CA-2024-001204 and CA-2024-001215

IN THE COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD) (SIR NIGEL TEARE)
No: CL-2022-000383

B E T W E E N: -

CRESCENT GAS CORPORATION LIMITED
("CGC")

Applicant/Claimant/Judgment Creditor/Respondent

-and-

(1) NATIONAL IRANIAN OIL COMPANY
("NIOC")

Respondent/Defendant/Judgment Debtor/Appellant

(2) RETIREMENT, SAVING AND WELFARE FUND OF OIL INDUSTRY WORKERS
("Retirement Fund")

Respondent/Defendant/Appellant

RESPONDENT'S REPLACEMENT SKELETON ARGUMENT IN OPPOSITION TO THE APPEAL AND IN SUPPORT OF THE RESPONDENT'S NOTICE

A INTRODUCTION

1. This Skeleton Argument is submitted on behalf of CGC, the Judgment Creditor and **Respondent** to this appeal, in opposition to the appeal and in support of the Respondent's Notice.

2. This appeal arises out of CGC's successful efforts at first instance, following a trial before Sir Nigel Teare (sitting as a Judge of the Commercial Court), to take execution

action in partial satisfaction of a Judgment Debt pursuant to s.423 of the Insolvency Act 1986 (**IA 1986**).

3. The s.423 IA 1986 claim was advanced on the basis that NIOC (the national oil and gas company of Iran) and Judgment Debtor (**the First Appellant**), had:

   a. On 23 August 2022, transferred ownership of a property known as "**NIOC House**", being prime commercial real estate in the heart of Westminster (with a then estimated value of at least £80-£104 million),[1] to a closely related Iranian entity[2] Retirement Fund (**the Second Appellant**) for nil consideration and so at an undervalue (**the August Transfer**). Prior to the August Transfer, NIOC had owned NIOC House for a continuous period of close to 50 years.

   b. The purpose of the August Transfer was to put NIOC House beyond the reach of CGC, the Judgment Creditor.

4. By the Judgment dated 15 April 2024 (**the Judgment**), the Judge found in favour of CGC on the two central issues:

   a. Prior to the August Transfer, NIOC House had been owned absolutely (i.e. legally and beneficially) by NIOC both as a matter of Iranian property law (NIOC's primary case)[3] and as a matter of English trust law (NIOC's alternative case)[4] and therefore the August Transfer was for nil consideration.

   b. The purpose of the August Transfer was to put NIOC House beyond the reach of CGC.[5] In reaching this conclusion, the Judge identified as material the facts that: (i) the Appellants had failed to disclose documents that must have existed

[1] Judgment ¶ 7 **{CB/15/165}**.

[2] Judgment ¶ 1 **{CB/15/165}**.

[3] Judgment ¶ 150 **{CB/15/192}**.

[4] Judgment ¶ 213 **{CB/15/204}**.

[5] Judgment ¶¶ 223-224 **{CB/15/206}**.

concerning the purpose of the August Transfer; and (ii) the absence of evidence from those in positions of authority who decided to execute the August Transfer. [6]

5. As a result, the Judge ordered a transfer of ownership of NIOC House to CGC. [7]

6. Briefly summarised, the circumstances that gave rise to CGC's successful claim pursuant to s.423 of IA 1986 are as follows:

   a. CGC, the Judgment Creditor, is a private limited company and wholly owned subsidiary of Crescent Petroleum Company International Limited, a privately owned oil and gas exploration and production company headquartered in the UAE.

   b. NIOC is a defaulting Judgment Debtor of CGC in an amount exceeding USD 2.6 billion pursuant to the Order of Knowles J sealed on 17 August 2022 (**the Knowles J Order**). Under the Knowles J Order, permission was given to CGC to enforce an international arbitral award rendered by the Hon. Murray Gleeson AC, Sir Jeremy Cooke and the Rt. Hon. The Lord Phillips of Worth Matravers, KG, PC dated 27 September 2021 (**the Remedies Award**).[8] **{SB/3/71-74}**

   c. The Remedies Award arises out of NIOC's total failure to supply gas pursuant to a 25-year term Gas Sales and Purchase Contract dated 25 April 2001 (**the GSPC**).[9] The arbitration took c.12 years to reach the Remedies Award largely due to the Appellants' guerilla delaying tactics. All their attempts to contest enforcement of the Remedies Award failed, with Picken J describing a s.69 challenge as meritless ([2022] EWHC 1645 (Comm) [69]-[70]), and NIOC has exhausted all possible court challenges to the Remedies Award and the earlier Award on Jurisdiction and Liability dated 31 July 2014. Its continued efforts, even on this appeal, to cast

[6] Judgment ¶¶ 218, 222 **{CB/15/205}**.

[7] Judgment ¶ 231 **{CB/15/208}**. The order of transfer is subject to a stay pending the outcome of this appeal.

[8] Judgment ¶ 4 **{CB/15/165}**.

[9] Judgment ¶ 7 **{CB/15/165-166}**.

aspersions on the Remedies Award,[10] are symptomatic of its unwillingness to recognise and comply with its debt obligations in breach of the Knowles J Order. This is very much a case of 'won't pay', and not 'can't pay'. NIOC is one of the world's largest oil companies by revenue.[11] The former Iranian President, the late Ibrahim Raisi, has stated, "*We are not going to pay even one dollar to anyone in the Crescent case*".[12]

d. The Knowles J Order was served on NIOC the day it was sealed: 17 August 2022. By its terms, it became finally enforceable in respect of the USD 1,344.70 billion component of the Remedies Award as of 1 September 2022 (14 days later). [13]

e. The Knowles J Order prompted a flurry of internal activity which the Judge found to be "*in circumstances of great expedition*"[14] as between NIOC and Retirement Fund, which was marked as "*TOP URGENT*" and which was for the purposes of obtaining a written authorisation from NIOC to confer authority to execute a transfer of NIOC House from NIOC to Retirement Fund.[15] The TR-01 form noted the transfer was "*not for money or anything that has a monetary value"* (Judgment ¶ 153iii)). As noted above, documents pertaining to this urgency and the purpose of the August Transfer were not disclosed and no witnesses were called by the Appellants to explain the August Transfer, so there was no evidence as to NIOC's purpose despite "[n]*o suggestion* [having been] *made that any of those persons could not have been called*".[16]

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[10] NIOC's Skeleton Argument ¶ 2 **{CB/6/43}**, referring to allegations that "*Crescent was implicated in corrupt activities*" which is both untrue and rejected by the Tribunal.

[11] In 2017 NIOC reported annual sales revenues of USD 110 billion (Darowski 4, ¶17 **{SB/9/102}**); in 2023, NIOC's Petroleum Minister reported that Iran had earned almost USD 4 billion in the period March to July, from gas exports alone (Darowski 4, ¶ 17 **{SB/9/102}**.

[12] Farda News, 10 May 2017 **{SB/32/223}**.

[13] Judgment ¶¶ 134, 138 **{CB/15/190}**, **{CB/15/191}**.

[14] Judgment ¶ 137 **{CB/15/191}**.

[15] Judgment ¶¶ 43, 135, 137 **{CB/15/174}**, **{CB/15/190}**, **{CB/15/191}**.

[16] Judgment ¶ 218 **{CB/15/205}**.

f. On 23 August 2022, 6 days after the Knowles J Order, title transfer form TR01 was executed as a deed by NIOC's Director of Legal Affairs on behalf of NIOC for the purposes of transferring NIOC House from NIOC to Retirement Fund for nil consideration, with the form witnessed as a deed by Mr. Raghozar, managing director of an English company called NTT and authorised representative of Retirement Fund.[17]

B THE ISSUES ARISING ON THIS APPEAL AND SUMMARY OF CGC'S POSITION

B1 THE APPELLANTS' APPEAL

7. Six days after service of an enforcement order, NIOC took "*top urgent"* action motivated to frustrate enforcement by a judgment creditor (a finding of fact not open to challenge). The issues on which the Appellants have been granted permission to appeal are limited and concern their alternative English law express trust case (*alternative* to their *primary* case based on Iranian law ownership as NIOC acknowledges[18]) that, prior to the August Transfer, NIOC already held NIOC House under an English law express trust for Retirement Fund as beneficiary. As detailed below, this express trust case is an *ex post facto* construct, undermined by contemporaneous and witness evidence. It is advanced to nullify the consequence of the unappealable finding that the August Transfer was a transaction for nil consideration, effected to prevent enforcement. **{CB/15/190}** **{CB/13/160}**

8. The Appellants contend that two documents relating to a mortgage agreed in 2019 to raise financing for refurbishment of NIOC House satisfy the requirements of s.53(1)(b) LPA by declaring,[19] manifesting and proving an English law trust. The two documents are: (i) a mortgage deed dated 25 September 2019 executed by NTT on behalf of NIOC (**the Mortgage Deed**); and (ii) an associated Certificate of Title (derived from a Law Society precedent) executed by Eversheds on behalf of NIOC on 9 January 2020 (**the Certificate of Title**) (collectively **the Mortgage Documents**). **{SB/41/321}** **{SB/44/334}**

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[17] Judgment ¶ 135 **{CB/15/190-191}**.

[18] NIOC's Skeleton Argument ¶¶ 15-16 **{CB/6/47}**.

[19] As explained below, the Appellants' case necessarily has to be that the Mortgage Documents declared and proved in writing the declaration of trust, since Retirement Fund only acquired separate legal personality on 25 September 2019.

9. On that basis, the Appellants contend that the August Transfer was not at an undervalue and therefore one of the requirements of s.423 of IA 1986 is not met.

10. The Appellants say that:

    a. The Judge was right to conclude that the Mortgage Documents did declare, manifest and prove a trust over NIOC House in favour of Retirement Fund in writing within the meaning of s.53(1)(b).[20] The inherent improbability and error of law in the Judge's finding that the Mortgage Documents declared, manifested and proved a trust is the subject of CGC's Respondent's Notice.

    b. The Judge was wrong as a matter of statutory construction to conclude that s.53(1)(b) requires that writing, manifesting and proving the alleged trust had to be signed by NIOC as opposed to an agent acting for NIOC (**Ground 1**).[21]

    c. The Judge was wrong as a matter of general legal principle to conclude that the signing of the Mortgage Documents by NTT and Eversheds respectively *qua* agents did not constitute signature by NIOC and therefore satisfy s.53(1)(b) in any event (**Ground 2**).[22]

    d. In relation to each of Grounds 2 and 3, NIOC further submits that its Amended Defence dated 17 November 2023 (**NIOC's Amended Defence**), signed by Mr. Howarth, Partner in Eversheds, also satisfies s.53(1)(b). **{CB/20/280}**

[20] Judgment ¶ 188, 191, **{CB/15/199}**, **{CB/15/200}**, NIOC's Skeleton Argument ¶ 6 **{CB/6/44-45}**.

[21] Judgment ¶ 188, 191, **{CB/15/199}**, **{CB/15/200}**, NIOC's Skeleton Argument ¶ 6 **{CB/6/44-45}**.

[22] NIOC's Skeleton Argument ¶ 5(1) **{CB/6/44}**.

e. The Judge was wrong as a matter of law to conclude that the Appellants could not rely on the trust allegedly created by the Mortgage Documents to defeat CGC's claim even if the requirements of s.53(1)(b) had not been satisfied (**Ground 3**).[23]

11. The Appellants' appeal also proceeds on the basis of the unproven factual assertion that the alleged agents in question, NTT and Eversheds, were authorised to sign documents that declared an English law trust.[24] However, the Appellants did not advance evidence before the Judge to prove any such case, the evidence before the Judge contradicted any such authorisation and as a result the Judge did not consider the alleged agent's authorisation in the Judgment. This point is addressed below in the context of the appeal and it also arises in the context of CGC's Respondent's Notice.

12. In summary, the Court is invited to dismiss the appeal because:

a. As to Ground 1, the Judge was right to conclude that s.53(1)(b) LPA requires a declaration of trust to be manifested and proved by writing signed by the settlor with an agent's signature being insufficient, in contrast to s.53(1)(a) and s.53(1)(c). This construction is supported by the statutory language, the authorities and the legislative policy of the provision. It is an important safeguard in respect of oral declarations of trust of land by ensuring that the settlor has direct involvement, through signature, of the written proof of trust.

b. Ground 2 raises a point not argued by the Appellants before the Judge in any detail. NTT and Eversheds (NIOC's alleged agents) were not, as a matter of s.53(1)(b), common law, company law or s.74 LPA, to be treated as signatures *by* NIOC. There is an important distinction between execution of documents *by* a company and execution *on behalf of* a company. Where a document is executed through the company's officers or another method prescribed by statute, it is treated as executed by the company itself. Execution by agents, if properly authorised, may also bind the company but is not execution *by* the company. The Appellants' contrary position is tantamount to saying that there is no difference between signature by a

[23] NIOC's Skeleton Argument ¶ 5(2) **{CB/6/44}**.

[24] NIOC's Skeleton Argument ¶ 5(2) **{CB/6/44}**.

principal and agent in circumstances where Parliament has made precisely that distinction in s.53(1)(b). Further, as noted above, the Appellants never led evidence to establish that NIOC's agents were in fact authorised to sign a document that either declared, manifested or proved a trust. This is unsurprising, because the evidence before the Judge contradicted any such authorisation. Accordingly, this Ground fails for that additional reason.

c. As to Ground 3, the Judge was right to conclude that failure to comply with s.53(1)(b) meant the Appellants could not rely on the alleged trust as a defence to CGC's claim. There are fundamental problems with the Appellants' contrary case:

i. The Judge was plainly right to find that using a trust which did not comply with s.53(1)(b) to defeat the claim of a third party creditor of the trustee would be enforcement of the trust against the creditor. There is no justification as a matter of authority or principle for restricting the "unenforceable" status of such a trust to cases where the beneficiary seeks to enforce against the trustee.

ii. Moreover, even if that restriction were to be accepted, it still would not assist NIOC. In those circumstances, the trustee owes no enforceable obligations. If the trustee voluntarily chooses to transfer property in the face of a creditor claim and with the requisite purpose, that transaction is obviously liable to be set aside under s.423 IA 1986. The Judge's finding that NIOC acted with the requisite purpose in this case is not open to challenge.

iii. Further or alternatively, the better view in law is that a trust which does not comply with s.53(1)(b) is invalid (as set out in the Respondent's Notice).

B2 CGC'S RESPONDENT'S NOTICE

13. In any event, this appeal should also fail by reason of two further and important issues which are the subject of CGC's Respondent's Notice: **{CB/8/81}**

a. The Judge erred in law in concluding that the Mortgage Documents declared an English law express trust.[25]

b. No agent purporting to declare a trust on behalf of NIOC had authority to do so (as noted above, this issue also arises in relation to Ground 2).

14. The first point entails an objective question as to whether a reasonable person, armed with all the background knowledge which would have been available to NIOC, would have understood that NIOC through the Mortgage Documents was manifesting a *present* intention to create an English law trust. In this regard, the Judge failed to apply the relevant legal test to the facts, failed to have regard to the relevant background circumstances and thereby misconstrued the Mortgage Documents.

15. It is important to appreciate here that, since Retirement Fund did not exist before 25 September 2019, there can have been no declaration of trust before that date and so the Mortgage Documents (the first of which was dated 25 September 2019) would themselves have to be the declaration of trust and not just evidence of one.

16. The Judge's errors of legal approach are developed later but in summary:

a. The Judge failed to have regard to his own finding (elsewhere in the Judgment) that NIOC was under the mistaken belief that Retirement Fund *already owned* NIOC House (and had since 1979). Objectively, therefore, NIOC had no reason to declare a trust.

b. The Judge failed to have regard to NIOC's factual case being that it was operating not on the basis of English law trust concepts but on the basis of the Iranian law ownership concept of *amanat*, which does not recognise the concept of split title but only absolute ownership. That was why NIOC's primary case at trial was to seek recognition of the alleged *amanat* in respect of NIOC House under the Hague Convention on the Recognition of Trusts (**Hague Convention**) (which was rejected by the Judge). But NIOC's (mistaken) belief in NIOC House being held under an

[25] Judgment ¶¶ 188, 191 **{CB/15/199}**, **{CB/15/200}**.

amanat, with Retirement Fund having sole absolute title to the property, was also (as the Judge should have recognised) *factually inconsistent* with an intention to declare a trust.

c. NIOC's English lawyer Mr. Cathcart never doubted that Retirement Fund had since at least 1979 been the beneficial owner of NIOC House. Based on his understanding that the purchase of NIOC House had been funded by Retirement Fund and his instructions from his clients,[26] he considered NIOC to be *"custodian trustee"* of the property for Retirement Fund, a concept he was familiar with from his experience as a scout leader.[27] In other words, the reasonable person would be aware that NIOC had been advised that the Retirement Fund's ownership of NIOC House was in English law terms to be treated as a "*custodian trusteeship*", and therefore there was no need for a declaration of trust. The Judge failed to have regard to this, which also explains why the Mortgage Documents (and earlier documents) asserted that a *"custodian trusteeship"* already existed in circumstances where: (i) no English law trust could have been created prior to 25 September 2019, when Retirement Fund acquired legal personality; (ii) NIOC never had any intention to create an English law trust; and (iii) NIOC had been acting in the mistaken belief that ownership of NIOC House was vested absolutely in Retirement Fund as a matter of Iranian law. [28] As a result, NIOC never led witness evidence asserting such an English law trust case. **{CB/15/197}**

d. Nor would the fact that Retirement Fund coincidentally acquired separate legal personality on 25 September 2019 (i.e. the date of the Mortgage Deed) have provided a new reason to make a declaration of trust at that time, since the Appellants and Mr. Cathcart were unaware that Retirement Fund did not have separate legal personality before 25 September 2019.

[26] Tr. Day 2/79/2-13 **{SB/51/516}**; Cathcart WS ¶¶ 4-6 **{SB/12/114-115}**.

[27] Judgment ¶ 99 **{CB/15/184}**; Tr. Day 2/80/21-25 {**SB/51/516}**.

[28] See Dr. Zeinoddin's WS ¶ 2.6 and fn. 2 **{SB/15/146}** which say that NIOC House was held pursuant to an *amanat* arrangement, in accordance with NIOC's Articles of Association.

e. The Judge failed to have regard to the nature of the transaction giving rise to the Mortgage Documents. It was inherently improbable that NIOC intended to declare a trust through the Mortgage Documents. This was a financing transaction and the purpose of the Mortgage Documents was to provide security to the lender. They were not an obvious or natural vehicle for NIOC to make a declaration of trust yet the Judge did not consider the question of why NIOC would seek to declare a trust in September 2019 through such financing documents.

f. Further, and consistent with the above, the negotiations preceding the Mortgage Documents proceeded on the (mistaken) basis that Retirement Fund was already the beneficial owner of NIOC House. Thus, Stephenson Harwood (solicitors for Bank Melli), by email of 30 July 2019,[29] wrote to Bank Melli and relayed the position that (inter alia) "*The beneficial owner of the Property is Pension Fund with the legal title being held by NIOC as sole trustee*" [Emphasis added]. Enclosed with the email was the draft Certificate of Title. The reasonable person would have understood that the Mortgage Documents were therefore intended merely to record a state of affairs already (wrongly) believed to exist.

g. The Judge failed to have regard to the fact that there was no evidence that the agents signing the Mortgage Documents (NTT and Eversheds) had authority to declare a trust (indeed the evidence was to the contrary), which again objectively indicated the absence of a *present* intention to declare a trust.

h. The Judge failed to have regard to the facts that after the Mortgage Deed was signed HM Land Registry (**HMLR**) asked for a copy of the "*trust deed*", NIOC could and did not provide one. Conspicuously, it did not rely on the Mortgage Deed itself as being a trust deed or evidence of one, which again objectively points to there being no intention for that document to create a trust. **{SB/41/321}**

i. As the Judge should have appreciated, the Mortgage Documents by their language and viewed (as they should have been) against this background objectively evidenced a belief in an existing (and longstanding) state of affairs (i.e. Retirement

[29] Email from Stephenson Harwood to Bank Melli dated 30 July 2019, p.8 **{SB/38/249}**.

Fund's ownership of NIOC House) and not a present intention to *change* that state of affairs by way of the creation of a trust. The proper approach is that *"... unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention."* (*In re Schebsman, Deceased* [1944] Ch 83 at 104, Parcq LJ). Had that been applied, the Judge ought to have found there was no intention to declare a trust.

j. Although the Judge recognised the legal question to be posed (Judgment ¶¶ 159-160), he failed to apply that test to the Mortgage Documents and made no attempt to analyse the relevant background circumstances, focussing instead on the particular clauses of the two documents (Judgment ¶¶ 185-191). It is possible that the Judge conflated the question of whether the documents manifested a *present* intention to declare a trust with the different question of whether the documents evidenced a trust *already* alleged to be in existence. But since Retirement Fund did not exist before 25 September 2019, there can have been no previous declaration of trust (and there was no evidence that a trust was declared in the negligible period - if any - between Retirement Fund coming into existence and the signing of the Mortgage Documents). **{CB/15/194}** **{CB/15/199-200}**

17. The second question the Judge failed to consider was whether any agent purporting to declare a trust on behalf of NIOC had authority to do so. This not only goes to the question of objective intention to create a trust but also to the question of whether (on the basis that, contrary to CGC's case, an agent can declare a trust for the purposes of s.53(1)(b)), NTT and Eversheds in fact had authority to declare a trust. As set out below, the evidence contradicted any such case, which was not even advanced by the Appellants. This point overlaps with the Appellants' unproven assertion, as part of their appeal, that the agents in question were authorised to declare a trust by signed writing.

18. The Respondent's Notice also addresses the Appellants' new argument on appeal that NIOC's Amended Defence (dated 17 November 2023) was a document satisfying s.53(1)(b). In short, NIOC's Amended Defence is not even by its own terms a declaration of trust (as it would have to be), nor could NIOC have declared a trust at that time since it no longer owned the property, nor was there evidence that Eversheds was authorised **{CB/20/280}**

to create a trust through that document, nor can a party self-servingly create a declaration of trust after proceedings have commenced.

C RELEVANT FACTUAL BACKGROUND

19. Although the Appellants frame their appeal as raising points of law only, they spend considerable time seeking to argue the merits of their position on the Mortgage Documents as constituting declarations of trust satisfying s.53(1)(b) of the LPA by contending at various points that: (i) there were decades worth of documents going back to the 1970s making clear that NIOC always regarded NIOC House as an asset of Retirement Fund;[30] (ii) the (alleged) uncontested fact that all rent from NIOC House had been paid to Retirement Fund and Retirement Fund had met expenditure relating to NIOC House;[31] (iii) the Judge accepted that there had been several occasions prior to Retirement Fund's incorporation when NIOC had declared a trust in favour of Retirement Fund (though these were not declarations of trust given that Retirement Fund was not incorporated and therefore had no separate legal personality).[32]

20. NIOC also annexes a Schedule of documents which it says evidence NIOC's understanding and intention that NIOC House was an asset of the Retirement Fund rather than an asset of NIOC prior to 2019 (when Retirement Fund acquired legal personality). **{CB/6/59}**

21. That rudimentary analysis conflates: (i) periods of time when Retirement Fund had no separate legal personality; and (ii) English law trust issues and Iranian law ownership issues, the latter being the basis on which NIOC operated. CGC accordingly addresses the Appellants' position by reference to the actual facts as found by the Judgment, which is also of relevance to CGC's Respondent's Notice.

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[30] NIOC's Skeleton Argument ¶ 3(1) **{CB/6/43}**.

[31] NIOC's Skeleton Argument ¶¶ 3(2) and 3(3), 9 **{CB/6/43}**, **{CB/6/43}**, **{CB/6/45-46}**.

[32] NIOC's Skeleton Argument ¶ 4 **{CB/6/43-44}**. Note also that permission to appeal to contend that these documents were prospective declarations of trust was refused: NIOC's Grounds 5 and 6 **{CB/2/21-22}**,**{CB/2/22-23}**; Retirement Fund's Ground 3 **{CB/5/41.1-41.2}**; Order of Males LJ dated 2 September 2024 **{CB/13/160}**.

22. **First**, the essential starting point of the Appellants' English law case is that NIOC's primary factual and legal case on ownership was advanced not under English law but Iranian law, which has a fundamentally different approach to property ownership in that it recognises only absolute ownership not split title. The background circumstances were that NIOC believed that only one party could have ownership, in absolute terms, of the property.

23. NIOC relied upon the fact that, by operation of Iranian law, pursuant to Article 36(m) of a 1964 Ministerial Decision "*the funds of the pension and saving funds of the oil industry employees*" (**the Funds**, not to be confused with Retirement Fund which did not exist at this time) were mandated to the Board of Directors of NIOC as "*Amin*" of the Funds, with Article 36(m) providing that the Funds were not to be treated as part of NIOC's assets and funds.[33]

24. Under Iranian law, as found by the Judge: (i) where an *amanat* exists, the owner entrusts an asset to the *amin* but retains ownership of it; (ii) an *amin* has no ownership of the asset and has no right to deal with it or to enjoy the fruits of ownership other than in accordance with the terms of the *amanat*; (iii) an *amin* cannot be equated with an English law trustee since an English law trustee has the legal proprietary interest in the asset, whereas an *amin* has no interest; (iv) an *amanat* can exist over public property; (v) the Funds (being pools of cash) were public property that NIOC managed, as *amin*, through an internal department of NIOC (known as the "**Pension Fund**").[34]

25. The Appellants' Iranian law case, which went through numerous amended iterations, ultimately asserted that: (i) NIOC House was purchased by NIOC in 1975 with monies belonging to, and held for the benefit of, the Funds or their 'members' and accordingly NIOC House was from the date of its purchase held under an *amanat* by NIOC as *amin* for the Funds under Iranian law, which *amanat* then became an *amanat* in favour of

[33] Judgment ¶ 33 **{CB/15/172}**.

[34] Judgment ¶¶ 35-39 **{CB/15/173-174}**.

Retirement Fund on its subsequent incorporation[35] (alleged to be in 2001, well before the Mortgage Documents[36]); (ii) that *amanat* was to be recognised as a trust pursuant to the Recognition of Trusts Act 1987 (enacting the Hague Convention).[37]

26. That case was dismissed because it failed at the first hurdle: the Judge found that NIOC *borrowed* monies from the Funds to purchase NIOC House and accordingly purchased NIOC House with its own monies and owned NIOC House i.e., NIOC House did not (and could not) fall within the *amanat*. This finding was quite apart from the fact that, as also found by the Judge, the Retirement Fund did not have legal personality at the time of NIOC's purchase of NIOC House and therefore was not capable of owning NIOC House.[38]

27. **Second**, nevertheless, since 1979, NIOC had been acting on the mistaken (and legally incoherent) belief that NIOC House belonged to the Funds, a view which the Judge found to have been formed by NIOC's Board without fully considering the legal impact of the purchase having been made with monies borrowed from the Funds.[39] The Appellants further sought to bolster this belief through witness evidence of individuals who confirmed that this was their understanding throughout the relevant period prior to the

[35] NIOC's Amended Defence (dated 17 November 2023) at ¶¶ 18(2) **{CB/20/285-286}**, 18(3) **{CB/20/286}**, 33(1) **{CB/20/293}**, 86(7) **{CB/20/309}**; Retirement Fund's Amended Defence (dated 15 November 2023) at ¶¶ 1(iv) **{CB/19/240-241}**, 7(i)(za) and (zb) {**CB/19/242}**, 7(i)(b) **{CB/19/243}**, 18(ii)(c) **{CB/19/253-254}**, 19(i) **{CB/19/263}**. See also the witness statement of Dr. Zeinoddin (NIOC) at ¶¶ 4.1 **{SB/15/148}**, 4.2 **{SB/15/148}**, 4.4 {**SB/15/149}**, 4.6 **{SB/15/149}** expressing the belief that NIOC House was held by NIOC as *amin* for Retirement Fund because (i) that was NIOC's intention; and (ii) it was purchased with "*the Fund's resources*".

[36] Judgment ¶¶ 78 **{CB/15/181}**, 165-175,**{CB/15/195-197}**.

[37] Judgment ¶¶ 17-18 **{CB/15/168-169}**; NIOC's Amended Defence ¶ 86(6) **{CB/20/309}**; Retirement Fund's Amended Defence ¶ 32(iii)(d) **{CB/19/274}**.

[38] Judgment ¶ 52 **{CB/15/176}**.

[39] Judgment ¶¶ 60 **{CB/15/177}**, and 56-59 **{CB/15/176-177}**.

August Transfer.[40] It is this mistaken factual belief on which the Appellants now rely in contending that NIOC regarded NIOC House as belonging to Retirement Fund.

28. **Third**, the Appellants' alternative English law trust case consequently had to contend with three difficulties from the outset:

a. NIOC, being the entity alleged to have created an English law trust, was an Iranian law entity that had been operating under Iranian law, which does not recognise the distinction between legal and beneficial ownership.[41]

b. NIOC in fact mistakenly believed that NIOC House did legally and beneficially belong to "*the Funds*" pursuant to the Iranian law concept of *amanat* and therefore there was no reason to declare an English law trust.

c. Retirement Fund only acquired separate legal personality on 25 September 2019 as found by the Judge and therefore, as also found by the Judge, NIOC could not declare an English law trust in favour of Retirement Fund until 25 September 2019 and so NIOC had to have a *present* intention to declare a trust at that point in time.[42]

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[40] **Dr. Zeinoddin**, at WS ¶¶ 4.5-4.7 **{SB/15/149}**; in oral evidence at Day 2/32/25 – 33/7 **{SB/51/504-505}**; and Judgment ¶ 21-23 **{CB/15/169-170}**; **Mr. Cathcart** at WS ¶¶ 3 **{SB/12/114}**, 4 **{SB/12/114}**, 7 **{SB/12/115}**; in oral evidence at Day 2/65/9-15 **{SB/51/513}**; 66/20-24 **{SB/51/513}**; 70/2 **{SB/51/514}**; 79/21-24 **{SB/51/516}**; 90/11-14 **{SB/51/519}** (his mistaken characterisation of NIOC as being a "*custodian trustee*" of NIOC House (Judgment/¶¶ 97-99) **{CB/15/184}**, addressed below, was based on that wrongful belief); **Mr. Bayat** at WS ¶¶ 6 **{SB/14/132}**, 19 **{SB/14/134}**, 26 **{SB/14/136}**; and in oral evidence at Day 2/109/17-22 **{SB/51/524}**; 110/19-25 **{SB/51/524}**; 111/16-19 **{SB/51/524}**; 117/1-8 **{SB/51/526}**; and see Judgment ¶ 25 **{CB/15/170}**; **Ms. Nawaz** at WS ¶¶ 4 **{SB/13/121}**, 7 **{SB/13/121}**, 13-15 **{SB/13/122-123}**; and in oral evidence at Tr. Day 2/162/19-23 **{SB/51/537}**; and Judgment ¶ 26 **{CB/15/170}**.

[41] This was recognised in the Judgment at ¶¶ 160-162 **{CB/15/194}**.

[42] Judgment ¶ 176-177 **{CB/15/197}**.

29. As a result, of the 11 documents relied upon by NIOC[43] as allegedly declaring an English law trust, the Judge found only the two Mortgage Documents were potentially capable of declaring an English law trust. For that reason, the Judge recognised that it was not necessary to address pre-25 September 2019 documents.[44]

30. **Fourth**, the Appellants seek to place reliance on the *obiter* observations of the Judge regarding certain documents pre-incorporation as being capable of constituting declarations of trust, when they refer to NIOC holding NIOC House as *"Custodian Trustee"* for the Fund.[45] As noted above, NIOC's English lawyer Mr. Cathcart had (erroneously) advised NIOC that it was holding NIOC House as *"custodian trustee"* for the Funds, and had been since at least 1979. This was based on what NIOC had told him and on the assumption that the Funds had funded the acquisition of NIOC House.[46] This "*custodian trustee*" concept was not based on legal analysis (as he confirmed)[47] but which he took from his experience as a scout leader and their use of the term "*custodian trustee*" where individuals manage properties owned by the Scout Association Trust Corporation.[48] He gave oral evidence that he was "*surprised"* by evidence suggesting that as at 2001 the Funds had no separate legal personality;[49] and, as found by the Judge, "[he] *accepted when cross-examined that had he known* [that the Funds had no separate legal personality] *certain of his advice would have been different"* (i.e. no custodian trusteeship).[50]

31. In other words, the documents said by the Appellants to constitute pre-incorporation declarations of trust were not purporting to declare any English law trust but each asserted

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[43] Judgment ¶ 163 **{CB/15/195}**.

[44] Judgment ¶ 177 **{CB/15/197}**.

[45] Judgment ¶ 182-184 **{CB/15/198}**.

[46] Mr. Cathcart's witness statement, ¶ 5-6 **{SB/12/115}**.

[47] Tr. Day 2/82/5-9 **{SB/51/517}**.

[48] Tr. Day 2/79-82 **{SB/51/516-517}**, 88 **{SB/51/518}** (evidence of Mr. Cathcart); email of Mr. Cathcart dated 18 June 2018, ¶ 4 **{SB/33/227}**.

[49] Tr. Day 2/66/4-24 **{SB/51/513}**.

[50] Judgment ¶ 24 **{CB/15/170}** and Day 2 (14 March 2024) 80/5-11 **{SB/51/516}**. Contrast Mr. Cathcart's witness statement at ¶ 3 **{SB/12/114}**, 4 **{SB/12/114}**, 7 **{SB/12/115}**.

the historical existence of an alleged custodian trusteeship (the term "*custodian trustee*" was specifically used), based on Mr. Cathcart's understanding of the existing factual position.[51] Indeed, there was no reason for NIOC to depart from its longstanding prior and consistent position set out in writing, and as also found by the Judge, that NIOC House belonged to the Retirement Fund (in absolute terms as a matter of Iranian law).[52]

32. In conclusion, the historical position relied upon by the Appellants does not support its position that the Mortgage Documents constituted declarations of trust falling within s.53(1)(b) of the LPA. On the contrary, it reinforces the fact that, at all times, NIOC was proceeding on the mistaken factual basis that NIOC House belonged to Retirement Fund under Iranian law because it had been purchased with "*the Fund's resources*"[53] held by NIOC as *amin* for the Funds, and never had any objective intention to declare an English law trust. As detailed below, this is the subject of CGC's Respondent's Notice.

D THE APPELLANTS' GROUNDS OF APPEAL

D1 NIOC'S GROUND 1 AND RETIREMENT FUND'S GROUND 1

(a) The statutory language

33. As is common ground,[54] the text of the statute is the primary source of interpretation read in the context of the section as whole and any wider context: *Bennion* at ¶ 11.1; *R (O) v Secretary of State for the Home Department* [2023] AC 255 at [29].

34. Section 53(1) of the LPA provides as follows:

> ***53 Instruments required to be in writing.***
> *(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—*

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[51] Letter of 1 February 2014 **{SB/29/211}**; Letter of 12 November 2012 **{SB/27/209}**; Letter of 11 February 2014 **{SB/30/213}**; Letter of 18 March 2014 **{SB/31/222}** – this letter again asserted the historical existence of a custodian trusteeship and contemplated a future declaration of trust to reflect that.

[52] Judgment ¶ 178 **{CB/15/198}**.

[53] Zeinoddin WS ¶¶ 4.4 **{SB/15/149}**, 4.7 **{SB/15/149}**.

[54] NIOC's Skeleton Argument ¶ 23(1) **{CB/6/49}**.

(a) *no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;*

(b) *a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;*

(c) *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, or by his agent thereunto lawfully authorised in writing or by will. …*

35. Section 53(1)(b) thus provides that a declaration of trust must be manifested and proved "by some writing signed by *some person* who is able to declare such trust or by *his* will" (emphasis added).

36. That language is to be contrasted with the wording of s.53(1)(a) and s.53(1)(c), which are not concerned with the creation of a trust in land and which provide for a "person" or *his* "agent" to sign the writing for the purposes of creating or disposing of an interest in land (other than a trust) or disposing of a subsisting equitable interest or trust.

37. This conspicuous difference in drafting within the same section must have been deliberate, that is, the intention was that signature by an agent rather than by the settlor (the "*person*") was not to be permitted under s.53(1)(b).

38. Section 53(1)(b) also provides that the "*person*" who is able to manifest and prove a declaration by signed writing is the same "*person*" who can attest to such a declaration by "*his*" will. An agent's will would be irrelevant, so this language does not, by its terms cater for anyone other than the settlor providing the signed writing.

39. There is a further contrast between s.53(1)(b) and s.40 LPA (since repealed), the latter providing that a claim may be brought on a contract for the sale or other disposition of land or any interest in land only if it is "…*signed by the party to be charged or by some other person thereunto lawfully authorised*…". Where the Act intends to encompass the

signature of an agent, it says so.[55] Some *other* person in s.40 is plainly an agent. Moreover when the statute includes an agent it refers to the need for authority (*"lawfully authorised"*), a phrase which is present in s.53(1)(a) and (c) but absent from s.53(1)(b); and it also says where authority must be in writing (contrast s.40 with s.53(1)(a) and (c)).

40. This construction of s.53(1)(b), adopted by the Judge, is also supported by texts, *dicta* and judgments at first instance and the approach to statutory interpretation adopted by the Courts in analogous situations, as follows.

(b) The authorities

41. As to the legal texts, see: *Megarry & Wade on the Law of Real Property* at 10-042 and 10-049; *Lewin on Trusts*, 3-017 (and fn. 96); *Civil Fraud*, 1st Ed., 9-014; *Emmett & Farrand on Title*, R.133, April 2023, 22/3; Professor M. Haley, Dr L. McMurtry, *Equity and Trusts: Textbook Series*, 7th Ed., 4-006; Hudson, *Equity and Trusts*, 10th Ed., pp.213, 216; *Cheshire and Burn's Modern Law of Real Property*, 18th Ed., pp.1010-1011.

42. As to the cases, in *Morton v Morton* [2023] EWHC 163 at [100] the Court held that accounts signed by the partnership accountants and not the partners themselves were incapable of satisfying the requirements of s.53(1)(b). See also *HRH Tessy Princess of Luxembourg & ors v HRH Louis Xavier Marie Guillaume Prince of Luxembourg* [2018] EWFC 77, [67]-[68] and *Fish v Sky Apartments 2018 Ltd* [2022] EWHC 763 at [51].

43. As set out below, the question of whether signature by an agent is permissible has also been considered in the context of other statutes, with the Court concluding that the omission of a reference to an agent meant that signature by an agent was impermissible, including in a situation where some sub-sections made reference to signature by an agent and other sub-sections did not.

44. In *Banbury v Bank of Montreal* [1918] A.C. 626, at 713 (concerning s.6 of the Statute of Frauds (Amendment) Act 1828), the Court observed: "*Lord Tenterden's Act… omits the words 'or some other person thereunto by him lawfully authorised.' …the writing must*

[55] Contrast with other sections is instructive because s.53(1)(b) falls to be construed in the context of the Act as a whole: *Bennion* ¶11.2(2) (p.413).

be signed 'by the party to be charged therewith.' The signature of an agent will not suffice. The reason, I take it, is that a man shall not be charged with fraud unless his own signature is attached to the document..." [Emphasis added].

45. In *Cascades and Quayside Ltd v Cascades Freehold Ltd* [2008] L. & T.R. 23, the Court of Appeal at [7] contrasted s.99(5)(a) and (b) of the Leasehold Reform, Housing and Urban Development Act 1993 holding that s.99(5)(a) could not be satisfied by the signature of an agent since it did not include the words "*on behalf of*" unlike s.99(5)(b).

46. See also *St Ermins Property Co Ltd v Tingay* [2003] L&TR 6, [2002] EWHC 1673 (Ch), concerning the same provision in the 1993 Act, where (*obiter*) it was suggested that s.53(1)(b) was to be approached in the same way at [26] (Lloyd J).

47. It is correct, as NIOC notes, that the wording in s.99(5)(a) of the 1993 Act was later amended to include the words *"on behalf of"*.[56] But this reinforces the point that, absent amendment, the statutory language did not cater for signature by agents, and that it is not for the Court to go beyond the language of the statute, read in its appropriate context to positively introduce wording not included by Parliament.

(c) The legislative purpose

48. A key purpose of s.53(1)(b) is to impose an important safeguard and constraint in respect of oral declarations of trusts of land by ensuring that the settlor is directly involved in the written proof of the declaration of trust. It therefore protects the settlor from the perils of oral evidence being misused to deprive him of his land. See Professor M. Haley, Dr L. McMurtry, *Equity and Trusts: Textbook Series*, 7th Ed., 4-004 and 4-006 referring to the views of D. Hayton, *The Law of Trusts*, 4th edn, p.130. The Appellants' interpretation of s.53(1)(b) would undermine this purpose. It would remove the requirement of settlor involvement and thereby expose owners of real property to a much-enhanced risk of fraud by an agent or indeed by a stranger in purporting to evidence a trust over their land. All the more so since an agent (on the Appellants' interpretation) would not have to be

[56] This is acknowledged in NIOC's Skeleton Argument at fn. 9 **{CB/6/54}**.

authorised in writing, NIOC contending that there is "*no fundamental objection*" to that approach.[57]

49. The importance of compliance with formal requirements in relation to land is frequently and rightly emphasised: Hayton (above); S. Gardner, *An Introduction to the Law of Trusts*, 3rd Ed. (Oxford: OUP, 2011), p.91; and P. Critchley, "*Taking Formalities Seriously*" in S. Bright and J. Dewar (eds), *Land Law: Themes and Perspectives* (OUP 1998) pp.509, 527-528; see also C. Harpum "*Property in an Electronic Age*" at p.9.[58] Section 53 appears immediately under a heading which emphasises the mandatory nature of compliance with the formal requirements which follow ("Instruments *required* to be in writing").[59]

50. As is common with formal requirements, s.53(1)(b) serves a cautionary function, to encourage the maker of the document to consider its effect before signing, and an evidential function, to provide a reliable means of verifying the transaction and thereby promoting certainty. As to the cautionary function, declaring a trust over land is a significant thing to do[60] and, where the settlor becomes a trustee, they will also be subject to fiduciary obligations. Requiring the signature of the settlor makes it more likely that they will consider the effect of their act before signing, a function which is removed on the Appellants' interpretation. As to the function of promoting certainty, that too is undermined by the Appellants' interpretation, which opens up a package of potential disputes as to the validity and scope of the agent's appointment and the reliability of the

[57] NIOC's Skeleton Argument ¶¶ 26 **{CB/6/50}**; 28 **{CB/6/51}**; and see Retirement Fund Skeleton Argument ¶ 22 **{CB/7/72}**.

[58] See p.9. The three functions identified by Dr. Harpum reflect the three functions of formalities rules identified in L. L. Fuller, "*Consideration and Form*" (1941) 41 Col. L.R. 799, 800–6, which concern contracts generally. For the reasons identified by Hayton, Gardner and Critchley, the need for strict formality requirements is all the more in relation to land.

[59] Recent authorities on other provisions concerning land support a strict approach to formalities requirements: see e.g. *Pathway to Relief v Ali* [2024] EWHC 1284 (Ch), [32]-[34] regarding s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.

[60] See Hackney, *Understanding Equity and Trusts* (1987) p.109.

agent's evidence, particularly since the agent could be appointed orally and the written evidence could be created many years after the declaration.

51. In seeking to meet the linguistic difficulty in the Appellants' case on s.53(1), NIOC contends that the reason s.53(1)(a) and (c) made express reference to agents is to provide that they should be authorised in writing because otherwise they could have been authorised orally, which is said to run contrary to the policy of the provision.[61] In support of this, NIOC cites a passage from an article by Professor Harpum.[62] His distinction rests on saying that s.53(1)(b) serves a different function to s.53(1)(a) and (c) because, whereas the former requires something to be *evidenced* in writing, the latter provisions require something to be *done* in writing.[63]

52. This cannot explain the absence of a reference to agents in s.53(1)(b). Whilst s.53(1)(b) serves an evidentiary function, it still requires something to be done by a "*person*" (just like s.53(1)(a) and (c)). If Parliament had intended to extend the signing power in s.53(1)(b) to agents, it would have said so – as it did in ss.53(1)(a), 53(1)(b) and 40 - and if such an agent did not have to be authorised in writing under s.53(1)(b), it would have said so – as it did in s.40.

53. In the context of the scheme of s.53, it makes no sense to omit reference to agents in s.53(1)(b) if the intention had been to permit signature by agents whilst referring both to agents and the requirement that they be authorised in writing in both s.53(1)(a) and (c). The Appellants' interpretation would create the anomalous position that s.53(1)(b) is more permissive (allowing orally appointed agents to sign) than s.53(1)(a) and (c), in circumstances where s.53(1)(a) and (c) expressly refer to agents but s.53(1)(b) does not.

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[61] NIOC's Skeleton Argument ¶ 26 **{CB/6/50}**.

[62] P.12 of Harpum's article {**CB/6/51**}.

[63] NIOC at ¶ 27(2) **{CB/6/51}** also relies on *Forster v Hale* (1798) 3 Vesey Junior 696 30 E.R. 1226. In line with the reasoning in *Grey v IRC* [1960] AC 1, limited assistance should be derived from s.7, Statute of Frauds 1677, which is the origin of s.53(1)(b) and cases concerning it. Like s.53(1)(c) (which was the subject of *Grey*), s.53(1)(b) uses different wording to the earlier provision in the Statute of Frauds 1677. Accordingly, it is to be presumed that the change in wording was deliberate.

It would also mean that Parliament intended to flip in and out of the common law rules of agency across sub-sections of the same provision.[64] This is unconvincing and creates ambiguity where none exists according to the language of the provision.

54. So, the dilution of the writing requirement to an evidencing requirement does not provide a reason for further diluting the signature to that of an agent. Further, the fact that declarations of trust of land do not themselves have to be in writing but evidenced in writing does not provide a policy reason for signature by agent to suffice for s.53(1)(b) (let alone the signature of an orally appointed agent). Quite the opposite. If a declaration of trust can be made orally, that is all the more reason why s.53(1)(b) should provide the protection of insisting on settlor involvement before the trust can be enforced.[65]

55. In any event, it is simply not necessary to introduce language to s.53(1)(b) to permit agents to sign; a settlor can fulfil the requirements of s.53(1)(b). NIOC's reliance on the Mental Capacity Act 2005 does not assist it on this fundamental point: s.12 of that Act imposes strict limitations on the powers exercisable under a qualifying lasting power of attorney; and, in any event, that Act provides a statutory exception and does not form part of the common law (on which NIOC purports to rely). Not only is it unnecessary, it would be unfortunate to expose a principal to the imposition of duties as an express trustee and fiduciary based on the acts of an agent. By contrast, the scenarios addressed in s.53(1)(a) and (c) arise in the context of transactions that would tend to arise in

[64] Though even at common law a general power of attorney does not authorise the agent to declare a trust over their principal's property.

[65] NIOC's Skeleton Argument at ¶ 24(1) **{CB/6/50}** also relies on an assertion that an agent can create a trust over property in its principal's hands, citing *Pennington v Waine* [2002] 1 WLR 2075 in support. But that was a case where a constructive trust arose by operation of law (see eg [59]). NIOC also relies on authorities related to transfers on trust, which are very different from self-declarations of trust. There is an obvious policy distinction between land and personalty exemplified by the LPA, as Hayton and Gardner acknowledge in the passages referenced in ¶¶ 48-49 above, and in any event agents cannot usually declare trusts over the assets of their principals without clear, express prior authorisation (which would be very unusual): *Reckitt v Barnett* [1928] 2 KB 244, 268 (Russell J), approved by the House of Lords: [1929] AC 176; *Re Bowles' Mortgage Trust* (1874) 31 LT 365.

commercial contexts, and so it is logical that – with the safeguard that actual authority must be given in writing – power to effect a transaction should be given to a third party. There is no similar need for declarations of trust, which may arise in the context of self-declarations (not transactions) and commonly will occur outside a commercial context.

(d) Role of the common law

56. The Appellants rely on the principle that statutes are to be interpreted in the context of the common law, which includes the principles of agency,[66] referring to *Bennion* at ¶ 25.1-25.3. However, that same passage notes that the principle of agency applying is not an invariable rule and that the answer to the question depends on applying the usual principles of construction. *Bennion* cites *Greece v O'Connor* [2022] 1 WLR 903, a case concerning s.26(5) of the Extradition Act 2003, where the Supreme Court held that the term "*person*" did not include agent read according to its natural meaning at [48]-[49].

57. Further, "*[w]hen Parliament enacts a special regime providing special rights and remedies, that regime may… supersede and displace common law rights and remedies... Whether it has that effect is a question of statutory construction*." (*Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners* [2007] 1 AC 558, Lord Walker at [135]; and *R v Secretary of State for the Environment, Transport and the Regions, Ex p. Spath Holme Ltd* [2001] 2 A.C. 349, HL, Lord Nicholls at 398). The exercise of statutory interpretation does not require a Court to give effect to common law doctrines without exception; indeed, the very point of a statute may have been to depart from or 'correct' *lacunae* that exist in the common law.

58. Moreover, the proposed "*congruence*" between s.53(1)(b) and the common law principles of agency (in the words of Retirement Fund's Skeleton Argument ¶ 38) would undermine the safeguards in relation to oral declarations of trust explained in the previous section. The Appellants' arguments suggest that an agent not authorised in writing should be capable of satisfying s.53(1)(b). As well as the danger of permitting disputes over whether or not an agent was actually authorised other than in writing, this would leave open the argument that an alleged agent with ostensible but not actual authority could be

[66] NIOC's Skeleton Argument ¶ 23(3) **{CB/6/49}**.

said to have satisfied s.53(1)(b).[67] That would further undermine the safeguarding purpose of s.53(1)(b) which must have been intended to avoid such claims and disputes. So, it follows that the Appellants' reliance on the common law principle of agency does not advance their position. It reinforces the fact that s.53(1)(b), unlike s.53(1)(a) and (c), does not refer to an agent and does not permit an agent to sign on its behalf. As noted above, the Appellants' contrary position requires the Court to read into s.53 the common law of agency so far as s.53(1)(b) is concerned but not s.53(1)(a) or (c).

(e) The presumption against absurdity

59. The Appellants also apparently rely upon the presumption against absurdity (*Bennion* at ¶ 13.3 *et seq*).[68] It is not clear what the Appellants say is the unworkable or impracticable result of the construction adopted by the Judge and there is no such result by giving s.53(1)(b) its ordinary meaning, quite apart from the high bar that the Appellants would have to satisfy to apply this principle. See *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, HL at 237 and 239:"*'manifest absurdity' is not enough: it must be an error… which in its context defeats the intention of the Act*" (Lord Scarman).

(f) The Appellants' contention that companies act through agents

60. The Appellants rely upon an alleged inconsistency in the Judgment in determining that an agent is not a person who can sign for the purposes of s.53(1)(b) and the Judge's recognition that a director could sign on behalf of a company.[69] This was not an issue explored before the Judge in any detail. However, there is a fundamental legal distinction between a document being signed "*by*" a company and a document being signed "*on behalf of*" a company: *Hilmi v 20 Pembridge Villas Freehold* [2010] EWCA Civ 314, [2010] 1 WLR 2750 at [31], with s.36A of the Companies Act 1985 (as it then was, later enshrined in s.44 of the Companies Act 2006) prescribing the methods by which a company can sign a document. This is addressed further in the context of NIOC's Ground 2, but a document signed by an authorised director with the required formality

[67] An ostensible agent may bind a principal: *Bowstead & Reynolds*, Article 3(2) and ¶ 2-005.

[68] NIOC's Skeleton Argument ¶ 23(3) **{CB/6/49}**.

[69] NIOC's Skeleton Argument ¶ 31 **{CB/6/52}** referring to the Judgment at ¶ 197 **{CB/15/201}**.

requirements of the Companies Act, would constitute signature "by" the company and the position was the same at common law prior to the enactment of the Companies Act.

(g) Retirement Fund's case on 'adversity' and 'beneficence'

61. Retirement Fund submits that if the consequences of a construction are more likely to be adverse than beneficial this tells against that construction: ¶ 15.3 of its Skeleton Argument. However, 'adversity' or 'beneficence' must be considered by reference to Parliament's intention, not the subjective wishes of a party in litigation. Further, "*[e]ach of the opposing constructions may involve some adverse and some beneficent consequences…. they are to be weighed… from the viewpoint of the community at large.*" (*Bennion*, 11.6, p433). CGC's construction is beneficial: it reinforces Parliament's intention to safeguard landowners against claims brought in relation to alleged declarations of trust made by alleged agents. With regard to the community at large, any 'detriments' in CGC's construction are outweighed by its benefits; as reflected in the fact that Parliament has seen fit not to amend s.53(1)(b) to refer to agents over nearly 100 years. **{CB/7/68}**

62. For all these reasons, Ground 1 should be dismissed.

D2 NIOC'S GROUND 2

63. NIOC's Ground 2 is an attempt to circumvent the requirements of s.53(1)(b) by contending that signature by agents is to be treated as signature *by* the company. It also raises a factual question regarding the authority of the alleged agents to declare a trust that NIOC failed to establish before the Judge.

64. The position advanced by NIOC is that, since a company "*can only ever act through the intermediation of human agents*" they are by definition acting through agents and therefore the actions of all 'agents' including third parties that are not officers of the company are to be treated as the actions of the company thereby satisfying the requirements of s.53(1)(b). This analysis is misconceived. **{CB/6/53}**

65. There is a fundamental distinction made in English law between execution by a company and execution on behalf of a company: see ***Hilmi*** at [31].

66. Section 44 of the Companies Act 2006 (replacing s.36A of the Companies Act 1985) prescribes the manner in which a document will be treated as having been executed by a company, which includes signature by two directors of the company or a director of the company in the presence of a witness who attests to the signature.[70]

67. Beyond the requirements of s.44, a company can authorise other individuals or entities to execute documents *on its behalf*. Such authorisation means that the company is bound by those acts, but it does not constitute execution by the company, rather it constitutes execution by an agent. In the context of whether an act by the agent binds the company, the issue is usually not material. However, in the context of the formal requirements for executing documents it may be.

68. NIOC's reliance on *UBAF Ltd v European American Banking* [1984] QB 713 is misplaced. That case concerned a claim for fraudulent misrepresentation and whether a representation signed on behalf of a limited company by a properly authorised officer or employee acting in the course of his duties (on the facts, a bank's assistant secretary) constituted the company's signature under the Statute of Frauds: see 717, 719 and 724. It was therefore concerned with attribution for the purposes of a tort claim, and specifically whether the claimant satisfied the good arguable case threshold for permission to serve out a tort claim with the ultimate issue to be determined at trial, and not the execution of documents for the purposes of addressing formalities (let alone formalities with land).

69. Further and in any event, prior to the introduction of a statutory definition of signature by a company (through the 1989 Companies Act, introducing s.36A of the 1985 Act), there were even stricter requirements for treating a signature as by the company. For the purposes of executing a document, every company was required to keep a common seal: ss. 32, 34 and 35 of the Companies Act 1948 (as amended).[71] The Companies Act

[70] The relevant provision for an overseas company is referenced by NIOC in this appeal, being regulation 4 of the Overseas Companies Regulation of 2009.

[71] See further the 4th Report, *Proposal For The Draft Regulatory Reform (Execution Of Deeds And Documents) Order 2004*, ¶ 3, summarising the way in which s.36A of the Companies Act

provisions introduced in 1989 (and maintained in the 2006 Act, now in force) lessened the formal requirements for execution by the company: *Palmer's Company Law*, ¶ 3.204.

70. In any event, the question whether a person or entity is acting *qua* company or *qua* agent will always be context and statute specific: see: *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] AC 500 (PC), [8]-[9] and [12] (507D-E), where Lord Hoffman distinguished between the "*primary rules*" of attribution based on the constitution of a company and the conferral of authority through principles of agency (being the "*general rules*"). See also *HKSAR v Luk* [2016] HKCFA 81, where Lord Hoffmann observed that, "*in every case the criteria for attribution must be such as will give effect to the purpose and policy of the relevant substantive rule*"; and rejected the suggestion that attribution is subject to "*uniform common law principles*" [41].[72]

71. It is unsurprising that an important formal requirement in relation to land like s.53(1)(b) should treat execution of a document by the company itself, through its officers or another method prescribed by statute, differently to execution by one of the many agents a company may appoint to act on its behalf. It is common to find judicial or academic statements to the effect that directors are agents of the company. But the modern law recognises that this description can be misleading: "*[w]here the board or the shareholders collectively act, they constitute the company, i.e. they act as the company. They are not its agents*" (Worthington, Davies, Hare, *Gower: Principles of Modern Company Law*, 11th Ed., 8-004[73]). See also *Moulin Global Eyecare Trading Ltd v IRC* [2014] 3 H 32 HKCFA and Lord Walker's analysis at [61]-[64] noting that the directors derive their authority from the company's written constitution (not other natural persons)

1985 (introduced by the Companies Act 1989) lessened the formal requirements for execution of documents.

[72] "*The question in each case is whether attribution is required to promote the policy of the substantive rule...*" (*McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553, [44], Dyson J).

[73] See further the distinction between the board acting "*as"* the company and the company "*contracting through agents"* at 8-005 to 8-016.

and as a body they are the company's vital organ; and explaining the errors in older authorities' references to the board as agent.

72. In the context of the formal requirements of s.53(1)(b) for manifesting and proving a declaration of a trust in land, Parliament's intention was to distinguish between a person and its agent, and the rules of attribution are thus to be applied in that specific context. On any view, and leaving aside the question of authorisation (addressed below), neither NTT nor Eversheds were acting *qua* company as opposed to acting *qua* agents.

73. Given the safeguarding purpose of s.53(1)(b) (as set out under Ground 1), a company is of course provided better protection if that section can only be satisfied by methods which constitute signature by the company *itself*, being methods likely to ensure the involvement of its officers and frequently its directors (who owe well-established duties to the company).

74. NIOC's reliance on s.74 LPA is equally misplaced:

    a. S.74(3) is concerned with natural persons: this arises from the use of the word "*person*" in sub-section (3) as contrasted with "*corporation aggregate*" in other sub-sections (such as (4)), and from the language of "*he*" and the reference to the "*person*" signing (and the absence of reference to signing in the 'name' of another). There is no evidence that Mr. Rahgozar (who signed the Mortgage Deed) was personally authorised by NIOC, nor that any partner at Eversheds was authorised.

    b. S.74(4) applies only where (i) "*a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person*"; and (ii) where "*an officer [is] appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise*". As addressed below, the 25 July 2018 power of attorney in favour of NTT expressly stated that NTT was not authorised to transfer ownership of NIOC House. Further, there was no evidence that Mr. Rahgozar was appointed for the purpose of conveying land (and giving an agent a power to convey is more comprehensible than giving an agent a power to declare a trust); the power of attorney dated 25 July 2018 did not **{SB/34/230-231}**

and could not deal with NTT's internal authorisations to its officers. Nor was there any evidence that (i) NIOC authorised Eversheds under a power of attorney to convey an interest in land; or that (ii) Eversheds appointed either the signatory of the Certificate of Title or NIOC's Amended Defence for the purpose of conveying an interest in land pursuant to a power of attorney.

75. Further and in any event, before the Judge, NIOC never sought to establish the authority of either NTT or Eversheds to sign the Mortgage Documents for the purposes of evidencing a trust. It is far too late for it to do so now. Indeed:

a. NIOC never sought to advance a case under Iranian law as to how its constitution authorised third party entities to act on its behalf, or whether under the Iranian law rules of attribution those acts were to be treated as those of an agent or of NIOC.

b. NIOC never sought to establish as a matter of Iranian law that execution by such a third party constituted execution by NIOC.

c. No evidence was called to demonstrate that the agents in question had authority to declare or evidence a trust, despite an NTT witness (Mr. Bayat) giving evidence.

d. The evidence that was produced and which would have been put to the witnesses had the issue been live, would have included a power of attorney granted to NTT dated 25 July 2018,[74] which did not confer any authority to declare a trust or to convey land. On the contrary, it expressly excluded the power to sell or transfer ownership of NIOC House and thereby excluded authority to declare a trust. In particular, it provided: "*…(d) This power of attorney does not cover sell [sic] or transfer of ownership of NIOC House*".[75]

[74] Power of Attorney from NIOC to NTT dated 25 July 2018 **{SB/34/230}**.

[75] Indeed, a new 'authorisation letter' was issued in August 2022 to authorise NIOC's legal director to facilitate the August Transfer: Judgment ¶ 135ii **{CB/15/190}**).

76. In relation to Eversheds, the scope of a solicitor's actual authority "*depends on the express terms of the retainer between solicitor and client*".[76] NIOC adduced no evidence of the terms of Eversheds' retainer. Absent evidence of actual authority being conferred on Eversheds to declare a trust as NIOC's agent, the Appellants' case would necessarily have to rely on there being incidental or implied authority to this effect. There is no evidential or legal support for such a case: (i) "*a solicitor only has authority to carry out any procedural steps that are directly incidental to the transaction or proceedings in which he or she is instructed… a solicitor has no incidental authority to bind the client in matters of substance which reasonably require the decision of the client and which are not properly incidental to the solicitor's existing instructions*";[77] and (ii) it has been held that a solicitor has no implied authority to enter into a contract.[78] A declaration of trust must be an *a fortiori* case.

77. For all these reasons, Ground 2 should be dismissed.

D3 NIOC'S GROUND 3

78. Ground 3 contends that even if the alleged declaration of trust was not enforceable for failing to comply with s.53(1)(b), it should still be treated as sufficient to defeat the application of s.423 IA 1986, on the basis that it means that Retirement Fund had the beneficial interest in NIOC House.

79. This ground of appeal seeks to turn the purpose of s.53(1)(b) on its head. It would transform an anti-fraud provision into an instrument of fraud. NIOC's proposition is that: a debtor can make (or pretend to make) an oral, unevidenced declaration of trust over its land, then wait and see if the creditor successfully pursues it; if so, it can rely on the unevidenced declaration of trust to defeat the creditor's claim and, if not, it can retain its land free of any trust.

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[76] Flenley and Leech, *The Law of Solicitors' Liabilities*, 4th Ed., 5.22.

[77] *The Law of Solicitors' Liabilities*, 5.24.

[78] *Ibid*, and see (as cited in fn. 9) Eccles v Bryant [1948] Ch 93 at 106 (Cohen LJ): "*The solicitor would have no authority to make any such bargain… Solicitors are not, in the absence of specific authority, agents of their client to conclude a contract for them…*".

80. The Judge cited several of the commentaries on the effect of non-compliance with s.53(1)(b).[79] The common and perhaps orthodox view is that the trust is "*unenforceable but not void*".[80] The Judge also recognised[81] that the limited case law showed that the section is not restricted to cases where the beneficiary seeks to enforce the trust against the trustee but includes cases where the beneficiary seeks to enforce the trust against the unsecured creditors of the trustee: *Gardner v Rowe* (1825) 2 Sim & St 346.

81. As has been pointed out, the idea that a declaration of trust failing to comply with s.53(1)(b) does create a trust but an unenforceable one is not an easy concept, the distinction between "*unenforceable*" and "*invalid*" being of doubtful content[82] and (as detailed below) there is a body of judicial opinion and commentary to the effect that such 'trusts' should simply be treated as invalid.

82. The Judge was plainly right to find that using a trust which did not comply with s.53(1)(b) to defeat the claim of a third party creditor of the trustee would be enforcement of the trust against the creditor.[83] There is simply no justification as a matter of authority or principle for restricting the "*unenforceable*" status of such a 'trust' to cases where the beneficiary seeks to enforce the trust against the trustee.

83. Moreover, even if that restriction were to be accepted, that still would not assist NIOC. In those circumstances, the trustee owes no enforceable obligations; there is nothing for a beneficiary to enforce. If the trustee then voluntarily chooses to transfer property in the face of a creditor claim and with the requisite purpose, that transaction is obviously liable

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[79] Judgment ¶¶ 203-206 **{CB/15/202}**.

[80] See for examples *The Law of Trusts* by Thomas and Hudson 2nd Ed. ¶ 5.12; Virgo, *The Principles of Equity & Trusts*, 5th Ed. Pp.123-124.

[81] Judgment at ¶ 211 **{CB/15/203}**.

[82] David Wilde, *Formalities for Declaring Trusts of Land* Conv. 2021, 3, 263-277 ("**Wilde**") at p.2.

[83] Judgment ¶ 212 **{CB/15/203}**. See also Wilde at p.2: "*But even if an unenforceable 'trust' were left in operation, for whatever reason, it is not one that outside parties would recognise…*".

to be set aside under s.423 IA 1986.[84] That section is to be given a broad interpretation to serve the policy of preventing debtors from evading creditors: *Invest Bank PSC v El-Husseini* [2023] EWCA Civ 555 at [59]-[66], [81], [97]. The Judge's finding that NIOC acted with the requisite purpose in this case is not open to challenge.

84. As noted above and despite references, in some texts, to non-compliance with s.53(1)(b) having the effect that a trust is 'valid but not enforceable', the following suggest that a failure to comply with s.53(1)(b) means that – at least until such time as s.53(1)(b) is complied with – there is no valid trust:[85] *Gissing v Gissing* [1971] A.C. 886 HL at 905; *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107 HL at 129 (*obiter*).

85. That analysis is supported by s.53(1)(b)'s requirement that a declaration be "*manifested*" as well as "*proved"*. The word "*manifested"* cannot be tautologous or otiose;[86] it connotes the coming into existence of a trust.

86. It is also noticeable, as held by the Judge,[87] that the sense in which textbooks have expressed the view that an unwritten declaration of trust is not invalid but unenforceable follows from the fact that the declaration of trust need not be documented until a later point in time. In such a situation, the trust becomes enforceable at the point in time that it is documented, prior to which time it is "unenforceable". If there is no later writing, however, it is difficult to see in what respect the trust is nevertheless valid and how it is in law capable of constituting a trust, since enforceability is, per Millett LJ's seminal analysis, fundamental to a trust:[88] it is not merely a matter of form. See further *Close Invoice Finance Ltd v Abaowa* [2010] EWHC 1920 (QB) at [87].

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[84] S.423 is precisely concerned with transfers with a "*gratuitous element"*: *Hill v Spread Trustees* [2007] 1 WLR 2404, [101].

[85] See to similar effect Wilde at pp.2, 4, 5.

[86] *Bennion*, 21.2 (p.662).

[87] Judgment, ¶¶ 208-210 **{CB/15/203}**.

[88] *Armitage v Nurse* [1998] Ch 241, 253.

87. This is indeed the better view, that a trust which does not comply with s.53(1)(b) is invalid.

88. In the circumstances, Ground 3 should be dismissed.

E. CGC's RESPONDENT'S NOTICE

89. If the Court is against CGC on its arguments opposing the appeal, then two further and related questions would arise.

90. The first question is whether the Mortgage Documents did in fact declare a trust for the purposes of s.53(1)(b) of the LPA. As recognised by the Judge, the Mortgage Documents could not simply manifest and prove a declaration of trust already created but had to declare a trust and serve as the evidential proof because Retirement Fund did not exist until 25 September 2019 (the date of the Mortgage Deed).

91. The Judge erred in law by concluding that the Mortgage Documents did declare a trust.[89] The Mortgage Documents merely restated NIOC's mistaken (and impossible) belief as to ownership of NIOC House by Retirement Fund.

92. The second point is that there was no evidence before the Court that the agents had any authority to declare a trust and indeed the evidence was to the contrary.

E1 APPLICABLE LEGAL PRINCIPLES

93. The applicable legal principles were set out by the Court of Appeal in *Ong v Ping* [2017] EWCA Civ 2069 at [40]. The question that arises is an objective one as to what a reasonable person, armed with all the background knowledge that would have been available to NIOC, would have understood that NIOC through the Mortgage Documents was manifesting a *present intention* to create an English law trust. In other words, there must be a *present intention* to declare a trust (otherwise it can only evidence a trust already declared, of which in this case there was none): *In Re Cozens* [1913] Ch 478 (a

[89] Judgment at ¶¶ 188-191 **{CB/15/199-200}**.

case under the Statute of Frauds) at p.487. The Court will "*not be astute to discover indications of such an intention"* absent clear words or circumstances (*In re Schebsman*).

94. The Judge in stating the test, did not refer to the background circumstances in terms.[90] However, his application of the test to the facts erred in law in that he made no attempt to analyse the relevant background circumstances and focussed instead on isolated clauses of the two documents allegedly declaring a trust[91] As a result and by ignoring their context he misconstrued the two documents. In this regard the Judge conflated a present intention to declare a trust with an assertion as to pre-existing fact (i.e. that Retirement Fund already beneficially owned NIOC House).

E2 APPLICATION TO THE FACTS

(1) THE MORTGAGE DOCUMENTS

95. On 25 September 2019, a Mortgage Deed was entered into between Retirement Fund and NIOC as Mortgagors and Melli Bank as Security Agent acting as security trustee for the Secured Parties, who had entered into a EUR 55 million facility agreement dated 17 June 2019 with NTT for the purposes of refurbishing NIOC House (**the Mortgage Deed,** as already defined at ¶ 8 above).[92] The purpose of the Mortgage Deed was to secure that borrowing against NIOC House (for the purpose of this section, **the Mortgaged Property**). The Mortgage Deed was executed on behalf of Retirement Fund (by a Mr. Rahimi), on behalf of NIOC by NTT (through NTT's signatory, Mr. Rahgozar) and by Melli Bank. **{SB/40/273}**

96. The clause alleged to be a declaration of trust was clause 1.4 of the Mortgage Deed, which provided: "*The National Iranian Oil Company is the legal owner of the Mortgaged Property and the Pension Funds, Savings and Staff Welfare of Oil Industry is the sole beneficial owner of the Mortgaged Property.*" [Emphasis added] **{SB/40/282}**

[90] Judgment ¶¶ 159-160 **{CB/15/194}**. At ¶ 162 **{CB/15/194}** the Judge does refer to "*all the circumstances of the case*".

[91] Judgment ¶¶ 185-191**{CB/15/199-200}**.

[92] Facility Agreement between NTT and Bank Melli dated 17 June 2019 **{SB/37/239}**.

97. After the Mortgage Deed was executed, NIOC sought to register it with HMLR. By letter dated 26 November 2019, HMLR referred Eversheds to the "*absence of a copy of the trust deed made between [NIOC] and [Retirement Fund]*"[93] and invited Eversheds to provide the "*trust deed*"; and by an email the following day, Eversheds asked NIOC "*if there is a Trust Deed… and if so provide us with a certified copy*".[94] Despite further correspondence, NIOC was unable to provide a 'trust deed'. As a result, Eversheds wrote to HMLR dated 29 November 2019,[95] asserting that NIOC House was originally purchased by NIOC but that "*at some point since, as the full amount of the purchase price had been paid by the Pension Fund, then the beneficial ownership transferred to the Pension Funds, Savings and Staff Welfare of Oil Industry, for the benefit of the employees*." [Emphasis added] Conspicuously, this letter did not assert a declaration of trust. HMLR refused to register the Mortgage Deed for a number of reasons including the absence of a trust deed which made the relationship between NIOC and Retirement Fund unclear.[96] Neither NIOC nor Eversheds nor HMLR regarded the Mortgage Deed as constituting a trust deed or manifesting an intention to declare a trust.

98. On 9 January 2020, Eversheds completed the Certificate of Title and presented it to Bank Melli.[97] A Schedule to the Certificate of Title at 2.1.3.1 made the following disclosure: "*The legal interest in the Property is held by the Company. The beneficial interest in the Property is held by the Beneficial Owner*", repeating a similar formulation to the Mortgage Deed.

(2) THE JUDGE'S ERRORS IN APPROACH

(a) No present intention to create a trust

[93] Letter from HM Land Registry to Eversheds dated 26 November 2019 **{SB/41/322}**.

[94] Email correspondence between Eversheds, NTT and Bank Melli dated 27 November **{SB/42/327}**.

[95] Letter from Eversheds to HM Land Registry dated 29 November 2019 **{SB/43/333}**.

[96] Judgment ¶ 117 **{CB/15/187}**; Letter from Eversheds to HM Land Registry dated 26 November 2019 **{SB/41/322}**.

[97] Certificate of Title relating to NIOC House dated 9 January 2020 **{SB/44/334}**.

99. The Judge approached the construction of the above-quoted language of the Mortgage Documents in a vacuum by reference to the words used without regard to the relevant background circumstances.

100. Had the Judge done so he would have concluded that the Mortgage Documents did not evidence any present intention to declare a trust but restated an existing mistaken belief that Retirement Fund already owned NIOC House. That position was wrong both as a matter of Iranian law (for the reasons given by the Judge) and as a matter of English trust law since no trust could exist prior to 25 September 2019, given that Retirement Fund only acquired separate legal personality on 25 September 2019.

101. In particular, the following relevant background circumstances were disregarded:

102. **First**, the Judge failed to have regard to the fact that (as he found elsewhere) at all material times, NIOC was acting in the (mistaken) belief expressed on multiple occasions that Retirement Fund already owned NIOC House. [98] The key point is that at the time of the execution of the Mortgage Documents the reasonable person armed with knowledge of the relevant background circumstances would know that NIOC already believed that ownership was vested in Retirement Fund and that there was no reason to declare a trust.

103. **Secondly,** NIOC's pleaded and evidential case was that NIOC, through its board of directors, held NIOC House on behalf of Retirement Fund as *amin* under the Iranian law doctrine of *amanat*, Retirement Fund having provided the funds to purchase the property.[99] It was on that basis that NIOC believed that Retirement Fund already owned the property. Iranian law, as the Judge found, does not recognise any split title.[100] The Judge found that NIOC's mistaken belief as to ownership in fact arose from the failure of NIOC's board fully to consider the legal impact of the fact that the purchase had been made by NIOC with monies borrowed from the Funds.[101] But NIOC's belief, based on

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[98] Judgment ¶¶ 56**{CB/15/176}**, 57 **{CB/15/176}**, 60 **{CB/15/177}**, 77 **{CB/15/180}**, 89 **{CB/15/182}**.

[99] See the pleadings and evidence referenced in ¶ 25, fn. 35 above.

[100] Judgment ¶¶ 162 **{CB/15/194}**.

[101] Judgment ¶¶ 57 **{CB/15/176}**, 60 **{CB/15/177}**, 89 **{CB/15/182}**.

the Iranian law *amanat*, was (as the Judge should have recognised) nevertheless *factually inconsistent* with any intention to create a trust in the Mortgage Documents.[102]

104. **Third,** the Judge failed to have regard to the fact that Mr. Cathcart never doubted that Retirement Fund was already the beneficial owner of NIOC House based on his flawed "*custodian trustee*" analysis: see above at ¶ 16.c. He made and repeated this assertion in his witness statement.[103] As the Judge noted,[104] Mr. Cathcart was involved in a brief exchange in March 2014 about the possibility of entering into a declaration of trust to be provided to the HMLR, which went nowhere, and in December 2018 he advised that a search for documentation should be conducted, expressing some concern that the ownership was not documented in a declaration of trust by the solicitors who acted on the acquisition. Following this exercise, in January 2019 he remained firmly of the view that the NIOC House was purchased by NIOC for Retirement Fund and did not advise that any trust declaration be entered into.[105] In other words the reasonable person would be aware that NIOC had been advised that the Retirement Fund's ownership of NIOC House was in English law terms to be treated as a "*custodian trusteeship*" and so NIOC (again) had no reason to create a trust through the Mortgage Documents.

105. **Fourth**, both Mr. Cathcart and the Appellants were at all material times unaware that Retirement Fund did not have separate legal personality. A reasonable person would know NIOC had no new reason to make a declaration of trust when Retirement Fund coincidentally and as a matter of law acquired legal personality in September 2019.

106. **Fifth,** the Judge failed to have regard to the inherent improbability of NIOC intending to declare a trust through the Mortgage Documents. This was a financing transaction and

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[102] See Milroy v Lord [1862] 2 GF & J 264, 274 (Turner LJ): "*if it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.*"

[103] ¶4 **{SB/12/114}**, 6 **{SB/12/115}**. See also Judgment ¶ 99 **{CB/15/184}**; Tr. Day 2/80/21-25 **{SB/51/516}**.

[104] Judgment ¶¶ 104 **{CB/15/185}**, 109 **{CB/15/186}**.

[105] Email from Cathcarts Solicitors to NTT dated 23 January 2019 **{SB/36/236-238}**.

the purpose of the Mortgage Documents was to provide security to the lender. They were not an obvious or natural vehicle for NIOC to make a declaration of trust yet the Judge did not consider the question of why NIOC would seek to declare a trust in September 2019 through such financing documents.

107. **Sixth,** and consistent with the above, the Judge failed to have regard to the fact that the negotiations leading to the Mortgage Deed proceeded on the mistaken basis that Retirement Fund was *already* the beneficial owner of NIOC House. Thus, Stephenson Harwood (solicitors for Bank Melli), by email of 30 July 2019,[106] wrote to Bank Melli and relayed the position that (inter alia) "*The beneficial owner of the Property is Pension Fund with the legal title being held by NIOC as sole trustee*" [Emphasis added]. Enclosed with the email was a draft Certificate of Title. The reasonable person would have understood that the Mortgage Documents were intended merely to record a state of affairs already believed to exist.

108. **Seventh**, the Judge failed to have regard to the fact that there was no evidence that the agents in question had authority to declare a trust and the evidence before the Court was to the contrary (see further below). The lack of such authority would again indicate the absence of a present intention to create a trust.

109. **Eighth,** the Judge failed to have regard to the fact that when, after the Mortgage Deed had been entered into, HMLR asked Eversheds for a copy of the relevant declaration of trust, no such document was provided: see ¶ 97 above. Conspicuously, they did not rely on the Mortgage Deed, which again objectively points to there being no intention for the Mortgage Documents to create a trust.[107]

(a) No evidence of authority to declare a trust

[106] Email from Stephenson Harwood to Bank Melli dated 30 July 2019 **{SB/38/249}**. That this reflects what had been conveyed to Stephenson Harwood appears from the email from Stephenson Harwood to Eversheds dated 16 October 2018 **{SB/35/232}**.

[107] Where the question is whether a trust was declared, the Court will have regard to the whole chronology: see e.g. *Paul v Constance* [1977] 1 W.L.R. 527, 532, Scarman LJ.

110. The Appellants did not seek to establish any such authority and the NTT power of attorney dated 25 July 2018,[108] pursuant to which the 25 September 2019 Mortgage Deed was concluded, contradicted any such authority since it expressly excluded any power to execute any document involving a transfer of ownership.

111. This absence of evidence on the question of authority is all the more striking given:

    a. An NTT witness (Mr. Bayat) did give evidence at trial to the effect that NTT always regarded Retirement Fund as the beneficial owner of the property even prior to the August Transfer and prior to the Mortgage Deed.[109]

    b. Eversheds signed statements of truth to pleadings on behalf of NIOC in which it was pleaded that Retirement Fund had separate legal personality in 2001 and that from that date NIOC held NIOC House as *amin* for Retirement Fund and that in the alternative there was in existence an express trust under English law even prior to the Mortgage Documents.[110] These are all inconsistent with Eversheds having been authorised to create an English law trust. See also the limitations on a solicitor's implied authority referred to at ¶ 76 above.

112. In other words, on the available evidence there was no basis to conclude that the agents in question had any authority to declare a trust through the Mortgage Documents.

113. **In conclusion**, but for the errors of law in the Judge's approach to the Mortgage Documents, he would have concluded that they did not evidence a present intention to

[108] Power of Attorney from NIOC to NTT dated 25 July 2018 **{SB/34/230}**.

[109] Bayat WS, ¶¶ 6, 13 **{SB/14/133}**.

[110] NIOC's Amended Defence dated 17 November 2023: ¶ 18(4) **{CB/20/286}**, 39(9) **{CB/20/297}**, 86(5)**, {CB/20/308}**; and 86(9) **{CB/20/309}**. Eversheds also made interlocutory witness statements making assertions about the dates on which Retirement Fund acquired legal personality and subsequent to which NIOC House was held under an *amanat* for it: Howarth 6 (s.67) fn. 1 **{SB/10/106}**; Howarth 7 (s.67), ¶¶ 33.2, 33.4 **{SB/11/110}**.

declare a trust and so were incapable of constituting declarations of trust for the purposes of s.53(1)(b). For this additional reason, the appeal should therefore be dismissed.

(3) NIOC'S AMENDED DEFENCE

114. NIOC's reliance on its Amended Defence as a declaration of trust is fatally flawed:

a. ¶ 86(9) of NIOC's Amended Defence says that the trust was declared by a series of other listed documents but not that the Defence itself declares the trust. ¶ 86(10) puts an alternative case that the trust was declared "*at a time unknown*" and is evidenced by the Defence. So by its own terms, NIOC's Amended Defence is not a declaration of trust and does not show a present intention to declare a trust through that document. **{CB/20/309}** **{CB/20/312}**

b. At the time of NIOC's Amended Defence, NIOC had divested itself of the ownership interest in NIOC House and the August Transfer had not (yet) been set aside. At that time NIOC was not therefore "*some person who is able to declare such trust*" within s.53(1)(b). NIOC here relies on *Gardner v Rowe*. In that case there had been a prior declaration of trust and the trustee was permitted to evidence that trust after bankruptcy. It is not authority for the obviously wrong proposition that a party can declare a trust after it has divested itself of the relevant property.

c. There was no evidence that Eversheds was authorised, when signing the statement of truth, to declare a trust. Nor would that be within a solicitor's usual authority.

d. For the reasons addressed in *Close Invoice* at [87], a party cannot self-servingly 'create' a declaration of trust after proceedings have commenced. At the Consequentials Hearing the Judge described a *similar ex post facto* attempt to declare a trust by way of a new document dated 7 May 2024 as making a "*mockery of a trial"*. [Judgment dated 8 May 2024, "Ruling 1" ¶ 3] **{SB/54/589}**

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