Neutral Citation [2021] EWHC 597 (Ch)

Claim No: PT-2019-BHM-000014
Appeal No: BM00094CH

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES IN BIRMINGHAM
Chancery Appeals

On appeal from the Order of District Judge Shorthose dated 17 July 2020 (sealed on 7 August 2020)

Birmingham Civil Justice Centre
33 Bull Street
Birmingham BS4 6DS

Date: 19 March 2021

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

BETWEEN:

SUDAGAR KHAN

Appellant
(Defendant in the proceedings below)

TARIQ HANIF MAHMOOD

Respondent
(Claimant in the proceedings below)

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Mr John Aldis (instructed by **Mir Solicitors**) for the Appellant
Mr Tom Russell (instructed by **Bhatia Best Solicitors**) for the Respondent

Hearing date: 2 March 2021

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Approved Judgment

I direct that 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 Marcus Smith:

A. INTRODUCTION

1. By an order dated 17 July 2020 and sealed on 7 August 2020 (the **Order**), District Judge Shorthose declared that:

> "The Claimant and the Defendant are the joint legal proprietors of 1 Moor Park Drive, Bradford Moor, West Yorkshire, BD3 7ER (the **Property**[1]), which they hold on trust for themselves as tenants in common in equal shares."

2. The Order was consequential upon a substantial reserved judgment (the **Judgment**), handed down on 16 July 2020 after a trial of two days taking place on 5 and 6 March 2020.

3. The Claimant, Mr Tariq Hanif Mahmood – to whom I shall refer as the **Respondent** – is the nephew of the Defendant, Mr Sudagar Khan –who I shall refer to as the **Appellant**. On 19 November 1997, the Respondent and the Appellant jointly purchased the legal title to the Property. The legal title in the Property was held in the names of the Respondent and the Appellant as joint tenants. The question before the Judge was whether:

   (1) As the Respondent contended, and as the Judge found, the beneficial interest in the Property was held on trust for the Respondent and the Appellant in equal shares as tenants in common; or whether

   (2) As the Appellant contended, the beneficial interest in the Property was held on trust for the Appellant alone.

4. The Appellant appeals the Order on various grounds, which I set out more fully in Section C below. Each of those grounds contends that the Order was wrong in declaring that the Property was held by the Respondent and the Appellant in equal shares as tenants in common, and that the Order should be varied so as to declare that the beneficial interest in the Property was held on trust for the Appellant alone. Permission to appeal was given in relation to some grounds of appeal by the Judge himself; and, in relation to the remaining grounds, by me.

5. The Respondent, for his part, contends, in a Respondent's notice, that the Order can be upheld on other grounds. Again, the contentions in the Respondent's notice are set out in Section C below.

6. Before I do so, it is necessary to state the facts found by the Judge. Neither party sought to suggest that the findings of fact by the Judge ought to be or indeed could be re-visited on appeal. As the Respondent's counsel, Mr Russell, noted in his written appeal submissions, "[i]nsofar as [the Appellant] asks this Appellate Court to re-visit the Judge's factual findings, there is no proper basis to do so, because the Judge's factual

[1] A list of the terms and abbreviations used in this Judgment appears at Annex 1 to this Judgment. Annex 1 also sets out where each term/abbreviation first appears in the Judgment.

findings were not plainly wrong". I agree: indeed, I pay tribute to the clear and comprehensive nature of the Judge's fact-finding exercise in the Judgment, which I adopt and set out in summary form in Section B below. Mr Aldis, counsel for the Appellant, made clear at the outset of his submissions that he was in no way seeking to re-visit the Judge's findings of fact, but that the appeal could and should succeed on the basis of those findings.

B. THE FACTS

(1) The Judgment

7. As I have said, this Section is essentially derived from the Judgment.

(2) Purchase of the Property in 1997

8. The Respondent and the Appellant purchased the legal title to the Property in their joint names on 19 November 1997 for £45,000.[2] There was no mortgage (and never has been). The Respondent has never occupied the Property, which has been and continues to be the home of the Appellant and his extended family.[3]

9. The Property was valued as at September 2019 with a (then) current market value of £205,000.[4] Part of that value derives from the appreciation of property prices generally; but part is due to work done on the Property by or at the cost of the Appellant.

10. There was a significant dispute between the Appellant and the Respondent as to how the purchase of the Property was funded:

(1) The Respondent contended that he invested £22,500 – half the purchase price – on 19 November 1997. This was, he said, intended as a short-term investment which (however) the Respondent has not, until now, sought to realise.[5] As the Judge stated:[6]

> "The [Respondent] now wishes to realise his interest in the Property by forcing a sale following the failure to negotiate a sale of his interest to the [Appellant]."

(2) The Appellant's contention was recorded by the Judge as follows:[7]

> "It is the [Appellant's] case that the [Respondent] contributed no funds to the purchase and that he only ever had a nominal valueless interest [i.e., the legal estate] held on trust for the [Appellant]. The inclusion of the [Respondent] as joint legal owner was a sham to protect the [Appellant's] assets from a potential claim against him by his wife in the event of a divorce."

[2] The register as HM Land Registry records both the Appellant and the Respondent as proprietors.

[3] Judgment at [2].

[4] Judgment at [3].

[5] Judgment at [4].

[6] Judgment at [4].

[7] Judgment at [5].

11. The Judge determined that as at the time of purchase, the Respondent did indeed contribute half the purchase price:[8]

> "I have already stated my view that the only explanations for joint ownership in 1997 was the financial contribution by the [Respondent] or the sham arrangement to protect the Property from the [Appellant's] wife in the event of a divorce. I am satisfied that there was no such agreement, which I find fanciful. The [Appellant] had owned Boynton Terrace[9] in his sole name and would have had to explain to his wife why the Property was co-owned with his nephew when the [Appellant] accepts that he had never been mentioned it [*sic*] to her. He did not retain any financial records such as evidence of monies being introduced by the [Respondent] (even if provided by the [Appellant]) as a paper trail to avoid his wife challenging the [Respondent's] beneficial interest on a divorce. It is also far-fetched to imagine that between being rejected by the Bank in October 1997,[10] when he was presumably happy to purchase the Property in his sole name or in joint names with his wife, and completion one month later that he had now found the funds from the sources stated yet been convinced by the [Respondent] to set up the sham arrangements and buy the Property jointly. The [Appellant[11]] has insisted that he put up all the funds without the need for help from the [Respondent], which begs the question as to why he even had the conversation with the [Respondent] leading to the sham ownership idea."

12. All other things being equal, the inevitable consequence is that the beneficial interest was held on trust for the Respondent and Appellant equally as tenants in common. Since neither party was seeking to challenge the Judge's findings of fact, it is easy to understand why this part of the Judge's reasoning was not the subject of appeal, and was accepted by both parties as being the correct starting point for the matters at issue in this appeal. I have therefore contented myself with a very brief articulation of the Judge's unchallenged findings and unchallenged legal conclusions as to how the Property was held on purchase.

(3) Events in 2006/2007: their relevance and how they arose

13. Ten years after the Property was purchased, the Respondent was investigated by Gedling Borough Council and charged with benefit fraud following his failure to disclose his interest in the Property when claiming benefits in 2004.[12]

14. During the course of these proceedings, under caution and with legal representation, the Respondent admitted being the joint legal owner of the Property (as he had to, given the state of the Register), but asserted that his interest was only nominal and that he (together with the Appellant) held the entirety of the legal estate on trust for the Appellant.[13] As the Judge noted, "[t]he grounds for that claim was that [the

[8] Judgment at [115], where the Judge draws together the strands of his careful analysis of the evidence. It is unnecessary for me to consider the detail any further, as that detail is not material to the questions arising on appeal.

[9] The Appellant's previous home, which was sold after the Property was acquired and after some renovation work had been done to the Property: Judgment at [21] and [29].

[10] There was an unsuccessful mortgage application, or at least a mortgage application that was not proceeded with by the Appellant, as described by the Judge: Judgment at [81]*ff*.

[11] The Judgment refers to the Claimant, i.e. the Respondent, but that does not make sense.

[12] Judgment at [9].

[13] Judgment at [9].

Respondent] had agreed to be a nominal trustee in order to protect the [Appellant] from any potential claim in a divorce at which point the parties could pretend that the [Respondent] held a 50% interest. The [Appellant] had apparently been having a long-term affair which had put his marriage at risk."[14]

15. In order to divest himself of the legal interest in the Property – in relation to which the Judge made careful findings, to which I will come – the Respondent instructed John O'Connor Solicitors in Derby "to transfer the property to the [Appellant]. A defective TR1 was drawn up and executed by the [Respondent] on 22 March 2007, but was never registered at HM Land Registry in order to effect a legal transfer of the title to the Property to the [Appellant]."[15]

16. The significance of the dealings in 2006/2007, and particularly the significance of the **TR1**, on the beneficial ownership of the Property was a point raised by the Judge at the conclusion of the trial: the Judge requested further written submissions on this point, and the Judgment deals not only with the initial beneficial ownership of the Property in 1997, but also with the possible transfer of that beneficial ownership in 2006/2007.[16] It is the Judge's conclusions in relation to the transfer (as opposed to his conclusions on initial beneficial ownership in 1997) that are here in issue, and it will be necessary to set out the Judge's findings in relation to the transfer in some detail. Before I do so, there are two preliminary points that must be made:

(1) As I have said, the question of a subsequent disposition was a point that troubled the Judge, and on which he required additional submissions to be made. It appears (as this was a Part 8 Claim, the pleadings were limited) that this was a new point, arising out of the Judge's concerns, having heard the evidence.

(2) In any event, it is a point that requires a very careful articulation of the evidence – and I express my admiration and gratitude for the Judge's considerable efforts in this regard. The fact is that the point of a subsequent disposition of the equitable interest in the Property only arose because the Judge rejected the Appellant's contentions in relation to the manner in which the Property was initially held. In other words, the story that the Appellant told in relation to the acquisition of the Property in 1997 – namely, that the Respondent's beneficial interest was a "sham" to deceive the Appellant's wife, and which the Judge altogether rejected – in fact was concocted some 10 years later, when the Respondent was concerned about the investigations into his financial position. The Judge:

(a) Found that, in 2007, the Appellant gave evidence in court about the Respondent's nominal interest in the Property.[17]

(b) Noted that this was a case where there were very few documents to support either party's case,[18] and that he was heavily reliant on witness

[14] Judgment at [9].

[15] Judgment at [10].

[16] Judgment at [7] and [124].

[17] Judgment at [34].

[18] Judgment at [50].

recollection, which however needed to be handled with great care.[19] The Judge noted that "[i]t should not be any surprise that both [parties] have had difficulty in recollecting exactly what happened and what was said in 2007 at the time of the trial and execution of the TR1 13 years ago, let alone at the time of the purchase in 1997, nearly 23 years ago."[20]

(c) The Judge noted that there were significant issues with the evidence and recollection of both the Respondent[21] and the Appellant.[22]

In these circumstances, making findings as to what happened and what was intended in 2006/2007 – particularly when the story about the nominal ownership of the Respondent appears wrongly to have been attributed by the Appellant to 1997, when in fact it surfaced in 2006/2007 – was challenging, and I have paid very careful regard to the findings of the Judge. Needless to say, not having heard the evidence, there is nothing that I can properly say or add to the Judgment in this regard.

17. With these preliminary points in mind, I turn to the events of 2006/2007.

(4) The events of 2006/2007

18. The Judge found as a fact that "[t]he first time that there was any suggestion of the [Respondent] not being a genuine 50% beneficial owner of the Property and not having made a financial contribution was the [Respondent's] own evidence to the Council's investigator in 2007 and subsequently his defence of the charges brought against him in Nottingham Magistrates later that year".[23]

19. It was shortly after his interview with the Council's investigator that the Respondent instructed John O'Connor Solicitors to transfer his interest in the Property to the Appellant.[24] As to this:[25]

(1) In a handwritten note dated 26 March 2007, John O'Connor Solicitors noted:

"Received the Title Deeds for the above property from Tariq Mahmoud [i.e., the Respondent] and Sudagar Khan [i.e., the Appellant] to transfer into the sole name of Sudagar Khan."

(2) By a TR1, signed by the Respondent in the presence of his solicitor, the Respondent purported to transfer the whole of the registered title in the Property to the Appellant. The transfer was for no consideration.

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[19] Judgment at [51], citing *Gestmin SGPS SA v. Credit Suisse (UK) Ltd*, [2013] EWHC 3560 (Comm) and *Kogan v. Martin*, [2019] EWCA Civ 1645.

[20] Judgment at [55].

[21] Judgment at [59]*ff*.

[22] Judgment at [65]*ff*.

[23] Judgment at [89].

[24] Judgment at [90].

[25] I am quoting from documents that were before the Judge and which he referenced in the Judgment. I was taken to these documents in the course of submissions, and they have served to elucidate, rather than expand, the points made by the Judge in the Judgment.

(3) As I have noted, title in the Property was registered in the names of both the Respondent and the Appellant. As the Judge noted, a TR1 identifying only one of two registered proprietors as transferor would be unlikely to satisfy HM Land Registry, even if the transferee was the other registered proprietor. As the Judge noted:[26]

> "…As it turned out, the solicitor drafted the TR1 incorrectly and omitted the [Appellant's] details from the TR1 as joint transferor. This meant that the TR1 was invalid and could not be registered. Any attempt to do so would have been rejected outright or returned with a requisition to amend the TR1 and re-execute. It has not been suggested by either party and I find it inconceivable that there was a deliberate plan between the [Respondent] and the solicitor to draft an ineffective TR1, not least because this could well have been identified by the Magistrates and Prosecutor."

(4) It is not necessary to speculate further on whether the TR1 would have been sufficient, in and of itself, and without more, to effect the transfer of the legal estate. The fact is that the TR1 was never submitted to HM Land Registry. That was because the Respondent failed to put his solicitor in funds to complete the transfer. A letter dated 18 April 2007 from John O'Connor Solicitors stated:

> "We are now ready to register this transaction and should be obliged if you would let us have the sum of £60.00 in respect of the Land Registry Fee at your earliest convenience."

(5) Although the Respondent contended that the failure to register the TR1 lay with the Appellant,[27] he conceded that this was not the case in his evidence to the Judge:[28]

> "The [Respondent] conceded in cross-examination that he had intended to transfer his interest in the Property in 2007 because it had proven to be a problem for him by causing the criminal investigation. Although his interest had a value of perhaps £50,000 at that time, he did not consider it a major investment and put it out of his mind for many years. His focus was on dealing with the criminal proceedings and he thought that by instructing the solicitor and signing the TR1 that he had done all that he needed to do. However, he blamed the [Appellant] for the TR1 not being registered as he had failed to pay the outstanding fees of £400.[29] Upon being shown the documents from the solicitor's file, he conceded that the £400 must have been paid by the [Appellant] but the outstanding fee of £60 remained unpaid and resulted in the solicitor closing his file and the TR1 not being registered."

20. Pausing there, it is necessary to identify the Judge's findings as to the intentions of the respective parties at this point in time (that is, the time that the TR1 was excecuted). So far as the Respondent is concerned:

(1) The Judge, as has been seen in the paragraph quoted in paragraph 19(5) above, found that the Respondent had an intention to transfer his interest in the Property to the Appellant in 2007.

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[26] Judgment at [112].

[27] See the summary of the Respondent's case at [25] of the Judgment. The Respondent's case was disputed by the Appellant: see [35] of the Judgment.

[28] Judgment at [95].

[29] This would probably have been in respect of stamp duty.

(2) The Judge expanded upon this intention later on in his Judgment:[30]

> "…it is my judgment that [the Respondent's] actions in instructing solicitors to transfer his interest in the Property to the [Appellant] and to execute the TR1 were attributable to his desire to avoid conviction rather than to reflect his true understanding of the Property's beneficial ownership. He had been caught out by the Council, which must have been frustrating given his belief by that time that he still had an interest which was unlikely to be realised for some time, as it was his uncle's [i.e., the Appellant's] family home. I am satisfied that, despite this, he did intend at that time to transfer his legal interest to the [Appellant] for nil consideration with any financial dealings to be resolved informally within the family at a later date. This was at his sole instigation as opposed to a considered agreement between the parties. As it turned out, the solicitor drafted the TR1 incorrectly and omitted the [Appellant's] details from the TR1 as joint transferor…"

21. Turning to the Appellant's understanding at this time, the Judge found:[31]

> "Both parties accept that the executed TR1 was at least shown by the [Respondent] to the [Appellant] in 2007.[32] I am satisfied that an original or even copy of the TR1 was not handed to the [Appellant] as he would surely have retained that and disclosed it as part of these proceedings and would almost certainly have tried to register it at some stage after he discovered that it hadn't yet been done. I do not believe that the [Appellant] would have had any idea as to the importance of the TR1 or understood its significance and the need for registration. By being shown the TR1, it is more than likely that the [Appellant] would have believed that the Property was now legally his alone even if there had been no detailed discussions about the [Respondent's] financial interest."

(5) Subsequent events

22. Although the TR1 was never submitted to HM Land Registry, the Respondent continued – at least for some time – to assert that he had no interest in the Property:[33]

> "Between 2009 and 2012, the [Respondent] attempted to obtain a licence to act as a driving instructor. Due to his criminal conviction for a dishonesty offence, his application was initially rejected, so he pursued an appeal to the FTT. Through his solicitors, he repeated the evidence that he had used before the Magistrates and it appears that the Tribunal Judge had some sympathy and couldn't understand why he had pleaded guilty (as he was incorrectly informed) if he had no beneficial interest. The appeal was rejected as the Judge wasn't able to look behind a conviction for dishonesty. This was repeated in 2012, but this time [the Respondent] was successful with the Driving Standards Agency and he obtained his licence…"[34]

23. Thereafter, relations between the Appellant and the Respondent soured "due to issues flowing from the breakdown of the [Respondent's] marriage". This was probably some

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[30] Judgment at [112] (emphasis added).

[31] At [96] of the Judgment.

[32] The Judgment in fact says "2017", but both counsel accepted that this was a typographical error, which I have corrected.

[33] Judgment at [97].

[34] The paragraph concludes with the words: "These actions repeated the pattern on his own evidence of telling lies to achieve his aims. I am satisfied that that was his principal motivation". I must be careful, because of course if (which is one of the points under appeal) the beneficial interest did transfer in 2006/2007, then the Respondent was not – in fact – telling lies.

time between 2012 and 2015,[35] In any event, in September 2016, the Respondent's solicitors at that time sent a letter before action asserting a 50% beneficial interest in the Property, and thereafter matters took their course until the trial before the Judge.

C. THE JUDGE'S CONCLUSIONS; THE GROUNDS OF APPEAL; AND THE RESPONDENT'S NOTICE

(1) Resulting trust

24. As I have described, the Judge found that the beneficial interest in the Property was originally held 50%/50% as between the Appellant and the Respondent. That conclusion is not challenged, and represents the starting point for this appeal, which is concerned with the question of whether a different conclusion pertains by reason of events subsequent to the acquisition of the Property, and in particular the events in 2006/2007.

25. It is important to note that the Judge concluded that at the time of purchase of the Property, it was the common intention of the parties that the beneficial interest in the Property be held in this way. He then went on the say:

> "128. Although it is not yet clear what the practical effect will be of the Privy Council decision in *Marr v. Collie*, [2017] UKPC 17, which reasserted the principle that the starting point is the common intention of the parties even in non-domestic arrangements like this, Mr Aldis [counsel for the Appellant] concedes in any event that if I find that the parties contributed equally to the purchase price that on resulting trust principles the starting point is that they hold the beneficial interests equally.
>
> 129. Based on my findings of fact as to the respective contributions and the joint legal ownership, the burden of proof is on the [Appellant] to satisfy me that there was a common intention of the parties to change their beneficial interests later.
>
> 130. There is no suggestion that there has ever been a repayment of the [Respondent's] contribution or that the [Appellant] has purchased the [Respondent's] share. The [Appellant] instead relies upon the representation made by the [Respondent] in 2007 that he had gifted his share to him as the criminal proceedings had convinced him that his ownership had become too much trouble despite its apparent value. This was evidenced by the instruction of John O'Connor Solicitors and the execution of the TRI which was shown to the [Appellant] by the [Respondent] and produced in the Magistrates Court in late 2007.
>
> 131. I have concluded that the [Appellant] has not discharged this burden of proof on the balance of probabilities based on my findings of fact and that there was no new actual or inferred common intention in 2007 or any time thereafter. The [Appellant] took no steps to check that the transfer had completed or to remedy the defective TRI and he did not rely upon the representation or sight of the TRI to act in any way differently towards the Property to his detriment after 2007."

26. These findings were, of course, made in the context of the Judge's consideration of whether the resulting trust that he had found to exist at the time of the purchase of the

[35] The Judge is – unsurprisingly – not very specific on dates, but this is what I take from [98] and [99] of his Judgment, in combination with his description of the dealings between the parties up to 2012.

Property had subsequently changed so as to affect the 50%/50% beneficial holding he had found to exist at purchase. As is clear, he found no such change of intention. That finding is relevant not merely to the question of resulting trust (which is a point not on appeal before me) but to points which are on appeal.

(2) Other contentions as to beneficial interest

27. Before the Judge, the Appellant contended that the beneficial ownership was not 50%/50% because:

(1) A proprietary estoppel arose in favour of the Appellant: it was contended that the Respondent had represented to the Appellant in 2007 that the Property would be transferred to the Appellant's sole name for no consideration. The Appellant relied upon that representation to his detriment, such that it would be unconscionable for the Respondent to resile from the representation he had made. The Judge rejected this contention, and declined to grant any equitable remedy on the grounds of proprietary estoppel.[36]

(2) On execution of a transfer of a legal estate, but before that transfer is perfected by registration, an equitable interest in the transferred property arises in the transferee.[37] It was contended that this principle applied here to transfer the Respondent's equitable interest in the Property to the Appellant.[38] Before me, this was referred to as the "registration gap argument". That submission was conflated with other arguments going to the same end. Thus:

(a) It was contended that the TR1 could be construed as an assignment of the Respondent's beneficial interest.[39]

(b) It was contended that this was a case where equity should perfect an imperfect gift.[40]

The Judge considered and rejected these contentions, for reasons that he gave in [147] to [151] of the Judgment.

(3) A constructive trust arose. This contention does not appear to have been separately considered in the Judgment, and it is pertinent to observe that it may add little to the points that I have already described. However, because it constituted a separate ground of appeal, it is appropriate that I consider it separately.

28. The Appellant thus, in his grounds of appeal, contended that the Order was wrong in declaring that the Property was held beneficially for the Appellant and Respondent in equal shares, and that the Order should have declared that the Appellant and Respondent held the Property on trust for the Appellant alone because:

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[36] Judgment at [133] to [136].

[37] See, e.g., *Scribes West Ltd v. Relsa Anstalt (No 3)*, [2004] EWCA Civ 1744.

[38] Judgment at [138] to [139].

[39] Judgment at [140].

[40] Judgment at [141].

(1) The Respondent was estopped from resiling from his representation that he held the Property for the Appellant and had no beneficial interest. I shall refer to this as the **Proprietary Estoppel Point**.

(2) The entire beneficial interest was held on trust for the Appellant by the Respondent and the Appellant together because the TR1 had been executed. I shall refer to this as the **Registration Gap Point**.

(3) The Respondent intended to gift his interest in the property to the Appellant, but failed to do so properly, with the result that equity should perfect the imperfect gift. I shall refer to this as the **Imperfect Gift Point**.

(4) The TR1 constituted an equitable assignment of the Respondent's beneficial interest in the Property. I shall refer to this as the **Equitable Assignment Point**.

(5) A constructive trust arose. I shall refer to this as the **Constructive Trust Point**.

(3) Permission to appeal

29. The Judge refused permission to appeal in relation to the Proprietary Estoppel Point. He gave permission to appeal on the questions of whether there had been a transfer of the Respondent's beneficial interest in the Property, whether by equitable assignment or otherwise.[41] Because I was concerned that the parties be clear to what was and what was not under appeal, by my order of 26 January 2021 I gave permission to appeal "in respect of all grounds of appeal pleaded in the Grounds of Appeal dated 31 July 2020 to the extent that permission was not given by the court below". That included in relation to the Proprietary Estoppel Point.

30. I propose to consider these various grounds of appeal in the following sections of this Judgment. I consider the points in the following order:

(1) The Registration Gap Point.

(2) The Imperfect Gift Point.

(3) The Equitable Assignment Point.

(4) The Proprietary Estoppel Point.

(5) The Constructive Trust Point.

(4) The Respondent's notice

31. The Respondent's notice was filed out of time, and the Respondent had to apply for permission to rely upon it. For the reasons I gave at the hearing of the appeal, I gave the Respondent permission to rely on his Respondent's notice.

32. The essence of the Respondent's point in the Respondent's notice was that the Order could and should be upheld on the ground that – even if one or more of the grounds of

[41] See the Judge's reasons given on Form N460

appeal should succeed – the Order should stand because the Appellant did not come to this court with "clean hands".

33. I consider this point after I have dealt with the various grounds of appeal.

D. THE REGISTRATION GAP POINT

34. In *Scribes West Ltd v. Relsa Anstalt (No 3),*[42] Carnwath LJ identified two[43] propositions that he regarded as "uncontentious":

(1) The transfer of a registered estate in land is not completed until registration and – until then – the transferor remains the proprietor of the legal interest.

(2) Before registration, and following execution of the transfer and payment of the purchase price, the transferee becomes the owner in equity.

35. This is no more than an articulation of the doctrine that began with *Walsh v. Lonsdale*,[44] and which applies in all cases where there is a statutorily prescribed mode for the transfer of an interest which is not (fully) complied with by the transferor. Provided there is a contract for the transfer of the interest, equity will look on that as done which ought to be done, and regard the owner of the legal interest or estate as holding it on trust for the (intended and contractually agreed) transferee. Essentially, all that equity is doing is giving effect to the intentions of the parties as incorporated in a formal agreement (i.e., an enforceable contract), instead of limiting the parties to their common law remedy of damages, which would in many cases be unsatisfactory.

36. The importance of a contract to transfer the property cannot be understated: equity does not – save in particular cases, to which I will come – lend itself to the perfection of imperfect gifts. A promise of a gift (i.e., one unsupported by consideration) will not, generally speaking, be enforced in equity.[45]

37. This ground of appeal accordingly fails. There was no contract for the transfer of <u>any</u> interest in the Property and no "registration gap" where equity will protect the transferee pending formal transfer of the legal title. The "registration gap", in the sense used by the Appellant, only exists in the time between the agreement to transfer and the final performance of that agreement (in this case by registration). There is no such "registration gap" in the present case.

E. THE IMPERFECT GIFT POINT

38. As I have noted, equity will not, generally speaking, "rescue" an ineffective gift. A gift of property – if complete and effective – will, of course, be respected. But a failed gift is, on the whole, just that – failed and ineffective.

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[42] [2004] EWCA Civ 1744 at [9].

[43] There was a third proposition, which is not material for present purposes.

[44] (1882) 21 ChD 9.

[45] See, e.g., *Milroy v. Lord*, (1862) 4 De G F & G 264, 45 ER 1185.

39. The exception to this rule is that stated by Turner LJ in *Milroy v. Lord*:[46]

> "I take the law of this Court to be well-established, that, in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him."

There is, as Turner LJ stated, "no equity in this Court to perfect an imperfect gift", save where this requirement is met.

40. It is fair to say that the statement of principle in *Milroy v. Lord* has undergone a degree of development over the years, culminating in the decision of the Court of Appeal in *Pennington v. Waine*.[47] In that case, the Court of Appeal relaxed somewhat the strict requirement that <u>everything</u> must be done which, according to the nature of the property, is necessary to be done to effect the transfer. *Pennington v. Waine* concerned a gift of shares, which required the delivery of a share transfer. Arden LJ stated:[48]

> "…Even if I am correct in my view that the Court of Appeal took the view in *Rose v. Inland Revenue Comrs* that delivery of the share transfers was there required, it does not follow that delivery cannot in some circumstances be dispensed with. Here, there was a clear finding that Ada intended to make an immediate gift. Harold was informed of it. Moreover, I have already expressed the view that a stage was reached when it would have been unconscionable for Ada to recall the gift. It follows that it would also have been unconscionable for her personal representatives to refuse to hand over the share transfer to Harold after her death. In those circumstances, in my judgment, delivery of the share transfer before her death was unnecessary so far as perfection of the gift was concerned."

41. The touchstone is one of *unconscionability*:[49]

> "If one proceeds on the basis that a principle which animates the answer to the question whether an apparently incomplete gift is to be treated as completely constituted is that a donor will not be permitted to change his or her mind if it would be unconscionable, in the eyes of equity, *vis à vis* donor to do so, what is the position here? There can be no comprehensive list of factors which makes it unconscionable for the donor to change his or her mind: it must depend on the court's evaluation of all the relevant considerations."

42. Accordingly, it follows that the mere fact that the Respondent failed to pay to his solicitor the £60 needed to effect registration, nor indeed the technical defect in the TR1 itself, is in and of itself sufficient to prevent equity from recognising the gift, although these are both factors pointing in the direction of equity <u>not</u> assisting. The question is one of unconscionability.

43. In this case, as it seems to me, it would be unconscionable to permit the Respondent to resile from his imperfect gift:

(1) The Judge placed considerable emphasis on the fact that although the TR1 had been executed, it was both defective and had never been given to the Appellant:[50]

[46] (1862) 4 De G F & G 264 at 274-275, 45 ER 1185 at 1189-90.

[47] [2002] EWCA Civ 227.

[48] At [66].

[49] At [64].

> "In *Re Rose, Mascall v. Mascall*, the donors had completed all the formalities required of them and the relevant transfer forms had been delivered to the done or a third party who could complete the necessary formalities. These cases are distinguished because on the facts of this case, the TR1 was defective and the [Respondent] would have had to re-execute a corrected TR1 and deliver it to the [Appellant]. This is not something that could be corrected by the [Appellant] alone. I also rely upon *Zeital v. Kaye* as authority that the done must have the necessary title documents in his possession. If he had had a valid TR1 in his possession, then he could have sought to register it at any time to transfer the legal and beneficial interest."

(2) The Judge found that it was the intention of the Respondent to make a gratuitous transfer of his interest in the Property, and to that end the Respondent instructed solicitors and executed the TR1.

(3) The transfer involved the Appellant – who paid £400 stamp duty and who was aware of the TR1 and its significance in broad terms.

(4) The transfer was not gratuitous in the normal sense of the Respondent wanting to make a pure gift to the Appellant. The Respondent was in deep trouble with regard to his benefit fraud and – in order better to defend himself against the allegations being made, he decided to divest himself of his interest in the Property. He did not abandon any "moral" claim he might have over the Appellant for payment – as the Judge put it, "I am satisfied that…he did intend at that time to transfer his legal interest to the [Appellant] for nil consideration with any financial dealings to be resolved informally within the family at a later date" – but he did intend to divest himself of his interest in the Property.

(5) As I have noted, this was not altogether altruistic conduct on the part of the Respondent: he was acting decisively in his own interests, and he deployed the "no beneficial interest in the Property" argument in the years up to 2012, sometimes with apparent success.

(6) The Appellant participated in this: it is difficult to know precisely what the Appellant's state of mind would have been when giving evidence for the Respondent in the Magistrate's Court. This is absolutely no criticism of the Judge, but merely a reflection of the difficulty of the fact-finding exercise in this case. Considering the Judge's findings as a whole, I do not consider that the Appellant would have given evidence in support of the Respondent unless he was satisfied that what he was saying was at least true at the time he was giving evidence (i.e., that the Respondent had no beneficial interest in the Property), even if in the years prior to 2007 and prior to the execution of the TR1 there had been such a beneficial interest. In other words, the Appellant might have been prepared to give the false impression that what he considered <u>now</u> to be the case always had been the case.

(7) Although the TR1 was never sent to HM Land Registry, and may have been defective, the Judge found that this was not a deliberate scheme to undermine the gratuitous transfer that the Respondent intended to make.

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[50] Judgment at [149].

44. These factors, viewed in the round, render it, in my judgment, unconscionable for the Respondent to resile from his imperfect gift, and that was (and remained) the case from 2007, when the TR1 was executed. It seems to me that, from that point on, the Respondent (and, of course, the Appellant) held the legal estate of the Property on trust solely for the Appellant. I am conscious that, in reaching this conclusion, I am differing from the Judge, who concluded[51] that these factors were insufficient to justify the intervention of equity. I differ from the careful Judgment of the Judge only with great hesitation, and certainly not on any point of fact. However, having considered the facts as found by the Judge and the law as it applies to those facts, I have reached the conclusion that the Judge was wrong on this point and that the appeal should be allowed. That is essentially for two reasons:

(1) The Judge correctly identified the deficiencies in the legal transfer or (to put the same point another way) the imperfections in the gift. These were, perhaps, threefold: *(i)* the failure to name the Appellant as one of the transferors; *(ii)* the failure to pay the £60 to effect the transfer; and *(iii)* the failure to present the TR1 to the Appellant, so that he could do the necessary. These are all, I stress, relevant factors, and (pre-*Pennington v. Waine*) might well have been fatal. But *Pennington v. Waine* makes clear that the test is not whether everything has been done which, according to the nature of the property, is necessary to be done to effect the transfer, but whether it is unconscionable to allow the donor to resile from his or her gift. In short, whilst I entirely accept the imperfections in the gift identified by the Judge, and accept their relevance to the question before me, I consider that [149] of the Judgment places too much weight on them as contra-indicators to equitable intervention.

(2) The Judge was, of course, well aware of the decision of the Court of Appeal in *Pennington v. Waine*, to which he referred several times in the Judgment. His conclusion, as regards this decision, was:[52]

> "*Pennington v. Waine* does not assist the [Appellant] as the Appellant had not relied upon the apparent gift in the TR1 to his detriment. I am also satisfied that it would not have been unconscionable in any way to resile from the gift as the consequence of the gift would have been a windfall to the [Appellant] as there was no consideration."

With great respect to the Judge, his second point takes matters no further: every gift is a "windfall" because – by definition – a gift is made without consideration. Thus, in *Pennington v. Waine* itself, the Court of Appeal found that it was – on the facts of that case – unconscionable for the donor to resile from a gift even though not everything that could have been done to perfect the gift had been done.

The first point made by the Judge treats reliance as the key factor and – to be clear – it is obviously relevant. But it is not the determinative factor with "unconscionability". Unconscionability, as it seems to me, focuses more on the conduct of the donor, whereas reliance focuses more on the conduct of the donee in respect to the donor's gift. Whilst hard-and-fast lines obviously must be

[51] At [149] and [150] of the Judgment.

[52] Judgment at [150].

eschewed, it seems to me that (accepting, as I do) the Judge's findings on the Appellant's reliance,[53] the Judge also found that "[b]y being shown the TR1, it is more than likely that the [Appellant] would have believed that the Property was not legally his alone even if there had been no detailed discussions about the [Respondent's] financial interest".[54] It seems to me that this belief, albeit unaccompanied by concrete detrimental reliance, and combined with the Respondent's conduct that I have described, renders the Respondent's attempt to resile from his "gift"[55] unconscionable.

45. This ground of appeal accordingly succeeds. Although, strictly speaking, this renders it unnecessary for me to consider the remaining grounds of appeal, given that all of the grounds are closely related, and given that they were fully argued before me, it is appropriate that I consider them.

F. THE EQUITABLE ASSIGNMENT POINT

46. In the law of trusts, it is trite to refer to the so-called "three certainties", namely:

(1) Certainty of intention to create a trust;

(2) Certainty of subject-matter; and

(3) Certainty of beneficiaries or objects.

47. These three certainties can helpfully be translated into the requirements for an (equitable) assignment of a chose in action. Thus, in order for there to be an equitable assignment, there must be:

(1) Certainty of the intention to assign;

(2) Certainty as regards the chose or thing in action that is the subject of the assignment; and

(3) Certainty as regards the identity of the assignee.

48. Taking these three requirements in reverse order:

(1) There can be no real doubt as to the identity of the assignee. By the TR1, the assignor (the Respondent) was purporting to transfer something (and I will come to what that "something" was in a moment) to the assignee (the Appellant).

(2) The identity of the chose in action being or purportedly being transferred is a little less straightforward, but nevertheless clear in this case. The purpose of the TR1 is (obviously) to transfer the <u>legal</u> estate, and it is common ground that that never happened. We are not here concerned with the transfer or assignment of the legal estate (which never happened, and no-one contends did happen), but rather with the transfer or assignment of the equitable chose in action (the Respondent's 50%

[53] I.e., that there was no reliance.

[54] At [96] of the Judgment, quoted in paragraph [*] above.

[55] Accepting, as I do, that it was not really an "altruistic" gift.

beneficial interest) that was (prior to any assignment, if any) held by the Appellant and the Respondent on trust for the Respondent. It is that equitable chose in action that we are here concerned with. The significance of the TR1 lies not in its effect as an instrument of transfer, but in its value in determining what the intention of the transferor or assignor was. It is to that that I turn.

(3) In *Scribes West Ltd v. Relsa Anstalt (No 3),*[56] Carnwath LJ considered that it was uncontentious that "[a]n equitable assignment of a chose in action requires no more than an expression of intention to assign, coupled with notice to the debtor, to impose on the latter an obligation to pay the assignee". As to this:

(a) It is clear law that the intention to assign must be manifested.[57] In this case, that intention plainly existed – as the Judge found – and it was manifested in the completion of the TR1 and in the showing of the TR1 to the Appellant.

(b) Although it is undoubtedly prudent to notify the debtor of the assignment,[58] notice is not a pre-requisite of an effective equitable assignment (whether to the debtor or the assignee), albeit that the debtor must be notified before he or she becomes obliged to account directly to the assignee.[59] In this case, however, there was notice to all relevant parties.

49. In these circumstances, and subject to the question of formalities, to which I will come, it seems to me apparent that the imperfect TR1 constituted or evidenced an equitable assignment on the part of the Respondent, assigning his beneficial interest in the Property (an equitable chose in action) to the Appellant.

50. Section 53(1)(c) of the Law of Property Act 1925 provides that "a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same…". In this case, the only written instrument capable of satisfying this requirement is the TR1. Although plainly not intended for this purpose (the TR1 is intended to effect the transfer of a registered legal estate) it seems to me that the TR1 manifests all the necessary details for a disposition of an equitable interest and it is signed by the assignor, that is the Respondent.

51. Accordingly, I conclude that there was – in 2007 – an equitable assignment of the Respondent's beneficial interest in the Property by the Respondent (as assignor) to the Appellant (as assignee). It follows that this ground of appeal must also succeed. Again,

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[56] [2004] EWCA Civ 1744 at [9].

[57] See, for example, *Re Vandervell's Trusts (No 2)*, [1974] 1 Ch 269 at 294: "…the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result. To yearn is not to transfer."

[58] Because: *(i)* this obliges the debtor to account to the assignee, and not the assignor; *(ii)* the assignee is at risk of a subsequent assignment taking priority under the rule in *Dearle v. Hall*; *(iii)* notice of the assignment affects the extent to which the debtor can set-off.

[59] There are many cases where an equitable assignment, manifested but not notified to anyone, including the debtor, has been held to be valid: *Re Way's Trusts*, (1864) 2 De G J & S 365, 46 ER 416; *Alexander v. Steinhardt, Walker & Co*, [1903] 2 KB 208.

I am conscious that I am differing from the Judge and again – given the careful Judgment – I do so with some circumspection:

(1) The submission that there was an equitable assignment in this case is identified at [140] of the Judgment. The Judge then considered, in a composite way,[60] the various different assertions that were advanced as to how the 50%/50% beneficial interest in the Property might have changed to a 100% beneficial interest on the part of the Appellant.

(2) In this composite assessment, although the Judge clearly addressed the Registration Gap Point and the Imperfect Gift Point, the Equitable Assignment Point here under consideration appears to have slipped through the gaps, and I can find no express consideration of it in the Judgment. Given the inter-relatedness of the points, and the fact that the Judge himself raised the issue of a disposition in 2006/2007 without the benefit of oral argument from the parties, that is perhaps not surprising.

52. For these reasons, this ground of appeal succeeds.

G. THE PROPRIETARY ESTOPPEL POINT AND THE CONSTRUCTUVE TRUST POINT

53. I can deal with these two grounds of appeal together, and briefly. At [135] of the Judgment, the Judge stated:

> "I am satisfied that the [Appellant] did not rely upon that representation and sight of the TR1 to act to his detriment. He would have carried out the additional renovations anyway and had already planned to do so before 2007. The [Respondent] has already conceded reasonably in any event that credit will be given for the value of any improvements carried out by the [Appellant]."

54. Since – however it is framed – for a proprietary estoppel to arise there must be some kind of reliance, the Judge's finding in the paragraph I have just quoted – which is entirely consistent with the rest of the Judgment – is fatal to any suggestion that an estoppel arose in this case. Had there been reliance, I would have been inclined to the view that the Respondent's concession that credit be given for the value of any improvement would, in any event, have satisifed the estoppel. But, given the absence of reliance, it is clear that this ground of appeal must be dismissed.

55. So far as the constructive trust argument is concerned, on careful consideration of the submissions of the Appellant, this appears to be no more than a re-run of the resulting trust argument described in Section C(1) above. Again, it seems to me that whilst the relationship between resulting and constructive trusts continues to be an interesting one, it is the Judge's findings of fact – set out in paragraph 25 above – that are fatal to this ground of appeal, and I accordingly dismiss it.

[60] Judgment at [147] to [151].

H. THE RESPONDENT'S NOTICE: "CLEAN HANDS"

56. As the Judgment makes clear, this is a case where neither party's evidence, or case, was straightforward. In particular, the Appellant's case as to the beneficial ownership of the Property on acquisition was rejected *in limine*, and in various other respects the Appellant's evidence was regarded as unsatisfactory. However, I consider that it goes too far to say, as the Respondent contended, that the "[the Appellant's] case was riddled with bad faith in relation to almost all of the disputed facts in issue before the court".[61]

57. The Judge addressed the evidence of both the Respondent and the Appellant in a balanced and measured way. Of the Respondent, the Judge noted that his evidence was "naturally tainted by his frank admissions in his written and oral evidence that he had in the past been prepared to give self-serving evidence which he knew to be false to achieve his objectives".[62]

58. Of the Appellant, the Judge said this:

> "65. The [Appellant] required an interpreter throughout which naturally inhibited the flow of his oral evidence. He is 67 and retired and appeared to have great difficulty in remembering in any detail the events of 1997 in particular.
>
> 66. He too was passionate about his case. The Property is and has been his family home for up to three generations for 23 years and he has carried out some significant works on it including the loft conversion. The thought of having to sell his home is naturally distressing for him.
>
> 67. Although I am mindful of my reference to the fallibility of memory, there were greater inconsistencies and omissions in his evidence. For example, he omitted any reference to providing £20,000 in cash to the [Respondent] in his pre-action correspondence and his witness statements. He also refused to concede that he had at least considered taking out a mortgage on the purchase of the Property despite being shown the documentary evidence.
>
> 68. While the [Appellant] Defendant asks the Court to take note of the [Respondent's] admission that he lied on a number of occasions about his ownership of the Property between 2007 and 2012, I also have to recognise that, by entering into the sham ownership arrangement, the Defendant was also prepared to be deceitful towards his wife and presumably the Court dealing with any financial remedy proceedings. As no divorce followed, this was not tested but it showed a willingness to go that far to protect his personal interests."

59. It seems to me that these findings – whilst critical of both the Respondent and the Appellant – are insufficient to give rise to a finding (which the Judge did not make) that the Appellant's behaviour was such as to deserve the characterisation that he did not come to this court with "clean hands".[63]

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[61] Paragraph 15 of the Respondent's written submissions.

[62] Judgment at [59].

[63] I appreciate, of course, that the "clean hands" point was not before the Judge: it was a new point before me. Nevertheless, I cannot form my own view of the conduct of the parties: on this I am dependent on the Judge's

60. There is a more fundamental reason as to why the Respondent's point is a bad one. In his submissions to me, Mr Russell, counsel for the Respondent, laid stress on the fact that it was the Appellant who was in need of equity's assistance, and so it was his "unclean hands" that were relevant here. In my judgment, that is not the case. I have found that the Imperfect Gift Point and the Equitable Assignment Point both succeed. They succeed by reason of the Respondent's conduct. It was the Respondent's gift; and it was his assignment. These are unilateral actions by the Respondent, in which the Appellant's conduct is of limited (I do not say no) relevance.

61. Even if I were of the mind to accept that the Appellant did not have "clean hands", I would have rejected the Respondent's contention on the ground that such "unclean hands" were irrelevant to the matters here at issue. Accordingly, I reject the point made in the Respondent's notice.

I. CONCLUSIONS AND DISPOSITION

62. Accordingly, the appeal insofar as it is based on the Registration Gap Point, the Proprietary Estoppel Point and the Constructive Trust Point fails. However, the Imperfect Gift Point and the Equitable Assignment Point both succeed.

63. Furthermore, for the reasons I have given, I reject the "clean hands" contention raised by the Respondent in his Respondent's notice.

64. As a result, the appeal succeeds and must be allowed.

65. I will leave it to the parties to seek to agree the appropriate order, failing which I will hear the parties on any consequential matters that cannot be agreed.

ORDER

BEFORE Mr Justice Marcus Smith on 19 March 2021 in the Business & Property Courts in Birmingham by Skype

UPON hearing Mr Aldis of Counsel for the Appellant and Mr Russell of Counsel for the Respondent

UPON the Appellant's appeal by notice sealed on 10 September 2020 ("**the Appeal**")

AND UPON the Respondent applying by respondent's notice dated 18 February 2021 to uphold the decision of the lower court for reasons different from or additional to those given by the lower court ("**the Respondent's Application**")

IT IS ORDERED THAT:

findings. It seems to me that the Judge's findings, whilst critical of the Appellant, do not go sufficiently far as to justify the conclusion that the Appellant had "unclean hands".

1. The Appeal is allowed and the order of District Judge Shorthose dated 17 July 2020 is set aside.

2. The Respondent's Application is dismissed.

3. The claim (PT-2019-BHM-000014) is dismissed.

IT IS DECLARED THAT:

4. "The Respondent and the Appellant are the joint legal proprietors of 1 Moor Park Drive, Bradford Moor, West Yorkshire, BD3 7ER ("**the Property**"), which they hold on trust for the Defendant absolutely."

BY CONSENT IT IS ORDERED THAT:

5. The Respondent shall forthwith transfer his legal interest in the Property to the Appellant ("**the Transfer**").
6. The court, pursuant to section 50 of the Trustee Act 1925, appoints the Appellant's solicitor to transfer the Property.

7. The Respondent shall join and co-operate with the Appellant and do all such things, take all such steps and execute all such documents as are necessary to effect the Transfer.

8. If the Respondent fails to execute any document necessary to effect the Transfer within 7 days of being requested to do so in writing by the Appellant, or an authorised representative of the Appellant, a District Judge shall execute such documentation in place of the Respondent pursuant to section 39 of the Senior Courts Act 1981.

IT IS FURTHER ORDERED THAT:

9. As regards the costs of these proceedings, both here and below:

    a. The Respondent shall pay no costs in relation to the preparation of the witness statements of Tazeem Sawaiz and Ajaz Ahmed.

    b. Subject to paragraph 9(a) above, the Respondent shall pay 30% of the Appellant's costs of the claim on the standard basis.

c. The Respondent shall pay 40% of the Appellant's costs of the appeal (to reflect failure of 3 grounds out of 5) on the standard basis.

10. Unless the parties agree, there be a detailed assessment of the costs. No order for payment on account of costs.

11. This order shall be served by the Appellant on the Respondent.

SERVICE OF THIS ORDER

The court has provided a sealed copy of this Order to the serving party Mir Solicitors at:

782 Manchester Road
Bradford
West Yorkshire
BD5 7QP

01274 371978
Ref: 108068