Neutral Citation Number: [2020] EWCA Civ 687

Case No: A3/2019/1944

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
COMPANIES AND INSOLVENCY LIST (ChD)
HH JUDGE HALLIWELL
[2019] EWHC 1722 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 June 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE HENDERSON
and
LADY JUSTICE ROSE

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Between :

JACOB AZOURI EZAIR — **Appellant**

- and -
STEPHEN LEONARD CONN
-and-
JONATHAN AVERY-GEE
(As Joint Administrators of Charlotte Street Properties Limited) — **Respondents**

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Mr Richard Lander (instructed by **Chandler Harris LLP**) for the Appellant
Mr Mark Cawson QC (instructed by **DrydensFairfax**) for the Respondents

Hearing dates : 5 and 6 May 2020

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, released to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:30am on Monday 1 June 2020.

Lord Justice Patten :

1. This appeal concerns six properties in Greater Manchester ("the Properties") which are registered at HM Land Registry in the name of the appellant, Mr Jacob Ezair. The Properties are houses, some or all of which are in multiple occupation. They were acquired by Mr Ezair between 1973 and 1984 as investments and were let and managed as part of a business which he carried on as a sole trader under the name of Northern Estates.

2. In 1999 Mr Ezair decided to incorporate his business using a newly-formed company called Northern Estates Limited ("NEL"). This is a private company which had an authorised share capital of £100 divided into 100 shares of £1 each. On 5 April 1999 Mr Ezair entered into an agreement in writing ("the 1999 Agreement") to sell to NEL the goodwill and assets of the business including the Properties in consideration for the allotment to him of 98 of the shares. Clause 2.1 of the 1999 Agreement stated that NEL was to purchase the "Business" as a going concern "with effect from the Transfer Date" which was defined as 5 March 1999. But the clause then contains a list of the assets comprised and used "in the conduct of the Business" which include (at clause 2.1.2) "the freehold and leasehold property as detailed in the Third Schedule". This is a schedule of all the properties owned and let by Mr Ezair as part of his business and includes, as I have said, the Properties which feature in this case.

3. Under clause 3 of the 1999 Agreement NEL accepted the vendor (Mr Ezair's) title and by clause 4 agreed to purchase the Business subject to all of its existing debts and other liabilities. Completion of the contract is dealt with by clause 6 which provides as follows:

> "6. Completion
>
> 6.1 Completion of the sale of assets of the Business other than the Properties shall take place on the Transfer Date when the Purchaser shall deliver to the Vendor the certificates for the Consideration Shares and the Vendor shall execute and do all such deeds and things as may be necessary to vest those assets in the Purchaser
>
> 6.2 Completion of the sale of the Properties (or any one or more of them) shall take place seven days after either party gives notice in writing to the other party to complete the transfer of the Properties (or of that one or more of the Properties specified in the notice)"

4. Paragraph 1 of the Fourth Schedule to the 1999 Agreement incorporates the Standard Conditions of Sale (Third Edition) but subject to the usual proviso that where there is a conflict between the Standard Conditions and the terms of the contract, the latter are to prevail. For the moment I need only observe that paragraphs 4-6 of the Standard Conditions contain detailed provisions about the timetable to be followed leading up to completion in terms of raising requisitions about title, proving title and giving possession on completion. Many if not most of these conditions are inapplicable to the 1999 Agreement given what is provided for in clause 6 and the fact that the

consideration took the form of the allotment of shares which took place either immediately before or soon after the 1999 Agreement. But it is, I think, common ground that completion of the sale of the Properties would at least involve the execution by Mr Ezair of appropriate forms of transfer so as to enable the transferee to become the registered proprietor of the Properties and their legal owner.

5. It is also common ground that the reason for delaying completion and allowing the Properties to "rest in contract" (as it is put) in the name of Mr Ezair was simply to avoid payment of stamp duty on the transfers of title. The result therefore of the 1999 Agreement was that although NEL undoubtedly acquired legal title to most of the assets of the Business, it did not become the registered proprietor and therefore the legal owner of the Properties. The legal estate remained vested in Mr Ezair on the terms of the 1999 Agreement. The case for the respondent administrators ("the Administrators") is that the effect of the 1999 Agreement, at least following the allotment of the shares, was to make Mr Ezair a bare trustee of the Properties for NEL so as to give NEL a right to an immediate transfer of the Properties unrestricted by the requirement to serve a notice under clause 6.2. But before I come to examine what were the consequences in equity of these matters and how any rights under the 1999 Agreement are said now to be enforceable by the Administrators, it is necessary to complete the transactional history.

6. In September 2002 Mr Ezair established a family trust in Jersey for the benefit of himself and his children. One of the objectives was to avoid capital gains tax on the disposal of the assets which were to include the Properties. As part of these arrangements, Charlotte Street Properties Limited ("CSP") was incorporated as a private company in Jersey. Its shares were registered in the name of two Jersey nominee companies (G & S Nominees and G & S Nominees No 2 Limited) which were owned and controlled by Rathbone Nominees Jersey Limited (later Hawksford Trustees Jersey Limited) who acted as the trustees of the Jersey settlement. They also provided the directors of CSP.

7. On 28 November 2003 NEL entered into a written contract with CSP to sell to it eight properties (including the Properties) for a consideration of £1.3m ("the 2003 Agreement"). The agreement took the form of a standard contract of sale also incorporating the Standard Conditions of Sale (Third Edition). The eight properties were sold subject to any existing tenancies and were identified in a schedule to the 2003 Agreement. Clause 6 of the special conditions provided:

> "The Seller or Buyer may request completion of any one or more of the Properties at any time."

8. In the body of the 2003 Agreement the completion date was stated to be:

> "28 days after either the Seller or the Buyer has given to the other written notice to this effect"

9. The purchase price of £1.3m was financed as to £800,000 by a loan from Northern Rock plc and as to the balance of £500,000 by an inter-company loan from NEL. CSP borrowed a total of £2.5m from Northern Rock secured by a charge over the Properties and a personal guarantee from Mr Ezair. There is no documentation before the Court relating to the inter-company loan or even the receipt by NEL of the £800,000 as part payment of the purchase price. But in the Directors' Reports and Financial Statements

of CSP in the years following its incorporation the Properties were shown as assets of the company and the indebtedness to Northern Rock and NEL is recorded.

10. A change in the financing arrangements occurred in 2011 after CSP had failed to service the Northern Rock loan and LPA receivers were appointed over the Properties. Mr Ezair was called on his guarantee and was forced to arrange to re-finance the borrowings of CSP in order to preserve the Properties for the benefit of the company. According to his third witness statement in these proceedings which he made on 11 May 2018 Mr Ezair was able to reach an agreement with the receivers for the release of the security in return for payment of the sum of £903,000. This was provided by means of a personal loan to Mr Ezair from Barclays Bank in the sum of £800,000 and the sale of two properties which produced the remaining £103,000. The loan from Barclays Bank was secured by a charge over the remaining Properties.

11. On 25 May 2011 Mr Ezair entered into a loan agreement with NEL and CSP ("the 2011 Agreement") which recites much of the transactional history and records the loan of £906,931 by NEL to CSP to finance the redemption of the charges (plus costs) held over the Properties by Northern Rock. According to the recitals this money was provided to NEL out of the Barclays' loan and then lent on by NEL to CSP. Under clause 2 of the agreement the loan was repayable with interest on demand and in any event within 24 months. Clause 5 of the 2011 Agreement states:

> "The parties acknowledge that for the time being the Chorlton Properties shall remain resting on contract in the name of the Guarantor (Mr Ezair) and charged to Barclays Bank as security."

12. CSP is now in administration and NEL is in liquidation. The underlying dispute which is said by Mr Ezair to have given rise ultimately to these proceedings is his divorce in 2011 and a subsequent falling out between him and his four children. But none of that is relevant to what we have to consider. The Administrators were appointed by the Court on 16 October 2017 on the application of NEL. On 15 November 2017 they made an application to the Court for an order pursuant to s.234 of the Insolvency Act 1986 requiring Mr Ezair to immediately deliver up to them validly executed Land Registry TR1 (transfer) forms in respect of the Properties and for an order under s.39 of the Senior Courts Act 1981 that a judge should execute the transfers if they were not signed by Mr Ezair within 7 days of the order The issue of the application was preceded by a letter before action sent to Mr Ezair's solicitors on 17 October 2017 ("the 2017 letter") which enclosed the transfer forms and stated:

> "In order to avoid the necessity for litigation to be issued under section 234 of the Insolvency Act 1986 (as amended) we write to request that your client execute the attached TR1 forms and return to us immediately (and in any event within the next 7 days) in order that our clients may deal with the realisation of these assets of CSP for the benefit of creditors of that company.
>
> We would also request that your client arrange with Barclays Bank PLC their agreement to this transfer as the Mortgages registered against each of the properties listed above are in your client's name and the bank has registered a restriction against dealing without their consent.

> If we do not receive the executed TR1 Forms and the consent of Barclays Bank PLC to the transfers by Tuesday 24 October 2017 we have instructions to issue proceedings to recover these assets for the benefit of the creditors of CSP without further recourse. We hope that such action will not prove necessary and that your client will cooperate and avoid any adverse costs which will be payable by him…"

13. The s.234 application was supported by a witness statement of Mr Avery-Gee setting out the background to the application and the matters relied upon as justifying the relief sought. He refers to the witness statement made by Mr Ezair's son, Nathan Ezair, in the application for the administration order where Nathan Ezair says (at [8.3]):

> "CSP is not registered as the proprietor of a number of properties of which it is the beneficial owner, as evidenced not least by the fact that the properties in question have, at all relevant times, been included in the accounts of CSP as assets of CSP, and which such accounts are also shown (sic) CSP as recipient of rental collections since incorporation."

14. Mr Avery-Gee says at [9] of his witness statement that his belief that CSP is the beneficial owner of the Properties is based on the Directors' Reports and Financial Statements of CSP which include the Properties as assets of the company; the receipt by CSP of the rental income from the Properties; the 2003 Agreement "which has been executed but not completed and the CSP properties continue to "rest" with [Mr Ezair]"; and the 2011 Agreement which refers in its recitals to the sales under the 1999 and the 2003 Agreements.

15. The essence therefore of the claim for an immediate transfer of the Properties was that as a result of the two contracts of sale CSP had become the beneficial owner of the Properties (as confirmed by its treatment of them as assets in its accounts and the receipt of the rental income) even though under the terms of those contracts the Properties were to "rest in contract" with Mr Ezair. In his first witness statement in reply (made on 3 January 2018), Mr Ezair refers to the Properties being "transferred" to CSP following the creation of the family trust in 2002 but on terms that they continued to "rest in contract" in his name. He has, he said, always been their legal owner and, as a result of an agreement with the directors of CSP in April 2014, he had "returned" to being their beneficial owner.

16. This witness statement therefore based his opposition to the order for an immediate transfer on some agreement in 2014 under which he regained beneficial ownership of the Properties. But in his third witness statement (11 May 2018) he addresses what he says was the effect of the sales of the Properties under the 1999 and the 2003 Agreements. Dealing first with the 1999 Agreement, he said:

> "16. The effect of the NEL Agreement was that instead of me owning the beneficial interest in the Chorlton Properties, I owned the shares in NEL, which held the beneficial interest in the Chorlton Properties.

> 17. Legal title to the Chorlton Properties was not transferred to NEL pursuant to the NEL Agreement. This provided for completion of the sale of the Chorlton Properties on notice, given pursuant to clause 6.2 of the NEL Agreement (page 19-29). No such notice was given and legal title was therefore not transferred. As a result, the legal title to the Chorlton Properties remained with me personally, with the beneficial title being transferred to NEL. I held them on trust for NEL.
>
> ….
>
> 19. As for the relationship between me and NEL, I understood that NEL as beneficial owner was entitled to receive the net rents, after payment of expenses incurred, for instance on maintenance. We "kept score" in the accounts whereby if I personally made any payments out on behalf of NEL to contractors and the like, the payments were to be credited to me at a later date. The balance was recognised and noted by our accountants."

17. His position in relation to the 2003 Agreement was as follows:

> "25. Pursuant to the NEL/CSP Agreement, NEL transferred its beneficial ownership in the Chorlton Properties to the Company. As with the NEL Agreement, the NEL/CSP Agreement did nothing which affected legal title to the Chorlton Properties. No transfer of legal title took place as the requisite written notice was not given. This meant that subsequent to the NEL/CSP Agreement, I retained legal ownership of the Chorlton Properties, holding such ownership on trust for the Company. The Applicant seems to be under the incorrect impression that title to the Chorlton Properties passed entirely from NEL to the Company by virtue of the NEL/CSP Agreement but this is not the case. It was only the beneficial ownership that was transferred.
>
> 26. The Company essentially stepped into the shoes of NEL and continued to deal with the Chorlton Properties and their tenants in the same way as NEL had done previously. The company did however use a management company that I incorporated on 11 April 1983 called Barkbeech Limited (Company Number 01713625) ("Barkbeech"). I was the sole shareholder and director of Barkbeech until its liquidation."

18. Finally, he refers to clause 5 of the 2011 Agreement (see [11] above) and says:

> "32. On 25 May 2011 I entered into an agreement with NEL and the Company. A copy of this appears at page [47-49] ("the 2011 Agreement"). The Chorlton Properties were to remain resting in contract in my name. The phrase "resting in contract" meant that I would continue to retain legal title but the Company

> would have a contractual right to require me to complete the sale. In the meantime I therefore retained legal title to the Chorlton Properties and continued to hold them on trust for the Company. The 2011 Agreement accordingly had no impact whatsoever upon the ownership of the Chorlton Properties and does not evidence the Company's ownership of the Chorlton Properties as the Applicants contend it does. At paragraphs 12 to 14 of my witness statement dated 3 January 2018 I said that I had the beneficial interest in and beneficial ownership of the Chorlton Properties as at 25 May 2011 as well as the legal ownership. I now accept that that analysis was not correct. I had the legal ownership at that time (and still do so) but the beneficial interest in and beneficial ownership of the Chorlton Properties once again became mine in 2014, as I explain further below."

19. At [36] of the same witness statement Mr Ezair repeats his case that in 2013 or 2014 he reached an oral agreement with Mr Steven Robinson of Hawksford Trust that the beneficial ownership of the Properties should be returned to him in recognition of the fact that he had preserved them from the claims of the LPA receivers by means of the Barclays' loan which he remained personally liable to repay. I should say at this stage that this allegation is strongly denied by the Administrators both as a matter of fact and as to whether what would have been an unenforceable agreement for lack of writing could nonetheless be given effect to on the basis of proprietary estoppel or a constructive trust. But, for the moment, it is only necessary to recognise that it was deployed as an argument to counter the Administrators' claim that the Properties continued to be beneficially owned by CSP. Mr Ezair's position, doubtless on advice, was that the effect of the two sale agreements had been to transfer beneficial ownership to CSP but on terms that required the service of a notice before Mr Ezair was obliged to complete the transfer of the legal estate.

20. NEL has never served a contractual notice under clause 6.2 of the 1999 Agreement. Up to the trial of this claim CSP had also never served a notice under the 2003 Agreement requiring completion 28 days thereafter. Mr Ezair contends that it has also never served the requisite notice under clause 6.2 of the 1999 Agreement to which, of course, it was not a party. But the Administrators rely upon the 2017 letter as being effective notice for that purpose in terms of requiring completion within 7 days. Even if that is right, an issue exists as to whether CSP (as opposed to NEL) was entitled to serve a clause 6.2 notice when it was not a "party" to that contract and had not taken a legal assignment of the benefit of the 1999 Agreement.

21. The Administrators have since judgment on this application done both of those things. The benefit of the 1999 Agreement has been assigned to CSP and a clause 6.2 notice served on Mr Ezair. As part of a Respondents' notice, Mr Cawson QC, on behalf of the Administrators, has invited us (if and so far as necessary) to take those matters into account as establishing his clients' right to an order for the transfer of the Properties regardless of anything else. This is also opposed and I shall explain in due course why Mr Ezair says it would be procedurally unfair to him for us to deal with those matters as part of this appeal.

22. But, for the moment, I intend to concentrate on the issues that were eventually determined at the trial of this application by HH Judge Halliwell. The judge handed

down a reserved judgment on 4 July 2019 ([2019] EWHC 1722 (Ch)) in favour of the Administrators and subsequently made an order for the transfer of the Properties to CSP.

23. Although the application was issued in November 2017, there was a long and complicated procedural history before it was eventually disposed of. On 23 May 2018 District Judge Khan made an order for the determination of a preliminary issue "whether or not as a matter of law the [Administrators] are potentially entitled to the relief claimed herein in an application brought by them under sections 234 and 236 of the Insolvency Act 1986". This came on for hearing before HH Judge Eyre QC on 9 July 2018. The judge interpreted the preliminary issue as not requiring him to determine whether, as a matter of discretion, the Court in this case would grant the relief sought on a s.234 application as being confined to the narrower issue of whether there was a potential entitlement to the relief sought under the provisions of ss. 234 and 236.

24. One might have thought that this was an argument about the scope of the Court's power under those sections and therefore a matter of statutory interpretation. The Administrators had indicated that they would seek an account of rent and other income from Mr Ezair as part of the order but Mr Cawson conceded at the hearing that such relief would not fall within the terms of s.234. But in relation to the transfer of the Properties the submissions made on behalf of Mr Ezair by Counsel then instructed by him were simply that the powers of the Court under s.234 could not be used where there were significant factual and other disputes about title.

25. Section 234 is in the following terms:

> 234.— Getting in the company's property.
>
> (1) This section applies in the case of a company where—
>
> > (a) the company enters administration, or
> >
> > (b) an administrative receiver is appointed, or
> >
> > (c) the company goes into liquidation, or
> >
> > (d) a provisional liquidator is appointed;
>
> and *"the office-holder"* means the administrator, the administrative receiver, the liquidator or the provisional liquidator, as the case may be.
>
> (2) Where any person has in his possession or control any property, books, papers or records to which the company appears to be entitled, the court may require that person forthwith (or within such period as the court may direct) to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder.
>
> (3) Where the office-holder—

> (a) seizes or disposes of any property which is not property of the company, and
>
> (b) at the time of seizure or disposal believes, and has reasonable grounds for believing, that he is entitled (whether in pursuance of an order of the court or otherwise) to seize or dispose of that property,
>
> the next subsection has effect.
>
> (4) In that case the office-holder—
>
> (a) is not liable to any person in respect of any loss or damage resulting from the seizure or disposal except in so far as that loss or damage is caused by the office-holder's own negligence, and
>
> (b) has a lien on the property, or the proceeds of its sale, for such expenses as were incurred in connection with the seizure or disposal."

26. As provided in s.234(2), the Court is given power to direct the transfer to the office holder of any property, books or records to which the company "appears to be entitled". "Property" can include real property as the reference to "convey" and "transfer" makes clear. But the provisions of subsections (3) and (4) also confirm that an application under s.234 may not (and probably is not intended to) provide a definitive ruling about title nor is the possibility of such a ruling a pre-condition to the exercise of the power. Sections 234 and 236 are designed to assist an office holder in the carrying out of the relevant insolvency process by placing under his control the property and records to which the company appears to be entitled. Although, as Warner J recognised in *Re London Iron and Steel Co Ltd* [1990] BCLC 372, a determination of whether the company appears to be entitled to the property does not preclude the resolution at the hearing of the grounds upon which the application is resisted, it may not provide an appropriate procedure for determining complex issues about title involving, in particular, claims by third parties. Section 234 creates a summary procedure whereby the office holder in his own name may seek the transfer of company property to him. Although the entitlement to such an order will depend upon the company's apparent rights to the property in question and the judge will have to resolve any dispute about entitlement raised by the respondent in the proceedings, the purpose of the power conferred on the Court is and remains as Lord Hoffmann explained in *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58 at [26]-[28] that of enabling the office holder to carry out his statutory functions by placing the apparent property of the company under his control. This process does not therefore necessarily involve any determination of title and the final resolution of such a dispute may fall to be made in subsequent proceedings.

27. In the present case, however, Judge Eyre QC has decided that the Administrators' claim based on there being a trust of the Properties in favour of CSP as a result of which the company may call for an immediate transfer of the legal estate is one which can be determined within the scope of s.234 and there has been no appeal from this order. But it is important to note that the judge did not rule on the exercise of the Court's discretion

whether to make an order under s.234 nor was he asked to consider the applicability or suitability of the s.234 procedure to a claim for specific performance of either the 1999 or the 2003 Agreements. The Administrators did not choose to pursue a contractual remedy by serving the requisite notices and seeking an order for specific performance in proceedings brought in the name of CSP. Their position, as I have explained, was and remains on this appeal that the effect of the two contracts was to vest in CSP beneficial ownership of the Properties which entitles the company to an immediate transfer of the legal estates free of any requirement for the service of any contractual notice. This is a pure point of law based upon an analysis of the legal effect of the transactions between Mr Ezair, NEL and CSP and is, I accept, suitable for determination under the s.234 procedure. But although the point did not arise as part of the argument on the preliminary issue (and arises only obliquely on this appeal), my own view is that s.234 was not intended to cover the prosecution of a claim for specific performance or for damages in lieu. The summary nature of the power to order an immediate transfer of the property in question to the office holder suggests that it is concerned with property to which the company appears to have title that could be asserted without the need for some kind of contractual enforcement and the possible resolution of a contractual dispute. The remedy in such cases is for the office holders to commence proceedings for specific performance in the name of the company which is what they could have done but which they contend was unnecessary in the present case.

28. When the application came to be tried by Judge Halliwell, Mr Ezair chose not to give evidence by attending for cross-examination on his witness statements and Mr Lander, on his behalf, abandoned any reliance on the alleged 2014 agreement as a defence to the claim even though it had been successfully relied on by Mr Ezair at an intermediate hearing before Judge Eyre on 24 October 2018 to defeat an application by the Administrators for the summary disposal of their claim. Mr Lander says that there had been problems involving late or inadequate disclosure by the Administrators and that a tactical decision was made to take a stand on the issue about the effect of the contracts and the failure by CSP to serve a valid notice. There is, however, no evidence about this nor could there be without a waiver of privilege on the part of Mr Ezair. The result was that the judge was faced only with the narrower legal issue of whether CSP had a beneficial interest which entitled it to an immediate transfer of the Properties.

29. The judge began by setting out the factual background including the various agreements and the way in which the Properties were treated in the accounts of CSP. He then summarised the procedural history including the decision by Mr Ezair not to give evidence or to rely on the alleged 2014 agreement. The judge found that the passages in Mr Ezair's third witness statement which I quoted earlier at [16]-[18] included admissions of part of the Administrators' case for the purpose of CPR 14.1(1). The admissions were that, following the 2003 Agreement, CSP stepped into the shoes of NEL and that Mr Ezair held the Properties on trust for it. "Stepping into the shoes" of NEL meant, he said, taking up the same position as NEL in relation to the Properties but the judge accepted that the admissions did not extend to an acceptance by Mr Ezair that the Properties were held on a bare trust for CSP.

30. Mr Lander sought permission to withdraw the admissions but the judge refused to do so and there is no appeal from that refusal. Mr Lander does, however, contend that the judge was wrong to treat the statements in Mr Ezair's witness statement as admissions

of the claim for the purpose of the proceedings and points to a later witness statement of 13 May 2019 in which Mr Ezair stated that he did not intend to make legal submissions about the effect of the agreements as part of his evidence. I shall return to this a little later.

31. The judge then turned to consider the substantive arguments relied on by the Administrators in support of their application. He accepted, correctly, that s.234 is procedural only and does not enlarge the company's rights over the property claimed. The Administrators therefore had to establish an equitable or other interest in the Properties on the part of CSP which entitled them to the order sought. The judge accepted that CSP was not a party and therefore privy to the 1999 Agreement and that there had been no assignment to it of NEL's rights under the agreement which complied with either ss.52(1) or s.53(1) of the Law of Property Act 1925. He also accepted (at [46]) that on the authority of the decision of the Supreme Court in *Southern Pacific Mortgages Ltd v Scott* [2015] AC 385 ("*Southern Pacific*") a contractual purchaser (in this case, NEL) could not create rights of a proprietary character which would take priority over other interests in the land until it had acquired the legal estate. This was a reference to Mr Lander's argument that in a case where the contractual purchaser of property sub-contracts to sell the property on to another party before completing his own purchase the effect of the sub-contract is not to confer on the sub-purchaser any beneficial or proprietary interest in the property which is binding on the vendor or otherwise enforceable against third parties. The vendor in such circumstances does not hold the property on trust for the sub-purchaser or owe any fiduciary duty in respect of it to him. For this Mr Lander relies on the judgment of Stamp LJ in *Berkley v Poulett* [1977] 1 EGLR 86 which was approved by Lord Collins of Mapesbury in *Southern Pacific*.

32. The judge, however, qualified his acceptance of these submissions by reference to the position of the purchaser under his own contract with the vendor. Having reviewed the authorities beginning with the judgment of Lord Jessel MR in *Lysaght v Edwards* (1876) 2 Ch D 499 (at pages 506-7), he said:

> "54. However, the view generally taken is that, once the vendor has received the purchase price in full, he is no more than a bare trustee since, from that point, he must hold the property in trust for the purchaser absolutely and indefeasibly with no active duties other than to preserve the property, *Clarke v Ramuz [1891] 2 QB 456 at 459-60,* and transfer it to the purchaser at his direction. This is certainly consistent with the view taken by the editors of *Underhill and Hayton on the Law of Trusts and Trustees (19th edn) Para 31.1* and *Megarry and Wade on the Law of Real Property (9th edn) Para 14-055.* It is also consistent with the following passage from the judgment of Lord O'Hagan in *Shaw v Foster (1871-72) L.R. 5 H.L. 321 at 349.*
>
> "By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase-money; or, as Lord Westbury has put it in *Rose v. Watson*: "When the owner of an estate contracts

> with a purchaser for the immediate sale of it, the ownership of the estate is in Equity transferred by that contract." This I take to be rudimental doctrine, although its generality is affected by considerations which to some extent distinguish the position of an unpaid vendor from that of a trustee.
>
> Thus, as it is stated by the Master of the Rolls in *Wall v. Bright*: "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey. In the meantime he is not bound to convey; there are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains for certain purposes his old dominion over the estate."
>
> …
>
> 65. In the light of Lord Collins's judgment in the *Scott* case, the sub-purchaser does not acquire a separate equitable interest when he enters into the sub-sale agreement. However, the Supreme Court's decision does not disturb established principles in relation to the transfer of the intermediate purchaser's equitable interest. In accordance with these principles, the sub-purchaser becomes entitled to the intermediate purchaser's equitable interest if and when the sub-contract is completed and the intermediate purchaser's interest is assigned to him. By analogy, the same is true if and when a point is reached where the intermediate purchaser holds on bare sub-trust for the sub-purchaser and the original vendor can thus act on the directions of the sub-purchasers in accordance with the principle in *Re Lashmar* (supra).
>
> 66. Moreover, until completion of the head contract, the sub-purchaser remains personally entitled to claim specific performance of the sub-contract so as to require the intermediate vendor to obtain specific performance of the head contract."

33. Although Mr Lander disputes the appropriateness of a s.234 application as the means of pursuing a claim for specific performance of the Agreements in this case, he, I think, accepts that in appropriately constituted proceedings CSP could (after serving the appropriate notice under the 2003 contract) seek an order for specific performance against NEL and Mr Ezair and thereby obtain performance of the 1999 Agreement by compelling NEL to take whatever steps were necessary to obtain the legal estate from Mr Ezair under that contract. But that is not the course which the Administrators have taken and, absent any assignment of the benefit of the 1999 Agreement (and any beneficial interest it may have created) by NEL to CSP, the claim was faced with the obvious difficulty that CSP had no right to obtain the legal estate in the Properties which it could enforce directly against Mr Ezair.

34. The judge, however, concluded that Mr Ezair did hold the Properties on a bare trust for CSP under the 1999 Agreement at the latest from the time when in 2003 CSP came under a liability for repayment of the loans from Northern Rock and NEL; the

Properties were shown as assets of CSP in its accounts and it began to receive the rents as income. He set out his reasoning as follows:

> "70. The 1999 Agreement has never been formally completed. However, at the outset, NEL furnished Mr Ezair with the contractual consideration in full, through the allotment of share capital, and he thus held the Property on bare trust for NEL.
>
> 71. Whilst Mr Ezair, as legal owner, was not a party to the 2003 Agreement, he signed the same in his capacity as director of NEL and, although he was not formally appointed as a director of the Company, he was in control of both companies at all material times. In his capacity as legal owner, he facilitated the transaction and co-operated in all the attendant formalities, including, the management of the properties and collection of the rents.
>
> 72. It is to be inferred, from the available evidence, that the transaction was concluded in order to avoid UK tax liability on property assets. To achieve that outcome, no doubt beneficial ownership of the Properties would have had to pass from NEL to the Company. Mr Ezair would have been fully aware that this was the case and acted on this basis.
>
> 73. There is no evidence that the 2003 Agreement was completed. To do so, NEL would have had to enter into a formal assignment of its rights under the 1999 Agreement. However, at all times NEL and the Company were under Mr Ezair's control. He arranged for the two companies to enter into the transaction under which the Company assumed liability for the relevant loans; he also arranged for the Properties to be let and the rents to be collected on the Company's behalf. The Properties were treated as assets of the Company in its annual accounts. No doubt this was on the footing that NEL's rights had been assigned to the Company and beneficial ownership had thus passed from NEL to the Company. Mr Ezair would have acted in his capacity as a director of NEL and, if he was not a *de facto* or shadow director of the Company, he plainly had a measure of control over its affairs. However, in his personal capacity, he was the legal owner of the Properties and in that capacity he acted as trustee and acknowledged the Company's beneficial interest. In my judgment, Mr Ezair is thus estopped from denying that NEL's rights under the 1999 Agreement have been assigned to the Company and that, following assignment, the Company is entitled to exercise NEL's rights under the 1999 Agreement, including its right to serve notice fixing the completion date.
>
> …

76. The decision of the Supreme Court in *Scott* does not preclude nor, indeed, is it inconsistent with these conclusions.

77. Firstly, in the present case unlike *Scott*, there have not yet been any third-party transactions in relation to the Property. At all times, the legal estate has remained vested in Mr Ezair himself. As legal owner, Mr Ezair is himself estopped from denying that NEL has assigned its rights under the 1999 Agreement to the Company.

78. Secondly, following the 2003 Agreement, the Company has effectively "stepped into the shoes" of NEL and assumed its rights under the 1999 Agreement. On analogy with *Re Lashmar (supra),* NEL no longer has any duties to perform. It is thus unnecessary for the Company to rely, as Mrs Scott was required to do, on the creation of new rights. No separate written disposition is required under *Section 53(1)(c)* of the *Law of Property Act 1925;* NEL's rights under the 1999 Agreement have passed to the Company by constructive trust so as to give effect to the common intentions of NEL, the Company and Mr Ezair himself or by virtue of the equitable doctrine of conversion and the Company's rights by estoppel. On this basis, *Section 53(2)* of the *1925 Act* applies.

79. Thirdly, the Company is entitled to hold Mr Ezair to the Admissions (supra) that, following the 2003 Agreement, the Company stepped into the shoes of NEL and Mr Ezair held the Properties on trust for it. Mr Ezair does not admit the precise nature of the trust but, on the basis that the purchase price has been paid in full and he has no active duties to perform otherwise than to preserve the Properties and transfer the title, he holds on bare trust for the Company.

…

81. A beneficiary who is absolutely entitled to land is entitled to call on the trustee to transfer the legal estate either to the beneficiary himself or his nominees, *Lewin on Trusts (19th edn) (2015) Para 24-002 (*cit *Stephenson v Barclays Bank Trust Co Limited [1975] 1 WLR 882)*. By the October 2017 Letter, the Administrators called on Mr Ezair, by his solicitors, to transfer the legal title. Before me, Mr Lander submitted that, if the Properties are held on trust, it remains necessary for the beneficiary to comply with the provisions of the 1999 Agreement by serving notice so as to fix a completion date. I am content to assume that this is correct. Where there is a contractual mechanism controlling the method by which a beneficiary calls on the trustee to transfer title to the trust assets, he can be expected to comply with it.

> 82. In the present case, Clause 6.2 provided for completion to take place "seven days after either party gives notice in writing to the other party to complete the transfer of the Properties…" 8 Originally "either party" was apt to mean the original parties to the 1999 Agreement only, namely Mr Ezair and NEL. However, Mr Ezair is estopped from denying that NEL's rights under the 1999 Agreement have been assigned to the Company and are exercisable by the Company itself, including its right to serve a notice fixing the date for completion.
>
> 83. On this basis, I am satisfied that the October 2017 Letter satisfied the contractual requirements. It amounts to a notice requiring Mr Ezair to complete the transfers. Although it also specified a seven-day time scale which, as it happens, replicates the seven day period in Clause 6.2, this did not form part of the notice requirements."

35. Putting aside for the moment the judge's reliance on the admissions said to be contained in Mr Ezair's third witness statement, the essence of his reasoning is that the benefit of the 1999 Agreement has passed to CSP by some process of equitable estoppel resulting from CSP's payment of the price under the 2003 Agreement financed by the loans from Northern Rock and NEL. Consistently with the decision in *Southern Pacific*, he has accepted that no beneficial interest under a bare trust can have passed to CSP simply by it becoming a sub-purchaser under the 2003 Agreement but CSP's assumption of liability for the loans and the payment of the £800,000 to NEL together with its treatment of the Properties as its assets are relied on as founding an estoppel which prevents Mr Ezair from denying that the benefit of the 1999 Agreement has passed to CSP and, with it, beneficial ownership of the Properties under that contract. CSP has, to use Mr Ezair's words, stepped into the shoes of NEL as the contracting party under the 1999 Agreement and holds the Properties under a bare trust as NEL did under that agreement.

36. The judge did not accept that the creation of a bare trust in favour of NEL under the 1999 Agreement following the allotment of the shares obviated the need to serve a notice under clause 6.2 of that contract. But a valid notice was served, he has held, in the form of the October 2017 letter from the Administrators' solicitors and Mr Ezair (as part of the same estoppel) is prevented from denying that NEL's rights have been assigned to CSP and are exercisable by that company.

37. In my view, the conclusions of the judge about a constructive trust of the benefit of the 1999 Agreement are wrong in principle. It is not entirely clear to me whether the judge has based his judgment on a common intention constructive trust or one derived from the estoppel he described in [73] of his judgment. But neither is a tenable basis for the intervention of equity in this way.

38. The relationship between Mr Ezair and NEL and between NEL and CSP is contractual. The rights which the Administrators now rely upon as the basis of their claim are derived from the 1999 and the 2003 Agreements and the enforceability of the same. They have no other legal basis. When CSP obtained the loans from Northern Rock and NEL in order to fund its purchase of the Properties it did so on the basis that it had entered or was about to enter into a contractual obligation to pay the sum of £1.3m for

the Properties in return for the obligation on the part of NEL to transfer the legal estate. It agreed under the contract that completion should not take place until 28 days after the service of a written notice but it could have served such a notice at any time and required NEL to make title by enforcing its own rights under the 1999 Agreement.

39. In these circumstances, I am unable to accept that the financing of the £1.3m purchase price or the consequent treatment of the Properties as assets of CSP took place in reliance on anything but the execution of the 2003 Agreement. That gave CSP the means of acquiring the legal estate in the Properties which it had bargained for and remained enforceable up to and including the hearing of this application. CSP was never promised or relied upon the prospect of being assigned the benefit of the 1999 Agreement. Nor was it the common intention of Mr Ezair, NEL and CSP that there should be an assignment of the benefit of that contract to CSP. The property transactions between them took the form of a sale followed by a sub-sale and the rights under both remain legally enforceable.

40. There is therefore no basis for the intervention of equity in this legal relationship by way of a constructive trust. This is not a case where Mr Ezair or NEL are asserting their own legal rights in order to deny some arrangement with CSP which it would be unreasonable for them not to give effect to. CSP's only expectation was that it would have the rights to the transfer of the Properties which it was given under the express terms of the 2003 Agreement and those rights are not in dispute. The accounts do no more than to reflect the economic reality that CSP has paid for the Properties and can call for their transfer under the contract.

41. Do the admissions relied on by the judge make any difference to this analysis? In my view, they do not. It has never been the Administrators' case that the benefit of the 1999 Agreement has been assigned to CSP. One of the disadvantages of an application made under s.234 is that there are no pleadings. But in his witness statement in support of the application Mr Avery-Gee stated that he believed that CSP was the beneficial owner of the Properties based on their treatment as assets in the company's accounts and the 2003 Agreement which "sells the CSP Properties and other properties from [NEL] to CSP, even though they were (and remain) in the name of [Mr Ezair]". This is the case which Mr Cawson pursues on this appeal to the effect that the result of the two contracts was that CSP obtained a beneficial interest in the Properties enforceable against Mr Ezair without service of any notice. The statements in his third witness statement on which the judge relied are Mr Ezair's response to that case. In [25] of the witness statement he accepted that CSP had acquired the beneficial ownership of the Properties by operation of the 2003 Agreement but said that he retained the legal title. His statement in [26] that CSP "stepped into the shoes" of NEL has no particular legal meaning but in the context of that paragraph he refers to CSP dealing with the tenants of the Properties in the same way as NEL had done. In [32] he said that CSP would have "*a contractual* (my emphasis) right to require me to complete the sale" but that was by way of explanation of what the phrase "resting in contract" used in the 2011 Agreement meant. As I explained earlier, the only contractual right of CSP was to serve notice requiring completion on NEL which would then have to serve notice under the 1999 Agreement in order to make title. No notice under the 2003 Agreement has ever been served.

42. Mr Lander does not accept that this sequence of sale and sub-sale gave CSP a beneficial interest in the Properties for the reasons explained by Lord Collins in *Southern Pacific*.

Nor, as I have explained, did the judge, which is why he founded himself on an assignment to CSP of the benefit of the 1999 Agreement. But the primary issue in relation to the contractual analysis is whether CSP, even if it obtained a beneficial interest under a bare trust, could enforce its rights free from the contractual provisions about notice.

43. CPR 14.1(1) states that a party "may admit the truth of the whole or any part of another party's case". This can be done by giving notice in writing either by letter or in a statement of case: see CPR 14.1(2). Both Mr Avery-Gee and Mr Ezair made witness statements which extended from a statement of the factual matters they relied on to the making of submissions about the legal effect of the agreements. I have considerable reservations as to whether the statements in Mr Ezair's third witness statement relied on by the judge can properly be regarded as admissions within the rule. As Mr Lander submitted, they were obviously intended to set out his case on the application rather than to concede any part of the Administrators' case which was not in any case fully articulated in Mr Avery-Gee's witness statement. But if they can be treated as formal admissions then nothing really turns on them. They were not admissions of a claim based on a constructive trust of the benefit of the 1999 Agreement because that was not the Administrators' case. And, in relation to what was the Administrators' case, there was no admission, as the judge accepted, that the vesting of a beneficial interest in CSP obviated the need to operate the notice provisions in the contracts. It is to that issue which I now turn.

44. As part of the Respondents' Notice the Administrators seek to uphold the order of the judge on the basis that, contrary to [81] of his judgment, it was not necessary for CSP as beneficial owner of the Properties to serve a notice requiring completion as a pre-condition to obtaining a transfer of the legal estate. The judge had said that he was prepared to assume that a notice did have to be served but on the premise that CSP had become the assignee of the benefit of the 1999 Agreement it could rely on the October 2017 letter as constituting notice under clause 6.2 of that agreement.

45. If, as I have held, the judge was wrong to find that the benefit of the 1999 Agreement had been assigned in equity to CSP then the October 2017 letter does not assist the Administrators even if it can be treated as a contractual notice. Notices would have to be served by NEL under the 1999 Agreement and by CSP under the 2003 Agreement, neither of which was done. In these circumstances, Mr Cawson submits that the effect of the two contracts following payment of the consideration in each case was to constitute Mr Ezair a bare trustee for CSP and entitle CSP to a transfer of legal title to the Properties without the need for service of the relevant contractual notices.

46. As indicated earlier, this argument faces what I consider to be insuperable difficulties in the form of the decisions in *Berkley v Poulett* and *Southern Pacific* but, even if they can be bypassed by reliance on the admissions contained in Mr Ezair's third witness statement, the Administrators must still explain how a beneficial interest created by the operation of a contract can be enforced free from its terms.

47. It is well established on authority that in the case of an unconditional contract for the sale of real property the vendor is treated as a trustee of the property for the purchaser pending completion: see *Shaw v Foster (1871-72)* LR 5 HL 321 and 349; *Lysaght v Edwards* (1876) 2 ChD 499 at 506-7 per Jessel MR. The relationship is described in some of the judgments as a bare trust but it is clear that it exists as an incident of the

contractual relationship and is no more than a consequence of the principle that equity treats as done that which ought to be done. It is therefore dependent upon the contract remaining specifically enforceable and (Mr Lander contends) remains at all times subject to the terms of the contract.

48. In *Jerome v Kelly* [2004] 1 WLR 1409 the House of Lords held that an uncompleted contract for the sale of land did not have the same effect as a declaration of trust. After reviewing the authorities I have mentioned, Lord Walker of Gestingthorpe (at [32]) said:

> "It would therefore be wrong to treat an uncompleted contract for the sale of land as equivalent to an immediate, irrevocable declaration of trust (or assignment of beneficial interest) in the land. Neither the seller nor the buyer has unqualified beneficial ownership. Beneficial ownership of the land is in a sense split between the seller and buyer on the provisional assumptions that specific performance is available and that the contract will in due course be completed, if necessary by the court ordering specific performance. In the meantime, the seller is entitled to enjoyment of the land or its rental income. The provisional assumptions may be falsified by events, such as rescission of the contract (either under a contractual term or on breach). If the contract proceeds to completion the equitable interest can be viewed as passing to the buyer in stages, as title is made and accepted and as the purchase price is paid in full."

49. Whatever may be the precise nature of the beneficial interest enjoyed by a purchaser under the contract of sale, it is clear that prior to completion of the contract the purchaser does not have an equity in the property which he can transfer to a sub-purchaser so as to be binding against the vendor. In *Berkley v Poulett* (supra) the plaintiff sued the vendor of an estate who had removed what were said to be fixtures prior to completion. The plaintiff was a sub-purchaser of part of the estate and was not party to the vendor's contract under which the whole estate had been sold to an intermediate purchaser who then sub-sold parts to the plaintiff. The majority of the Court of Appeal held that the items removed were not fixtures. The claim therefore failed for that reason. The members of the Court (Stamp, Scarman and Goff LJJ) expressed different views about the effect of the contractual arrangements but in his judgment Stamp LJ explained why he considered that the vendor did not become a trustee for the sub-purchaser. At page 93, he said:

> "A vendor under a contract for the sale of land is bound on completion to convey what he has agreed to sell. And so (I take his duties from the statement in *Fry on Specific Performance* 6th ed at p 638) he is bound on completion to show a good title to the property contracted to be sold and is bound to take reasonable care of the property and to pay the outgoings until the purchaser takes, or ought to take, possession and is bound upon payment of the money payable by the purchaser to execute and procure the execution by all other necessary parties of a proper conveyance vesting the legal estate in the purchaser and to put him in possession of the property agreed to be sold. The

purchaser has corresponding rights. These duties and rights arise from the contract of sale and it is because of their existence that the vendor is said to be a constructive trustee, or a trustee *sub modo*, of the estate for the purchaser from the time when the contract is constituted. But to say that it is the duty of the vendor as *trustee for the purchaser* to care for the property is to put the cart before the horse and may lead you into error. He is said to be a trustee because of the duties which he has, and the duties do not arise because he is a trustee but because he has agreed to sell the land to the purchaser and the purchaser on tendering the price is entitled to have the contract specifically performed according to its terms. Nor does the relationship in the meantime have all the incidents of the relationship of trustee and cestui que trust. That this is so is sufficiently illustrated by the fact that *prima facie* the vendor is until the date fixed for the completion entitled to receive and retain the rents and profits and that as from that date the purchaser is bound to pay interest. And you may search the Trustee Act 1925 without obtaining much that is relevant to the relationship of vendor and purchaser. Thus, although the vendor because of his duties to the purchaser is called a trustee, it is wrong to argue that because he is so called he has all the duties of or holds the land on a trust which has all the incidents associated with the relationship of a trustee and his cestui que trust. With these considerations in mind I pass on to consider the submission which is foreshadowed in the statement of claim that because, as is the fact, Lord Poulett had on August 2 notice of the subcontract he thereafter had a duty *as trustee for the plaintiff* pending completion of the estate contract to use reasonable care to preserve lot 1, including Hinton House and the disputed items, in a reasonable state of preservation. In my judgment that submission is not well founded. The plaintiff was not, and I emphasise this, an assignee of Effold's rights and interest under the estate contract and was no party to that contract. Lord Poulett could not have required the plaintiff to pay a single penny for Hinton House and could not in the events which happened have compelled the plaintiff to accept a conveyance of Hinton House. It follows in my judgment that as between Lord Poulett and the plaintiff there did not come into being those mutual rights and obligations of a vendor and purchaser of land the existence of which enables one to describe the vendor as a constructive trustee or a trustee *sub modo* for the purchaser. Putting it more concisely, because there was not between Lord Poulett and the plaintiff the relationship of vendor and purchaser the incidents of such a relationship were absent. Lord Poulett did not hold Hinton House as a trustee for the plaintiff and was under no fiduciary or contractual obligation to him to take reasonable care of Hinton House. The plaintiff's remedy in respect of any failure by Lord Poulett in his duty to Effold was against Effold in respect of the consequences of Effold's failure to enforce that

> duty. I am fortified in my conclusion by the speeches in the House of Lords in *Shaw v Foster* (1872) LR 5 HL 321."

50. In *Southern Pacific* (at page 414 D-E) Lord Collins (in a judgment concurred in by the other members of the Supreme Court) approved this passage from Stamp LJ's judgment in which he said it was implicit that the purchaser did not obtain proprietary rights against the vendor which he could pass to the sub-purchaser.

51. I think that we are therefore bound by authority to reject Mr Cawson's submission that the effect of the 2003 Agreement was by operation of law to transfer to CSP a beneficial interest in the Properties which is enforceable directly against Mr Ezair. But even if this difficulty can be overcome by reliance on Mr Ezair's admissions to the contrary in his witness statement, the question remains whether any right which CSP could enforce to obtain a transfer of the legal estate was conditional on compliance with the contractual requirement for the service of a notice to complete.

52. Mr Cawson's immediate response to this point is that there was in fact no contractual requirement for the service of a notice. For this he relies first on clause 2.1 of the 1999 Agreement which refers to Mr Ezair and NEL agreeing to sell and purchase the Business "with effect from the Transfer Date" of 5 March 1999. This, he says, indicates an immediate transfer of the business and its assets including the Properties so as to create a bare trust in favour of NEL and a corresponding right to the immediate transfer of the legal estate free of any other restrictions. In relation to the 2003 Agreement, he submits that special condition 6 on its true construction overrides the requirement for a notice in the definition of the completion date and permits CSP to call for completion at any time without giving 28 days or any other specific period of notice.

53. I would reject both of these submissions. It is clear from clause 6 of the 1999 Agreement that the parties have expressly agreed a difference of treatment between the Properties and the other assets of the Business. Whilst completion of the sale of the assets other than the Properties was to take place on or at least with effect from 5 March 1999, it is clear from clause 6.2 that completion of the sale of the Properties was to depend on the service of a notice. There is nothing in clause 2.1 to contradict that and the terms of the Agreement must be read consistently with each other. In relation to special condition 6 of the 2003 Agreement, I think that Mr Lander is right in his submission that this does no more than to allow CSP or NEL to request completion of the sale of various of the Properties as it chooses rather than being bound to complete the sale and purchase of all of the Properties at one time. A request for completion within the meaning of the condition must still comply with the requirement for service of a notice contained in the definition of Completion date.

54. On the premise therefore that CSP was required to serve a notice under the 2003 Agreement in order to require completion, one needs to consider what it is in the trust relationship created by the contract that has the effect of overriding the notice provisions. In the light of my view about there being no trust of the Properties in favour of CSP which is binding on Mr Ezair, this question has something of an air of unreality about it. But if Mr Ezair is bound by his admissions, one can test Mr Cawson's argument by considering what the position would be under the 1999 Agreement had matters stopped there. NEL would have the benefit of the trust described in *Lysaght v Edwards* and the other cases I have referred to. But it is clear both from those authorities and from what Lord Walker has said in *Jerome v Kelly* that the trust which

arises is one to give effect to the contract and, it must follow, is governed by its terms. The contract continues to subsist between the parties so that in the case of the 1999 Agreement clause 6.2 would remain operative. A demand by NEL for a transfer of the legal estate would constitute a demand for completion of the contract and I can see no basis for saying that the fiduciary duties which the contract places upon the vendor prior to completion can override what the parties have agreed. If confirmation was needed of this it can be found in clause 5 of the 2011 Agreement.

55. Therefore even if, contrary to my view of the law, Mr Ezair is bound by what he said about the beneficial entitlement of CSP in his witness statement, this has no relevance to the outcome. CSP could only obtain a transfer of the legal estate by serving a contractual notice on NEL and requiring NEL to take steps under the 1999 Agreement against Mr Ezair in order to make title. That, as I have already said, was never done.

56. That leaves the other question raised by the Respondents' Notice which is whether the Administrators should be permitted to support the judge's order by relying on the subsequent assignment of the benefit of the 1999 Agreement to CSP and its service of a clause 6.2 notice. The relevant sequence of events is that the judge handed down his corrected judgment on 4 July 2019 and made an order which was sealed on 5 July 2019. This stated in paragraph 1 that the Administrators were "entitled to judgment in accordance with the judgment handed down" and then in paragraph 2 adjourned to another date Mr Ezair's application for permission to appeal "together with issues as to costs and any other outstanding issues between the parties appropriate to be dealt with by the court under the handed down judgment including the terms of the relief to be granted".

57. On 9 July 2019 the written assignment of the benefit of the 1999 Agreement to CSP was executed and on 10 July 1999 a clause 6.2 notice was given by CSP to Mr Ezair. The case came back to Judge Halliwell on 23 July 2019 when he made the order under appeal directing Mr Ezair to execute transfers of the Properties in favour of CSP. That order was sealed on 29 July 2019.

58. The general rule is that the trial judge becomes *functus* only after the order he makes on an application is passed and entered by being sealed in the Registry. Until then he is free at his discretion to re-open and re-consider the matters at issue in the proceedings. This may include reversing his original findings of fact or law: see *In re L (Children)* [2013] 1 WLR 634 per Baroness Hale of Richmond JSC at [19]. Whether the judge should do so will depend upon the circumstances of the case and whether the party who is adversely affected by the re-consideration will have a proper opportunity of dealing with any new points which are raised.

59. In the present case, Judge Halliwell was not asked to take into account the post-judgment assignment and notice under the 1999 Agreement although he was made aware of them when considering whether to grant permission to appeal. We do not therefore have the benefit of his views about their effect or the way in which Mr Ezair would have responded to them. What the Administrators now seek, however, is that we should take them into account as part of this appeal so that even if, as I have found, Mr Ezair succeeds in his grounds of appeal against the judge's decision, the order of 29 July 2019 should still be upheld.

60. Mr Lander has submitted that there is in fact no jurisdiction for us to do this because the judge could not himself have relied on those matters to make his order. The relevant cut-off date was, he says, 5 July 2019 when the judge made his first order. I do not accept that. It seems to me that the terms of the 5th July 2019 order had the effect of continuing the proceedings until a detailed order setting out the terms of the relief could be made. This occurred on 29 July 2019 and it is, of course, that order against which this appeal is brought. We are, I think, therefore faced with deciding whether, as a matter of discretion, we should proceed to consider matters which post-date the judgment and were not considered by the judge in making his order.

61. Mr Lander says that his client will be prejudiced if we allow the Administrators to rely on the later assignment and notice to correct the defects in their claim but, at the same time, limit Mr Ezair to the arguments he relied upon in front of the judge. In particular, he says that reliance on the alleged 2014 agreement was abandoned in the belief that it was unnecessary in order to defeat the claim as then formulated whereas now he would wish to rely on it if the Administrators are to base their application on a new assignment and notice.

62. As I mentioned earlier, it is difficult in the absence of evidence to delve very far into the tactical decisions that were taken prior to the trial. The powers of the Court of Appeal under CPR 52.20 are very wide and include all the powers of the lower court: see CPR 52.20(1). But the function of the Court is to review the decision of the lower court and, in general, it will not receive evidence which was not before the lower court: see CPR 52.21(2). In the present case, the late assignment and notice had not taken place until after judgment had been handed down and the judge had made his first order of 5 July 2019. Nor were they brought to his attention at a time when he could realistically have taken them into account in formulating the reasons for his decision.

63. The general practice of the Court of Appeal is not to allow an appellant to raise for the first time on an appeal a point which could have been but was not taken in the court below. In *Jones v MBNA International Bank* [2000] EWCA Civ 514 May LJ (at [52]) said:

> "Civil trials are conducted on the basis that the court decides the factual and legal issues which the parties bring before the court. Normally each party should bring before the court the whole relevant case that he wishes to advance. He may choose to confine his claim or defence to some only of the theoretical ways in which the case might be put. If he does so, the court will decide the issues which are raised and normally will not decide issues which are not raised. Normally a party cannot raise in subsequent proceedings claims or issues which could and should have been raised in the first proceedings. Equally, a party cannot, in my judgment, normally seek to appeal a trial judge's decision on the basis that a claim, which could have been brought before the trial judge, but was not, would have succeeded if it had been so brought. The justice of this as a general principle is, in my view, obvious. It is not merely a matter of efficiency, expediency and cost, but of substantial justice. Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this

> depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

64. The rule, as May LJ explained, is of course not absolute and later decisions of this court have confirmed that the power to allow reliance on new points is not confined to exceptional cases; see *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337 at [26]. It depends upon an analysis of all the relevant factors. But in the present case we are placed in the obvious difficulty of determining what arguments Mr Ezair could have deployed had a later assignment and notice been served in time and deciding issues of prejudice which can only properly be examined if privilege is waived. The fact is that the Administrators chose to proceed under s.234 on what in my view was a false legal basis. They could, at the very start before commencing proceedings and certainly once Mr Ezair had made it clear in his witness statement that he was relying on the notice provisions, have executed an assignment of the 1999 Agreement in favour of CSP and served a clause 6.2 notice. Had they done so, all relevant defences would have been before the judge and most of the complicated arguments about title which he and now this Court have had to deal with would have been avoided. Taking those matters into account, there would, I think, be a risk of injustice if we were simply to allow the Administrators to rely on the July 2019 assignment and notice but hold Mr Ezair to his arguments at the trial. I would therefore decline to allow those matters to be introduced into these proceedings by way of the Respondents' Notice. The remedy for the Administrators is to commence new proceedings based on the recent assignment and notice, to which Mr Ezair can raise any defence which may be available to him.

65. For these reasons, I would allow the appeal and dismiss the s.234 application.

Lord Justice Henderson :

66. I agree.

Lady Justice Rose :

67. I also agree.

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