if nothing else) distinguishes this case from *Brisbane City Council* where land was conveyed to the City Council on terms that it be "set apart *permanently* for showground park and recreation purposes." The fact that, under the terms of the deed, Brent was free to dispose of the property contradicts any notion that the *property* (as opposed to the monies provided by the GLC) was not at Brent's free disposal. There was, no doubt, a financial disincentive to the exercise by Brent of its freedom to dispose of the property; but that does not nullify or impair that freedom.

75. There is a seventh difficulty with this argument. Its goal is the conclusion that even though the monies received from the GLC were applied for the agreed purpose, and that purpose has subsequently failed, the land is still subject to charitable trusts. Tudor on Charities (10th ed para 9-003) explains:

> "There is an important distinction between cases (i) where the issue is whether a gift can take effect at or about the time of its creation (cases of possible "initial failure") and (ii) cases where the charitable gift has taken effect and, at a later date, it becomes impossible or impracticable for it to continue to take effect or for some other reason the purposes of the gift require to be altered. The former are generally called cases of "initial failure". The latter used to be called cases of "subsequent failure"."

76. Having regard to the definition of "Community Project" and the importance of its management by a community co-operative, this is a case of subsequent failure. In such a case there are two main possibilities. One is that the monies (or whatever assets were acquired with those monies) remain subject to charitable trusts. In that event, the monies or assets will usually be applied for charitable purposes under the doctrine of cy-près (now largely regulated by the Charities Act 2011). The other is that the monies (or their equivalent) must be returned to the donor. The correct possibility depends on the terms of the gift. In *Re Cooper's Conveyance Trusts* [1956] 1 WLR 1096, 1103. Upjohn J said:

> "… whatever language is used, the whole question is what are the donor's intentions, to be ascertained on a true construction of the relevant documents in the light of the relevant surrounding circumstances.
>
> Thus, even where the gift is unlimited in time but is followed by clauses of defeasance or powers of revocation, it is a question of construction whether a donor intended to devote his gift to charity out-and-out or in perpetuity or only for a limited purpose and period."

77. The ultimate question, therefore, is whether the donor has made an out-and-out gift for charitable purposes. As it is put in Halsbury's Laws of England (volume 8 (2019)) para 172:

> "If a gift is only for a specific charitable purpose and is limited to that purpose, and the donor parts with his interest in the property only to the extent necessary for the achievement of that purpose, a subsequent failure of that purpose brings to an end the charity's interest in the property given, so that what remains of it is held upon resulting trust for the donor or falls into residue."

78. This principle does not appear to have been affected by the Charities Act 2011 (see section 62 (3)); and is to some extent reflected in sub-sections 65 (3) to (6). Here the express terms of the deed required the monies (or the agreed proportion of market value) to be repaid to the GLC if the agreed purpose subsequently failed. There was, therefore, no outright gift to Brent but only a gift for a limited purpose and for a potentially limited period.

79. The covenant to repay if the property ceased to be used for the purposes of the Community Project is therefore also inconsistent with any intention (either on the part of the GLC or Brent) that the monies should be permanently dedicated to charitable purposes. In the case of a gift limited in that way, once the limited charitable purpose had come to an end, the undisposed interest of the donor would usually revert to him on a resulting trust (buttressed in this case by the covenant to repay). Accordingly, in my judgment, even assuming that the receipt by Brent of the monies provided by the GLC did bring a charitable trust into existence, the land is no longer burdened by any charitable trust created by the deed. It was suggested that donations from other sources might have been effective to create a charitable trust. But that question was not investigated at trial; and it is too late to raise it now.

80. In its initial skeleton argument Stonebridge referred to the decision of Sales J in *Dore v Leicestershire CC* [201] EWHC 1387 (Ch). Although referred to in that skeleton argument, it received only a passing mention in oral submission. The judge accurately summarised the background to that case:

> "The *Dore* case was brought on behalf of a charitable unincorporated association called Breedon-on-the-Hill Community Association (BOTHCA) in relation to land acquired by Leicestershire County Council (LCC) upon which was built premises in 1962 to house a local school and community centre.

> BOTHCA contributed the sum of £3,000 to the cost of constructing the premises, those funds having been contributed in the 1940s and 1950s by members of the local community. For many years, BOTHCA used the community centre for its purposes while the predominant user of the premises was the school. However from about 2004 onwards, relations between the school and BOTHCA deteriorated, and LCC was proposing both to charge BOTHCA for the use of the premises and to limit its use of the premises. BOTHCA started the proceedings on the basis that what LCC was proposing to do contravened BOTHCA's private rights and was contrary to public law. BOTHCA argued that it had a beneficial interest in the premises and that disabled LCC from taking those steps."

81. LCC accepted that when it received the £3,000 contribution towards the construction costs "it received the £3,000 as monies impressed with a charitable trust, which charitable trust obligation has been carried through *to affect LCC's ownership of the Premises*": see *Dore* paragraph [5] (emphasis added). As the judge in our case rightly noted, the argument in *Dore* was not about whether a trust had been created (it was common ground that it had been); but whether BOTHCA itself was entitled to an interest in the property. Sales J decided that it was not; but that the land was held on charitable trusts. Stonebridge argued that Sales J, in effect, endorsed that common ground at [115] where he said:

> "… the true position is that from 1963 LCC held the beneficial interest in the property on charitable trusts, to provide premises for the use by and benefit of the community in the parish and also for educational charitable trust purposes to provide a Church of England primary school in the parish."

82. I have no reason to question Sales J's conclusion in the light of the common ground in that case. But once again, the question in this case is not: on the assumption that a trust of the property has been created, is it a charitable trust? but whether a trust of the property has been created at all. That was not the question in *Dore*; and not a question that Sales J decided.

83. The edifice of an unexpressed charitable trust is, in my judgment, an over-elaborate and unnecessary superstructure to impose on what was essentially a financial grant by one local authority to another to assist the latter to perform its statutory functions; with the latter being a contingent debtor in respect of repayment of the grant (plus overage) with interest; and the debt being secured by a legal charge. The GLC was content to protect its position by means of contractual obligations, fortified by a legal charge.

84. In my judgment the judge was correct to find that no charitable trust was created on Brent's acquisition of the property.

Result

85. I would dismiss Stonebridge's appeal.

Lord Justice Arnold:

86. I agree. Mr Crampin focused his submissions on the question posed by Lord Millett in *Twinsectra* at [74]:

> "whether the parties intended the money to be at the free disposal of the recipient".

87. For the reasons given by Lewison LJ, it is plain from the deed dated 21 June 1982 that, objectively assessed, the mutual intention of the GLC and of Brent was that the sum of £700,000 advanced by the GLC would be at the free disposal of Brent subject to (i) the limits on Brent's powers under statute, (ii) the contractual obligations contained in the deed and (iii) the charge securing the performance of those obligations. Even if the money was subject to a *Quistclose* trust, that trust came to an end when Brent applied the money for the purpose specified by the GLC. Even if the *Quistclose* trust had continued, it could only have applied to the money and not to the land, so as to attach to the proceeds of sale when the land was sold, given that the deed expressly provided that Brent was the beneficial owner of the land and expressly envisaged the sale of the land by Brent.

Lord Justice Snowden:

88. I agree with both judgments.