Neutral Citation Number: [2019] EWHC 3511 (Ch)

Case No: CH-2018-000239

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON
DISTRICT JUDGE HART

IN THE MATTER OF RANI MALATHI SAMARAKKODI BULATHWELA

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building

Date: 18/12/2019

Before :

THE HONOURABLE MR JUSTICE ZACAROLI

- -

Between :

EDWARD THOMAS and ANN NILSSON (Joint Trustees of the Bankruptcy Estate of Rani Malathi Samarakkodi Bulathwela)	**Applicants/ Respondents**
- and -	
(1) RANI MALATHI SAMARAKKODI BULATHWELA	**Respondent**
(2) KUMAR ANTON ROHITHA BULATHWELA	**Respondent/ Appellant**

- -
- -

Chris Dunk (instructed by **Freeths LLP**) for the **Respondents**
Arfan Khan (instructed by **Dylan Conrad Kreolle Solicitors**) for the **Appellant**

Hearing dates: 8 November 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. This is an appeal against the Order of District Judge Hart dated 9 August 2018 in which the judge (among other matters) declared that the Respondents (Mr Thomas and Ms Nilsson, the trustees in bankruptcy of Mrs Rani Bulathwela) were the sole legal and beneficial owners of a property known as 311 Whitchurch Lane, Edgeware, registered in the name of Mrs Bulathwela ("Whitchurch Lane").

2. The Order of 9 August 2018 dealt also with an application made by the Trustees in respect of another property, at Manor Park, Edgeware ("Manor Park"). No appeal is pursued against that part of the order.

3. Permission to appeal was granted by Snowden J on 25 May 2019, "limited to the issue of whether the Appellant [Mr Kumar Bulathwela, husband of Mrs Bulathwela] has a beneficial interest in [Whitchurch Lane] on the basis set out in the Appellant's Advocate's Renewal Statement dated 14 May 2019." The precise extent of this limitation is in issue between the parties, and I will return to it below.

4. Whitchurch Lane was purchased in the sole name of Mrs Bulathwela on 9 July 2004. It was purchased (as the judge found) as an investment, with the assistance of a loan secured by a mortgage from Mortgage Works. It was not suggested that Mr Bulathwela was a party to that mortgage. Whitchurch Lane was let pursuant to a tenancy agreement between Mrs Bulathwela (as landlord) and her daughter, Ms Thilini Anjana Norton, and her husband (as tenants).

5. In contrast, Manor Park had been acquired by Mr and Mrs Bulathwela in joint names, and was used as their family home.

6. Mr and Mrs Bulathwela are both solicitors. They ran two legal practices, in the course of which they ran up substantial debts to the Legal Services Commission ("LSC"). On 11 June 2009 Mr and Mrs Bulathwela executed a legal charge over Whitchurch Lane to secure their joint indebtedness to the LSC. On the same date they executed a legal charge over Manor Park to secure the same indebtedness.

7. Mrs Bulathwela was made bankrupt on the petition of the LSC on 7 July 2015. The Trustees commenced proceedings for possession and sale of both Manor Park and Whitchurch Lane, by application notice issued on 13 October 2006. This included an application for a declaration that Whitchurch Lane was held in the sole name of Mrs Bulathwela.

The Evidence relevant to the beneficial interest in Whitchurch Lane

8. The Trustees filed a witness statement from Mr Pickard (formerly one of the trustees in bankruptcy). The only passage in that witness statement with any relevance to the question of the beneficial ownership of Whitchurch Lane was a sentence in which Mr Pickard stated his understanding to be that the LSC charge on Whitchurch Lane and on Manor Park was security for an admitted debt owed by Mr and Mrs Bulathwela arising from the running of two legal practices.

9. Mr Bulathwela filed a witness statement in opposition to the claim on 22 November 2016. He referred to both properties as ones in which "I have interest as a joint owner and under the matrimonial rights". In relation to Whitchurch Lane, he said: "according to my understanding as the husband of [Mrs Bulathwela], I too [have] the rights to possess 50% interest on the property under the Matrimonial Act."

10. This was the only evidence filed by Mr or Mrs Bulathwela as to the beneficial ownership of Whitchurch Lane when the matter came before District Judge Hart on 25 January 2017. On that date, the judge gave directions for the determination of the application at a final hearing on 10 March 2017. She ordered that if either of Mr or Mrs Bulathwela wished to file further witness statement evidence in opposition, they should make an application to do so by 8 February 2017, supported by a witness statement explaining why it was filed out of time.

11. No application to adduce further evidence was made by either Mr or Mrs Bulathwela. On 8 March 2017, Mr Bulathwela filed a witness statement. This took issue with various matters in the Trustees' evidence and mostly related to matters of valuation, the consequences of orders for possession being made and alternative proposals for avoiding possession. Nothing in it related to the beneficial interests in Whitchurch Lane.

12. At the hearing on 10 March 2017 the Trustees sought an adjournment on discovering the existence of the tenancy granted to Ms Norton and her husband. The judge ordered Mrs Bulathwela to deliver up a copy of the tenancy agreement and any deposit certificate, and other documents requested in writing in connection with the tenancy. The Trustees were directed to serve the Application and evidence on Ms Norton and all chargeholders of Whitchurch Lane. Mrs Bulathwela was given permission to file further evidence, by 24 March 2017, "setting out the basis on which her daughter occupies [Whitchurch Lane], confirming whether any deposit was paid and attaching a statement setting out the rent received since 19 January 2015."

13. The judge refused permission for Mr Bulathwela to rely upon his statement dated 8 March 2017, and refused him permission "to file further evidence in relation to his asserted beneficial interest" in Whitchurch Lane (presumably on the basis that he was in breach of the direction to make an application in relation to such further evidence before 8 February 2017).

14. Mrs Bulathwela filed a witness statement on 23 March 2017. This provided certain details relating to the tenancy. She stated that the rent was £1000 per month, which had been collected from Ms Norton until February 2015. Since then, Ms Norton had been paying "only the mortgage money". She said that when her daughter was having difficulties Mr Bulathwela assisted her with the mortgage payment.

15. In paragraphs 9 to 11 of her statement of 23 March 2017 she purported to provide evidence as to the beneficial interest in Whitchurch Lane, in particular that:

    i) The money raised to pay for the deposit was "from family money" and "my husband provided the deposit money", but that given the passage of time she could not provide any documentary evidence of the deposit.

ii) She and Mr Bulathwela were of the understanding that Mr Bulathwela had the right to one half of the property.

iii) Mr Bulathwela was the main breadwinner of the family.

iv) She and her husband "offered" the property as security for the LSC debt "because we believed and are of the understanding that we both … are meant to own equal shares of the property."

16. At paragraph 12 she complained that the refusal to allow Mr Bulathwela to provide any further supporting evidence was unfair.

17. The matter came back for hearing before the judge on 31 October 2017. According to an email from counsel for the Trustees who attended that hearing, the judge noted that Mrs Bulathwela's evidence went beyond the permission that was given to her on 10 March 2017. In her order of that date the judge refused permission to the respondents to rely on paragraphs 9 to 11 of Mrs Bulathwela's witness statement dated 23 March 2017 going beyond the scope of the evidence permitted in the directions order of 10 March 2017.

18. Mr Bulathwela filed a further witness statement on 2 January 2018, but this dealt only with an update on valuation matters.

19. The application came on for hearing on 12 January 2018.

20. In the meantime, proceedings had been brought in the County Court at Barnet by the Trustees against Ms Norton and her husband, seeking possession of Whitchurch Lane. In those proceedings, Mr and Mr Bulathwela had filed evidence reflecting the evidence of Mrs Bulathwela in paragraphs 9-11 of her statement dated 23 March 2017.

i) In a statement dated 21 November 2017, Mrs Bulathwela repeated the substance of what appears in paragraphs 9-11 of her 23 March 2017 statement.

ii) In a statement of the same date, Mr Bulathwela said that the property was meant to be owned by himself and his wife. In an earlier statement, dated 13 October 2017, Mr Bulathwela said that he provided the deposit for the mortgage and made most of the mortgage payments.

iii) In a statement dated 23 November 2017, Ms Norton referred to the fact that mortgage payments were paid directly into the mortgage account by her or her father. She said that the property "was always treated as if it belonged to my Mum and Dad both", and that Mr Bulathwela dealt with all matters relating to the property.

21. At the hearing of the appeal I was provided with an index of the bundle which the Trustees had provided for the final hearing before the judge on 12 January 2018. There was no mention in it of any of the witness statements filed in the Barnet proceedings. Mr Khan (who did not appear below) told me on instructions, however, that the documents filed in the Barnet proceedings were also before the judge. After the hearing, Mr Khan provided to me by email an index of the bundle which it was

said was filed with the judge in preparation for the hearing on 12 January 2018. The index itself provides no support for the contention that it was placed before the court on that date: the index is headed in respect of a hearing listed on "27 November 2018" and is stated to be in respect of the proceedings in the Barnet county court. Moreover, the fact that the judge made no reference to any of the evidence filed in the Barnet proceedings strongly suggests that the evidence was not before her. Even if it was, given her ruling that paragraphs 9-11 of Mrs Bulathwela's statement of 23 March 2017 could not be relied on, and precluding Mr Bulathwela from adducing any further evidence relating to his beneficial ownership in Whitchurch Lane, it is inconceivable that the judge accepted into evidence the witness statements filed in the Barnet proceedings.

22. The judge reserved her judgment on 12 January 2018, inviting written submissions on an issue which is not relevant for this appeal. Further submissions were filed. The Trustees also filed further evidence as to the up to date position in relation to the charges on the properties. Mr Bulathwela also filed a further witness statement, dated 5 March 2018. Of relevance to this appeal, he complained (at paragraph 18) that "I was not given my right to provide evidence to prove my entitlement to the share of [Whitchurch Lane]." He reiterated that he had always understood that he had a half interest, and complained also that his wife's evidence on the issue had been rejected.

23. A further hearing took place on 15 June 2018, following which the judge delivered her judgment, on 9 August 2018.

The Judge's judgment

24. The judge dismissed Mr Bulathwela's claim to a beneficial interest in Whitchurch Lane on the following basis:

    i) Mr Bulathwela's evidence "on which he had permission to rely" was set out in his first statement, and was that he had a right to 50% of Whitchurch Lane "under the Matrimonial Act". There were no financial remedy proceedings, however, and the Matrimonial Causes Act 1973 was irrelevant to the Application.

    ii) In the absence of any trust deed, the starting point was that "equity follows the law". Since legal title was vested in Mrs Bulathwela alone, it was for Mr Bulathwela to prove that he had an equitable interest on the basis of a resulting or constructive trust.

    iii) The fact of Mrs Bulathwela's support for her husband was of little significance, given that it was in her financial interests to do so. What mattered was the substance of her evidence.

    iv) So far as a resulting trust was concerned, there was nothing in the permitted evidence which established any financial contribution by Mr Bulathwela to the purchase of the property. His payment of the mortgage instalments was by way of assistance to his daughter, who was obliged to pay the mortgage instalments in lieu of rent. This could not establish a beneficial interest under a resulting trust.

v) So far as a constructive trust was concerned, this depended upon establishing that it was the common intention of Mr and Mrs Bulathwela that he would have a beneficial interest. While this could be inferred from the parties' whole course of conduct, there was in this case no evidence of any discussion between Mr and Mrs Bulathwela which might establish an express common intention. In fact, on the contrary, Mr Bulathwela's mistaken assumption of an automatic legal entitlement as a spouse would have rendered any such discussion unnecessary.

vi) The judge referred to the fact that Manor Park was in joint names, which tended to suggest that a decision was taken, in relation to Whitchurch Lane, that it would be the sole property of Mrs Bulathwela.

vii) The only evidence supporting Mr Bulathwela's position, therefore, was the LSC charge on Whitchurch Lane. Absent any evidence to explain why the deed stated that both Mr and Mrs Bulathwela were granting a charge, and whether this was at the insistence of LSC or the respondents, the judge concluded that this evidence was insufficient to establish an inferred common intention.

Grounds of Appeal

25. Although it was suggested in the skeleton argument filed by Mr Khan that the judge had erred in law in favouring the approach adopted by the Privy Council in *Marr v Collie* [2018] QC 631 over that adopted by the Court of Appeal in *Laskar v Laskar* [2008] 1 WLR 2695, and Mr Khan submitted at the hearing that this was a point of general public importance in respect of which the court should make a ruling, it became apparent during the hearing that both parties were agreed on the correct approach to be adopted as a matter of law. They were in agreement that the starting point is to consider whether, on the basis of the evidence as a whole, there is to be inferred a common intention that beneficial ownership was to be shared between Mr and Mrs Bulathwela. It is only if there is insufficient evidence to reach a conclusion on this that it is necessary to revert to the question whether there is a presumption of resulting trust arising from contributions made to the purchase price.

26. Accordingly no practical purpose would be served by determining the point raised in the skeleton arguments concerning the alleged inconsistency between *Marr v Collie* and *Laskar v Laskar*.

27. Subject to an issue as to whether it is open to Mr Bulathwela to appeal the judge's case management decisions to exclude evidence (to which I will return below) the sole ground of appeal is therefore against the judge's finding of fact that Mr Bulathwela had failed to establish either a contribution to the purchase price (so as to found a resulting trust) or a common intention with Mrs Bulathwela that he had a beneficial interest in Whitchurch Lane.

28. Mr Khan, counsel for Mr Bulathwela, accepts that an appeal against a finding of fact by the trial judge will only succeed if the findings were unsupported by the evidence or were otherwise ones that no reasonable judge could have made (citing *Grizzly Business Ltd v Stena Drilling & Anor* [2017] EWCA Civ 94, at [39]-[40]). He relied, however, on *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] 1

WLR 577, at [196] for the proposition that if the challenge is to inferences drawn from primary facts an appeal court may more readily interfere with an evaluation of those facts.

29. In his skeleton argument, as part of the background, Mr Khan recited without distinction the evidence that was permitted, the evidence that was not permitted and the evidence filed in the Barnet proceedings. He contends that the conclusions of the judge that there was no contribution to the purchase price by Mr Bulathwela was plainly wrong, and was reached without any express adverse credibility finding have been against Mrs Bulathwela. He further contends that the documentary evidence supported the claim for a beneficial interest, citing in particular the LSC charge.

Conclusions

30. A significant difficulty with the Appellant's submissions on this appeal is the failure to distinguish between the evidence which was actually before the court, and that which was not. As I have noted above, the judge had excluded the evidence from Mrs Bulathwela that Mr Bulathwela contributed to the purchase price at the outset and had precluded Mr Bulathwela from submitting any evidence relating to his alleged beneficial interest. Even if (which is far from clear) the witness statements from the Barnet proceedings were before the judge insofar as that evidence went to establishing Mr Bulathwela's beneficial interest it was clearly inadmissible, in light of her order of 10 March 2017.

31. I will address below the extent to which Mr Bulathwela either has permission, or should be given permission, to appeal the order of 10 March 2017. I will first, however, deal with the appeal on the basis of the evidence which the judge had permitted to be adduced.

32. Assuming that the judge was correct to have regard only to the evidence that Mr and Mrs Bulathwela were (by reason of the orders of 10 March 2017 and 31 October 2017) permitted to adduce, in my judgment the judge's core finding of fact (that Mr Bulathwela did not have a beneficial interest in Whitchurch Lane) was one which was well within the ambit of reasonable findings a judge could make on the basis of the evidence.

33. Taking into account only the permitted evidence, there was no evidence of any financial contribution by Mr Bulathwela to the purchase price of the property. Mr Khan contends that the judge was wrong for not expressly making any finding as to credibility of either Mr or Mrs Bulathwela as a basis for rejecting their evidence. That criticism is misplaced, however, since there was no relevant admissible evidence to reject. Mr Khan submitted that Mr Bulathwela's oral evidence was not alleged to be inconsistent with the witness evidence (I note that there was no transcript or other record available of the oral evidence given at trial). That, however, takes the matter no further in the absence of anything in the permitted evidence which addressed his alleged contribution to the purchase price.

34. The only permitted evidence related to payments in respect of the mortgage. Mr Dunk, counsel for the Trustees, referred me to the following passage from the judgment of David Richards J in *Barrett v Barrett* [2008] EWHC 1961 (Ch), at [24]:

> "Contributions to mortgage instalments do not stand in the same position as direct contributions to the purchase price. They may be intended to confer a beneficial interest on the payer, but equally they may be intended as an advance to the mortgagor, entitling the payer to be subrogated *pro tanto* to the mortgagee's rights, or they may, as John contends in this case, be intended as payments in lieu of rent. To establish that they are intended to confer a beneficial interest, they must be referable to an agreement or arrangement made at the time of purchase that the payer should be responsible for the mortgage instalments either on terms that he should have a commensurate beneficial interest or in circumstances from which such an intention can be inferred — see Carlton v Goodman."

35. Mr Khan referred, in this connection, to *Tahir v Faizi* [2019] WL 02601978, at [61] to [63], where Murray J referred to the above passage from *Barrett v Barrett*. Mr Khan submitted that the present case is an "investment" case in that the mortgage payments were referable back to the agreement to invest at the time of the purchase.

36. While there was evidence that Mr Bulathwela had paid instalments due under the mortgage, he had done so (according to Mrs Bulathwela's evidence) only since February 2015 and in order to assist Ms Norton, their daughter, who was in financial difficulties and was otherwise paying the mortgage instalments in lieu of rent. This falls far short of evidence sufficient to give rise to a resulting trust. On a proper analysis, on the basis of Mrs Bulathwela's evidence, the payments were referable to Ms Norton's liability in respect of rent, and were not referable back to an agreement to invest at the time of purchase.

37. Accordingly, there is no basis to set aside the judge's conclusion based on resulting trust.

38. The principal focus of the appeal against the judge's conclusion that there was no constructive trust (again leaving aside the question whether she was correct to exclude evidence) is on the judge's decision that the LSC charge was insufficient to establish joint beneficial ownership.

39. It is first suggested that the judge, in concluding that there was an absence of evidence as to why the deed stated that both Mr and Mrs Bulathwela were granting a charge, ignored the evidence of Mr Pickard (which I have referred to at paragraph 8 above). That evidence, however, merely explained that there was a joint debt owed by Mr Bulathwela. As Snowden J pointed out in his reasons refusing permission to appeal, the fact that there was a joint debt might indeed explain why Mr Bulathwela needed to be a party to the charge, so as to acknowledge that indebtedness, but if that was the reason then it provided no support for the proposition that he had a beneficial interest. The judge's concern was that in the absence of evidence as to who required Mr Bulathwela to be party to the charge, and why, the mere fact that he had executed it was insufficient to persuade her that he held a beneficial interest.

40. It is then suggested that the judge wrongly elevated the burden of proof from balance of probabilities to certainty, because she proceeded on the basis that the legal charge "must specify the beneficial interest in question before it can exist." I do not accept

that submission. The judge's conclusion was that in the absence of any evidence as to why Mr Bulathwela executed the legal charge as well as Mrs Bulathwela – in particular whether this was at the insistence of the LSC – the mere fact that his execution of the charge implied that he had an interest in Whitchurch Lane was insufficient to establish, on the balance of probabilities, that he had a beneficial interest.

41. In my judgment, the judge's refusal to accept that the LSC charge demonstrated that Mr Bulathwela had a beneficial interest in Whitchurch Lane is not one with which an appeal court can properly interfere.

42. Accordingly, absent regard being had to any further evidence, I conclude that there is no basis for interfering with the judge's conclusions.

The admissibility of further evidence relating to Mr Bulathwela's interest in Whitchurch Lane

43. I turn to consider whether there is any basis for appealing the judge's decision, in her order of 10 March 2017, to exclude further evidence. I first need to explain in more detail the circumstances in which permission to appeal was granted.

44. In the Appellant's Notice (filed when Mr Bulathwela was acting as a litigant in person) the sole ground of appeal, so far as concerns Whitchurch Lane, was that the judge erred in declaring that the Trustees were solely beneficially entitled to the property.

45. On 10 December 2018, Mr Bulathwela applied for permission to amend his grounds of appeal and to adduce fresh evidence, in the form of a witness statement from Ms Norton dated 4 December 2018. In that statement Ms Norton said that she believed Whitchurch Lane was jointly owned by her parents, that it was always treated as an investment by both of them, that her father dealt with all matters relating to the property such as repairs and maintenance and that she recalled her parents giving the property as security for the debt they owed to the LSC because they treated it as their joint property.

46. The amended grounds of appeal, so far as they concerned Whitchurch Lane, raised the legal issue relating to *Laskar v Laskar* (see above at paragraph 25), sought a re-trial based on the new evidence from Ms Norton and, at paragraph 7, contended that: "the District Judge in her order dated 10 March 2017 erred in refusing to permit the Appellant to rely on further evidence relating to his beneficial interest in Whitchurch Lane. The District Judge ought to have permitted reliance on the same as it was in the interests of justice to do so."

47. On 9 April 2019 Snowden J refused permission to appeal. He also refused permission to adduce fresh evidence, noting that it was available to Mr Bulathwela at the time of the hearing below and there had been no appeal against the refusal to admit it.

48. Mr Bulathwela renewed his application for permission to appeal at an oral hearing, represented by Counsel. Counsel provided a document entitled "Advocates Renewal Statement" (the "Renewal Statement"). The principal argument advanced in the Renewal Statement was that the judge should have followed *Laskar v Laskar* in preference to *Marr v Collie*.

49. In reciting the evidence, the Renewal Statement recited passages in the witness statements filed in the Barnet Proceedings and from the non-permitted paragraphs in Mrs Bulathwela's witness statement of 23 March 2017, without identifying that this was evidence that the judge had refused to be admitted. At paragraph 13 of the Renewal Statement the grounds of appeal were stated to be that the judge was wrong to hold that the Trustees were solely beneficially entitled to Whitchurch Lane, because Mr Bulathwela had an interest by way of resulting trust or constructive trust. It was also contended that there ought to be a retrial on the basis of fresh evidence relating to the beneficial interest of Mr Bulathwela.

50. In addressing the substantive arguments in respect of the resulting trust claim, the Renewal Statement noted that the judge had found that there was nothing "in the permitted evidence" which suggested that Mr Bulathwela had made a payment towards the purchase of Whitchurch Lane, but contended that this was contrary to the evidence of Mr and Mrs Bulathwela cited at paragraphs 8-11 of the Renewal Statement. That was the evidence contained in the witness statements filed in the Barnet Proceedings and in the non-permitted parts of Mrs Bulathwela's statement dated 23 March 2017.

51. Following the oral renewal hearing, in an order dated 20 May 2019, Snowden J granted permission to appeal "limited to the issue of whether the Appellant has a beneficial interest in [Whitchurch Lane] on the basis set out in the Appellant's Advocate's Renewal Statement…". He maintained his earlier refusal to admit fresh evidence. In his judgment of that date, Snowden J referred (at paragraph 2) to the fact that Mr Bulathwela's case before the judge had been that he had a beneficial interest in the property "because it was said that he provided the money for the deposit and made payments towards the mortgage".

52. Having noted that Mr Bulathwela's counsel had abandoned certain of the grounds contained in the amended grounds of appeal, Snowden J referred to the sole remaining ground being that the judge "reached the conclusion which she did against the weight of the evidence", including that she "did not make any express findings rejecting the statements by Mr and Mrs Bulathwela as incredible". He then concluded that "by a very narrow margin" he was persuaded that there was a real prospect of persuading an appeal court that "the District Judge ought to have dealt more fully with the evidence (such as it was) from Mr and Mrs Bulathwela and the implications to be derived from the [LSC] charge."

53. Mr Khan submitted that Snowden J's order should be interpreted as giving permission to appeal the judge's prior orders in which she had refused to permit further evidence from Mr Bulathwela and had excluded paragraphs 9-11 of Mrs Bulathwela's witness statement of 23 March 2019. I do not accept this. On the contrary, in my judgment it is clear, first, that Snowden J gave permission on the sole ground relating to whether Mr Bulathwela had a beneficial interest and, second, that he was led by the terms of the Renewal Statement to reach his decision on the question of permission to appeal on this ground on the basis that there had been admissible evidence before the judge that Mr Bulathwela contributed towards the purchase of Whitchurch Lane at the outset.

54. Mr Khan also submitted that the order of 10 March 2017 should be construed as excluding only further evidence relating to the quantum of Mr Bulathwela's beneficial

interest because, otherwise, it would amount to a debarring order and it is not expressed to be such an order. I do not accept that submission. The order is clear on its face: it refused permission to adduce further *evidence* relating to Mr Bulathwela's "asserted beneficial interest in the Property", but did not debar Mr Bulathwela from asserting such interest on the basis of the evidence already served.

55. In order to challenge the judge's exclusion of evidence relating to Mr Bulathwela's interest in Whitchurch Lane, therefore, Mr Bulathwela needs permission to appeal that decision, and to do so out of time, the relevant order having been made on 10 March 2017, some two and a half years ago.

56. Treating Mr Khan's submissions as such an application, Mr Bulathwela's principal difficulty is that no reason has been articulated as to why the judge was wrong to have made the order of 10 March 2017, beyond the assertion in the amended grounds of appeal that it was "in the interests of justice" to permit further evidence. By 25 January 2017, when the matter came before the judge for the first time, Mr Bulathwela was already out of time for filing further evidence. He then failed to comply with the judge's direction that if he wished to file further evidence he would need to make an application to do so by 8 February 2017 with a supporting witness statement explaining the delay. When he sought to put in evidence after the expiry of that deadline, without making such an application, there was nothing in that evidence that purported to address the issue as to his beneficial interest. By the time of the trial there had been no attempt to remedy the default in compliance with the order of 25 January 2017: no application had been made to adduce further evidence, and no witness statement had been filed explaining the reasons for Mr Bulathwela's failure to file evidence prior to the first hearing before District Judge Hart in January 2017. There is still no explanation today for that failing.

57. Mr Khan submits that Mr Bulathwela is deserving of leniency on the grounds that he was acting as a litigant in person at the time. That fact, however, does not justify applying a lower standard of compliance to Mr Bulathwela, in particular given that any application he might have made at or before the trial would have involved him seeking relief from sanctions, in light of his failure to comply with the order of 25 January 2017: see *Barton v Wright Hassall LLP* [2018] 1 WLR 1119, at [18], per Lord Sumption:

> "18. Turning to the reasons for Mr Barton's failure to serve in accordance with the rules, I start with Mr Barton's status as a litigant in person. In current circumstances any court will appreciate that litigating in person is not always a matter of choice. At a time when the availability of legal aid and conditional fee agreements have been restricted, some litigants may have little option but to represent themselves. Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules: CPR r 1.1(1)(f). The rules do not in any relevant respect distinguish between represented and unrepresented parties. In applications under CPR 3.9 for

> relief from sanctions, it is now well established that the fact that the applicant was unrepresented at the relevant time is not in itself a reason not to enforce rules of court against him: *R (Hysaj) v Secretary of State for the Home Department* [2015] 1 WLR 2472, para 44 (Moore-Bick LJ); *Nata Lee Ltd v Abid* [2015] 2 P & CR 3. At best, it may affect the issue "at the margin", as Briggs LJ observed (para 53) in the latter case, which I take to mean that it may increase the weight to be given to some other, more directly relevant factor. It is fair to say that in applications for relief from sanctions, this is mainly because of what I have called the disciplinary factor, which is less significant in the case of applications to validate defective service of a claim form. There are, however, good reasons for applying the same policy to applications under CPR r 6.15(2) simply as a matter of basic fairness. The rules provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage on the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take."

58. For those reasons, even treating Mr Bulathwela as advancing an appeal against the order of 10 March 2017 excluding him from filing further evidence relating to this alleged beneficial interest in Whitchurch Lane, I dismiss that appeal.

59. That conclusion makes it logically difficult, for the reasons I explain below, for Mr Bulathwela to seek to adduce further evidence on the appeal, the purpose of which is to seek to obtain a retrial.

60. That evidence consists of the following:

    i) First, a further witness statement from Mr Bulathwela in which he asserted that he contributed funds to the purchase of the property. He purported to evidence this by exhibiting extracts from his bank statements from 2003 and 2004. These evidence a series of withdrawals from his bank account, on various dates between 12 December 2003 and 26 August 2004 which total £24,700. He also said that he made further payments towards refurbishing the property, and exhibits further bank statements showing further withdrawals from his account in September and October 2004, totalling £7,250.

    ii) He exhibited file notes, said to have come from a computer disk of a Mr Peter Marsden, his mortgage advisor. The first of those file notes, dated 13 April 2004, refers to an intended purchase of Whitchurch Lane by Mr Bulathwela "in just his own name". The second, dated 20 April 2004, refers to an intended purchase of Whitchurch Lane by Mrs Bulathwela.

iii) He also exhibited an invoice dated 14 March 2006 from Jago Associates, addressed to him alone, relating to the fee for a planning application in respect of Whitchurch Lane.

iv) Finally, he exhibited evidence relating to his payment of mortgage instalments (as referred to in his earlier evidence). For the reasons I have already given, these payments are of no relevance to Mr Bulathwela's claim to a beneficial interest.

v) Second, a witness statement from Don Jagodage of Jago Associates, who corroborated that he dealt with (and was paid by) Mr Bulathwela in respect of the planning application made in respect of the property.

vi) Third, a witness statement from Peter Marsden, corroborating that he supplied the file notes to Mr Bulathwela which are referred to in Mr Bulathwela's own statement.

vii) Fourth, a further witness statement from Ms Norton. In it she refers to discussions that she recalls having with her parents in which her father mentioned to her mother that he would arrange for the deposit money for the purchase of Whitchurch Lane. She also said that she did not know why the property was put into her mother's sole name. Finally, she refers to the fact that her father dealt with all matters relating to the property, such as maintenance and dealing with her and her husband as tenants, and that he paid for builders who worked on the property.

61. It is common ground that on an application to adduce new evidence on appeal, the principles set out in *Ladd v Marshall* [1954] 1 WLR 1489 remain of relevance and are of "powerful persuasive authority": see *Sharab v Al-Saud* [2009] EWCA Civ 353, at [52], per Richards LJ. Those principles are that leave to adduce further evidence may be given if:

i) It is shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

ii) The further evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

iii) The evidence is such as is presumably to be believed.

62. As to the first requirement, there was no credible argument advanced as to why any of this new evidence could not have been obtained with reasonable diligence for use at trial. In relation to the witness statement from Ms Norton, in fact, the evidence is largely the same as that in respect of which Snowden J refused permission in his order of 9 April 2019. He did so because, among other things, it was not evidence that would probably have an important influence on the result, it was not apparently credible, and there was no evidence to explain why it could not have been made available at the time of the hearing before the district judge.

63. I consider this is fatal to the application to adduce new evidence in this case where, for the reasons given above, there is no basis for interfering with the judge's conclusion to refuse permission to adduce further evidence on the question of beneficial ownership. Whereas there might be something to be said for interfering with that decision on the basis of new evidence which was not reasonably available at the time of the trial, that is not the case where not only was the evidence clearly reasonably available from the beginning of the proceedings but no sufficient explanation has been provided for the failure to obtain it earlier.

64. In any event, I consider that, on the critical issue as to whether Mr Bulathwela contributed to the purchase price of Whitchurch Lane, the new evidence is far from compelling. It reveals only that withdrawals were made from Mr Bulathwela's account without identifying the purpose for which they were made. The payments are in varying amounts over a period of months. They bear no relation, either in terms of aggregate amount or the dates, to the payment of the deposit in relation to Whitchurch Lane. So far as Mr Marsden's evidence and his file notes are concerned, these evidence a deliberate decision *not* to purchase the property in Mr Bulathwela's name, there having been an earlier decision to do so, and accordingly detract from, rather than support, his contention that he had a beneficial interest in the property. The most that can be said is that the new evidence supports the argument that Mr Bulathwela made payments towards the development of the property after its purchase. This alone does not amount to evidence likely to have had an important influence on the result.

65. Accordingly, I refuse the application to admit the new evidence. It is simply too late and not sufficiently compelling to persuade me that the interests of justice require a re-trial in order to enable this new evidence to be investigated. As Lord Sumption pointed out, it is important, when considering relieving a party from non-compliance with the rules and orders of the court, to take equal account of the interests of the other party, and the interests of other users of the court. The same is true at the stage when a re-trial is sought on the basis of evidence that could have been obtained earlier. In this case, such a re-trial would prejudice not only the Respondents but also other court users, by taking up court time that would otherwise be available for other litigants.

Conclusion

66. For the reasons set out above I dismiss this appeal.