

**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**

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**RESPONDENT’S REPLACEMENT SUPPLEMENTAL SKELETON ARGUMENT  
IN RESPONSE TO THE APPELLANTS’ SKELETON ARGUMENTS  
DATED 4 DECEMBER 2024**

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**A INTRODUCTION**

1. This Supplemental Skeleton Argument on behalf of the Respondent (CGC) addresses new points and authorities raised in the Skeleton Arguments of the Appellants (NIOC and Retirement Fund) dated 4 December 2024 that CGC did not have an opportunity to address in its Skeleton Argument dated 25 October 2024.
2. The sheer scale of submissions that have now been submitted by both Appellants through their original Skeleton Arguments dated 4 October 2024 and their Supplemental Skeleton Arguments dated 4 December 2024 necessitates this targeted Supplemental Skeleton to address the new points raised.

**B LACK OF PRESENT INTENTION TO DECLARE A TRUST**

3. The Appellants submit that the first question raised in point 2 of CGC’s Respondent’s Notice {CB/8/90-92} (and developed in CGC’s Skeleton Argument at paragraphs 90-91, 93-94, 99-109 {CB/9/127-128}, {CB/9/130-132}) seeks to challenge findings of fact rather than raising a question of law.<sup>1</sup> However, the new cases raised by NIOC in particular for this submission (addressed below) underline the very *legal* issue that arises. In particular, CGC’s Respondent’s Notice relies on the legal distinction between: (i) a restatement of a prior erroneous belief that ownership was vested in Retirement Fund; and (ii) a present intention to declare a trust, which requires not only an intention to hold rights for the benefit of another but an intention that by the settlor’s very words or actions, the trust relationship be immediately constituted.<sup>2</sup> Thus, as Agnew & Douglas note, “[t]here may be an underlying desire to hold rights for another’s benefit, but the settlor must also intend, by a specific statement or act, for those legal consequences to follow.”<sup>3</sup> The interpretation of the Mortgage Documents in issue, in the context of those legal questions, is a question of law, not one of fact.

4. NIOC had a longstanding erroneous belief that ownership of NIOC House was vested in Retirement Fund.<sup>4</sup> In that context, a focus on NIOC’s “*present*” intention<sup>5</sup> is necessary to demarcate between (a) an erroneous prior and continuing belief that ownership was

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<sup>1</sup> See NIOC’s Supplemental Skeleton Argument, paragraphs 2(1), 5-7 {CB/25/333-334} and Section B.2 (and see the heading to that section) {CB/25/334}; and see Retirement Fund’s Supplemental Skeleton Argument, paragraph 3 {CB/26/350}, 14-31 {CB/26/353-359}.

<sup>2</sup> S Agnew & S Douglas, ‘Self-declarations of trust’ (2019) 135 LQR 67, at 79.

<sup>3</sup> *Ibid*, at 79-81. See further the discussion of *Bayley v Boulcott* (1828) 4 Russ 345 and *Re Farepak* [2008] BCC 22 at 81-82.

<sup>4</sup> As the Judge said at the Consequential Hearings: “*What was long-standing was a view that the owner was the Fund. From time to time in the skeleton arguments prepared for today reference is made to a long-standing understanding of a trust. Now, I don’t think on the Iranian side there’s any evidence of that at all... They might have been saying there was an amanat, but that’s different from a trust.*” (Tr. 8 May 2024, 57/23 – 58/10) {SB/53/577}. See also CGC’s Skeleton Argument dated 25 October 2024, paragraph 27 {CB/9/108}.

<sup>5</sup> Retirement Fund wrongly tries to criticise the use of the term “*present*” intention: Retirement Fund’s Supplemental Skeleton Argument at paragraphs 17 and 19 {CB/26/355}.

vested in Retirement Fund; and (b) the need for a positive act to ‘correct’ such erroneous belief by language signalling a clear, unequivocal and irrevocable<sup>6</sup> intention to immediately constitute a trust at a particular point in time by making a declaration and thereby vest beneficial ownership in Retirement Fund under a trust. On the facts of this case, that positive intention needed to exist at the time the Mortgage Documents were created, given that Retirement Fund only came into existence as a separate entity on 25 September 2019, as the Judge found, being coincidentally the date of the Mortgage Deed.

5. The Judge erred in law in failing to analyse the relevant circumstances surrounding the Mortgage Documents (as identified in CGC’s Skeleton Argument dated 25 October 2024 at paragraphs 95-113 {CB/9/128-133}) and in the process failed to recognise or apply the legal distinction between a prior and continuing erroneous belief in ownership being vested in Retirement Fund through an *amanat* or the approximation of that *amanat* in English law terms and a present intention to immediately constitute a trust. Had the Judge done so, he would have concluded that the Mortgage Documents were not intending to declare a trust but simply reciting the prior and continuing erroneous belief as to ownership being vested in Retirement Fund, with there being no relevant intention and indeed no reason for NIOC to take the positive step of declaring a trust by way of those Mortgage Documents.
6. NIOC now acknowledges and concedes the legal distinction but (like the Judge) fails to apply it to the facts of this case.
7. NIOC submits at paragraph 8 of its Supplemental Skeleton Argument that “[a]n objective manifestation of an intention that a trust should exist constitutes an effective declaration of that trust even if it is coupled with a mistaken statement that the trust existed at an earlier date.” {CB/25/334}<sup>7</sup> This appears to recognise the legal distinction between an erroneous prior and continuing belief that ownership was vested in Retirement Fund and a present intention to declare a trust. However, NIOC seeks to elide its erroneous prior and continuing belief of ownership by Retirement Fund at a time when this was

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<sup>6</sup> *Grant v Grant* (1865) 34 Beav. 623 at 625; 55 E.R. 776 at 777 (Romilly M.R.).

<sup>7</sup> See to similar effect paragraphs 26-31 of Retirement Fund’s Supplemental Skeleton Argument {CB/26/358-359}.

impossible (since Retirement Fund had no legal personality)<sup>8</sup> with a present intention to declare a trust. The Mortgage Documents do not evidence any intention to alter or ‘correct’ its erroneous prior and continuing belief by making a declaration so as to immediately constitute a trust. Rather, they merely repeat the prior erroneous belief precisely because NIOC was not aware of the prior error and continued to believe, at that time, that Retirement Fund had already long since acquired separate legal personality and owned NIOC House.<sup>9</sup> Paragraph 13 of NIOC’s Supplemental Skeleton Argument maintains its elision between an intention to create a trust and an erroneous prior and continuing belief that ownership was vested in Retirement Fund by asserting that it is “*clear that NIOC intended that NIOC House should be held on behalf of the Fund and believed that it was.*” {CB/25/336-337} The Mortgage Documents evidence the erroneous prior and continuing belief and not a present intention to constitute a trust through the Mortgage Documents.

8. The new cases to which NIOC refers in its Supplemental Skeleton Argument at paragraphs 9-12 {CB/25/334-336} do not assist NIOC and instead illustrate the legal distinction set out above, and why therefore the Judge fell into legal error. First, in the present case (unlike the principal cases cited by NIOC), there was not a prior mistaken belief that a trust had been created; rather there was an erroneous belief that ownership was vested in Retirement Fund (through an *amanat*). Second, and in any event, in each of the principal authorities relied upon by NIOC, there were fresh declarations of trust to correct the prior position (together with an express confirmation of a previous failed declaration):

- a. Re Northcliffe [1925] Ch 651: This was a case of a settlor confirming (by using the word “*confirm*”, p.652) by will both a prior (failed<sup>10</sup>) declaration of trust and also independently declaring a trust by giving directions as to the gifts and benefits conferred by the will and then republishing the will (pp.654-655). It was a case in

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<sup>8</sup> Judgment/114 {CB/15/186}, 118 {CB/15/187}.

<sup>9</sup> See Teare J’s Judgment at paragraph 22 referring to the evidence of Dr. Zeinoddin, which evidence was during the course of the proceedings no longer relied upon as recorded there {CB/15/169-170}.

<sup>10</sup> It failed because it was in respect of property not yet acquired i.e. future property.

which a declaration was made, with the intent immediately to create a trust (and which had that effect), not a case of a party simply repeating a prior erroneous belief.

- b. Grey v IRC [1958] Ch 690: On 18 February 1955, an owner orally directed a nominee to hold properties on trust for his grandchildren. That failed for want of writing. However, when the nominees later (on 25 March 1955) made a written “*declaration of trust*”, executed by the owner, that properties had been “*and are now*” held on trust, this was held to be a valid declaration of trust (pp.706, 717). The trust was declared on 25 March 1955: pp.717 and 723, by words that indicated a present intention to declare a trust. That conclusion was not challenged or otherwise addressed before the House of Lords.
  - c. Paul v Constance [1977] 1 WLR 527: This case was not concerned with land. The statement made was “*the money is as much yours as mine*”, repeated on a number of occasions. The Court accepted a submission that this language “*convey[s] clearly a present declaration that the existing fund was as much the plaintiff’s as his own*” (p.532). However, this was not a case that involved the need for positive steps to cure a prior failed trust or an erroneous belief in that regard.
  - d. Rowe v Prance [1999] 2 FLR 787: This was a further case that did not concern land and adds nothing to the analysis in Paul (which was followed). Again, no issue of taking positive steps to cure a prior failed trust or an erroneous belief in that trust arose.
9. Accordingly, these authorities support CGC’s case that a present intention – which *may* be manifested alongside a statement of past belief as to the existence of ownership and/or a trust (as in the cases relied upon by NIOC) – is a necessary ingredient of a declaration of trust. The problem for NIOC in this case is that the erroneous statement of prior and continuing belief that ownership was vested in Retirement Fund made in the Mortgage Documents was not accompanied by or “*coupled*” (in the words of NIOC’s Supplemental Skeleton Argument, paragraph 8 {CB/25/334}) or corrected with the requisite present intention to declare a trust through the words used in the Mortgage Documents as set out above.

## **C THE ISSUE OF AUTHORITY**

10. The Appellants submit that CGC is seeking to overturn an alleged ‘implicit’ finding of fact that NIOC’s agents/attorneys had authority to declare a trust and/or that it is too late for CGC to raise the point now because NIOC may have been able to adduce factual evidence on the point.<sup>11</sup>
11. There are several difficulties with these assertions.
12. First, there was no such finding by the Judge, nor any indication that the Judge engaged with the question of the alleged agent’s authority. Indeed, on the evidence before the Judge (referred to below) any finding that NIOC’s agent/attorneys had authority to declare a trust would have been perverse. Moreover, the suggestion that there was an ‘implicit’ finding is contradicted by NIOC’s case that this is a new point which was not in issue at trial.
13. Second, and precisely because of the poorly particularised case advanced by NIOC, CGC pleaded that the burden rested on *NIOC* to establish an intention to declare a trust and to satisfy the requirements of s.53(1) of the LPA (see the pleading references below). The question of the authority of the agent to declare a trust arose under s.53(1) on the questions both as to (i) whether the Mortgage Documents demonstrate a present intention to declare a trust (that is the subject of the Respondent’s Notice); and (ii) whether the execution of the Mortgage Documents was by authorised agents (which arises on the Appellants’ appeal, Ground 2 {CB/2/19-20}). In other words, it is part and parcel of a point that was in issue between the parties and on which NIOC bore the burden of establishing its case. Accordingly, CGC is entitled to rely on all relevant circumstances that go to that question including: (i) the absence of any evidence that the agent signing the Mortgage Documents had any authority to declare a trust; and (ii) the positive and unanswerable evidence that the Appellants deployed before the Judge that demonstrates that NTT and Eversheds in fact had no authority to declare a trust.

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<sup>11</sup> NIOC’s Supplemental Skeleton Argument, paragraphs 2(2) {CB/25/333}, 5-7 {CB/25/333-334}, Section B.3 and in particular paragraph 15 {CB/25/338}; Retirement Fund’s Supplemental Skeleton Argument, paragraphs 4-13 and in particular 13 {CB/26/350-353}.

14. Third, it is fanciful for the Appellants to contend that there is a real possibility that they could have contradicted the lack of authority of NTT and Eversheds, which is why they are driven to take a flawed pleading point.
15. Developing the above points, CGC's pleading made clear that not only did it deny all NIOC's and Retirement Fund's allegations, but that NIOC's case on declaration of trust was inadequately particularised, and the burden was on NIOC to establish its case under s.53(1) of the LPA; any responses given were expressly without prejudice to this. In particular:
- a. NIOC's Amended Defence, at paragraph 86(9), pleaded a bare assertion that "*any of the following documents [including the Mortgage Documents]*" comprised a declaration of trust {CB/20/309}. No particulars were given and so far as the Mortgage Documents were concerned (see paragraph 86(9)(x) and (xi)) {CB/20/312}, NIOC did not even refer to the documents as having even been executed by agents. Whilst NIOC now asserts that it was "*necessarily implicit*" in paragraph 86(9) that the agents/attorneys had authority,<sup>12</sup> there was no pleading of an agent having made the declaration. This failure fell within NIOC's burden of establishing its case.
  - b. CGC's Amended Reply at paragraph 2(3) joined issue with everything that was not expressly admitted {SB/1/6}. Paragraph 28(B) of the Amended Reply denied that the documents relied on constituted a declaration of trust {SB/1/33}. Paragraph 28(C) denied that any of the documents relied on satisfied the requirements of s.53(1)(b) {SB/1/33-34}. Accordingly, CGC joined issue with NIOC's alleged "*necessarily implicit [but unpleaded allegation] that the agents who signed those documents did so with the authority of NIOC.*" (NIOC's Supplemental Skeleton Argument, paragraph 15(1)) {CB/25/338}.
  - c. CGC's Responses to NIOC's Requests for Information dated 15 December 2023 pleaded: "*It is for the First Defendant to plead to and demonstrate how it satisfies the requirements of s.53(1) of the LPA*" {SB/2A/70.2}. See further the response to

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<sup>12</sup> NIOC's Supplemental Skeleton Argument, paragraph 15(1) {CB/25/338}.

Request 3, sub-paragraph (a), which: specifically addressed the documents relied on by NIOC; pleaded that the burden of proof was on NIOC; and pleaded that NIOC had failed in its Amended Defence to provide particulars. It therefore remained for NIOC to plead and prove its case of a declaration of trust and the facts relevant to that case **{SB/2A/70.3}**.

16. Thus, paragraph 15(3) of NIOC's Supplemental Skeleton Argument **{CB/25/339}**, which asserts that CGC failed to deny NIOC's case on authority or particularise an issue on the (lack of) authority of NIOC's alleged agents/attorneys, is misconceived in circumstances in which NIOC failed to plead or advance a case on authority or even plead that the relevant documents were in fact executed by agents.<sup>13</sup>
17. Further and in any event, the factual question of whether the alleged agents were authorised is relevant to the question of whether or not, objectively viewed, there was any intention to declare a trust through the Mortgage Documents.<sup>14</sup> NIOC cannot therefore sever the question of authority from its case on intention to declare a trust which was plainly in issue at trial.
18. Moreover: (i) evidence of a lack of authority was deployed before the Judge by the Appellants; (ii) it is fanciful now to suggest that NIOC could have deployed further evidence on the issue and there was a real possibility that it would have affected the evidence (NIOC's Supplemental Skeleton at paragraph 17 **{CB/25/339}**); (iii) this is not a case of CGC keeping up its sleeve a point for deployment on appeal (NIOC's Supplemental Skeleton at paragraphs 16 and 19 **{CB/25/339-340}**) but of NIOC trying to take advantage of its own failure to discharge its burden of proof in respect of its thinly

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<sup>13</sup> So too are paragraphs 4-13 of Retirement Fund's Supplemental Skeleton Argument **{CB/26/350-353}**. Notably, Retirement Fund at paragraph 6 **{CB/26/351}** refers to the List of Common Ground and Issues, but does not draw attention to (i) the agreed disclaimer that this list was without prejudice to the detail of the pleadings **{SB/50B/495.50}**; or (ii) the pleadings themselves.

<sup>14</sup> See paragraph 108 of the Respondent's Skeleton Argument dated 25 October 2024 **{CB/9/132}**.

particularised case. In particular, the Appellants’ own evidence at trial before the Judge was as follows:

- a. On 27 June 2018, Retirement Fund issued a power of attorney in favour of NTT which stated in terms that it did *not* permit it to “*sell or transfer ownership*”. {SB/33A/229.2} This document was referenced and relied upon in Ms. Nawaz’s statement at §17, as conferring authority for Blackstone Solicitors to act on behalf of Retirement Fund {SB/13/123}.
- b. On 25 July 2018, NIOC issued a power of attorney to NTT, in similar terms to the power of attorney issued by Retirement Fund, to sign and execute documents including mortgage documents but *not* to “*sell or transfer ownership*” of NIOC House. The scope of NTT’s authority to declare a trust therefore turns on this document, which by its express terms *precludes* such authority (and certainly does not confer it) {SB/34}.
- c. Pursuant to NIOC’s power of attorney, NTT was therefore able to execute the Mortgage Deed of 25 September 2019 {SB/40} on behalf of NIOC but could *not* transfer ownership; it could not therefore have had authority to declare a trust.
- d. The events concerning the August Transfer reinforce NTT’s lack of authority to declare a trust under the power of attorney and the need for specific authorisation:
  - i. On 23 August 2022 (the day of the August Transfer), NIOC gave express authority to Mr. Alamolhoda, NIOC’s Director of Legal Affairs to execute a transfer of ownership {SB/46}. On 23 August 2022, pursuant to that grant of authority, Mr. Alamolhoda signed the TR1 {SB/47/390}.
  - ii. By contrast, also on 23 August 2022, NTT was given an express delegable authority by Retirement Fund by Board resolution of 8 May 2022 in order to sign TR1 on behalf of Retirement Fund {SB/17}. This was referenced in Dr. Zeinoddin’s statement at §5.8 {SB/15/151-152}. The reason why NTT needed a delegable authority from Retirement Fund was because NTT’s existing power of attorney from Retirement Fund, made on 27 June

2018 {SB/33A}, was drafted in substantially similar terms to NTT's power of attorney from NIOC and therefore did not confer authority to transfer ownership: see above at sub-paragraph a. NTT was not given any such delegable authority to act for NIOC on the transfer; instead, as set out above, authority was conferred on Mr. Alamolhoda on 23 August 2022.

19. Thus: (i) NTT's power of attorney governed its authority at the time of the Mortgage Documents and *precluded* NTT from declaring a trust (and certainly did not permit or authorise it to do so); (ii) Iranian law principles of agency are irrelevant; (iii) it is not and could not be said that there is any other document relevant to NTT's authority that could have been deployed given the terms of NTT's power of attorney.
20. So far as Eversheds is concerned, the suggestion that evidence would have been called to demonstrate that Eversheds had authority to declare a trust is equally unreal given the position on solicitors' authority as noted in CGC's Skeleton Argument dated 25 October 2024 at paragraph 76 {CB/9/124}. Even now, no such suggestion is made.
21. It follows that the Appellants' reliance on *Rhine Shipping v Vitol SA* [2024] EWCA Civ 580 is misplaced. The point in question is not new but fell within the Appellants' burden to establish (so far as it wished to do so). CGC is not seeking that new fact-finding be performed but is asking the Court of Appeal to overturn the Judge's determination that the Mortgage Documents evidenced an intention to declare a trust by reference to all the relevant circumstances, which include both the absence of evidence of authority and the evidence before the Judge demonstrating that there was *no* such authority.

**D THE EFFECT OF NON-COMPLIANCE WITH S.53(1)(B)**

22. Section D of NIOC's Supplemental Skeleton Argument, at paragraphs 27-28 {CB/25/341-342}, relies on *Gardner v Rowe* (1828) 5 Russ. 258 and *Mr. A v Commissioner of Inland Revenue* [2006] NZTRA 2 at [63] to submit that a trust which fails to comply with s.53(1)(b) may nonetheless be relied upon to defeat a claim by a

third-party creditor; and, relatedly, to submit that it is an abuse of language for CGC to contend that such reliance is to be treated as attempting to enforce a trust.<sup>15</sup>

23. NIOC's reliance on these cases is misconceived. These judgments stand for the proposition that a third-party creditor cannot rely on s.53(1)(b) to defeat a trust which the disputant regarded throughout as binding on him *and which he has subsequently 'perfected'* (through satisfying the writing requirement): see Mr. A at [63].<sup>16</sup> Similarly, Gardner v Rowe was a case where the oral trust was 'perfected' by later writing in the form of a deed: p.261. In Gardner, the later writing was treated as dating back to the date of oral trust through the perfection of the oral declaration, to defeat a creditor's claim even if the creditor's claim arose prior to the written declaration. Further, the 'perfecting' of the trust through subsequent writing was only permitted because it was found that this was not done fraudulently in order to defeat the creditors. Importantly, Gardner, like the other authorities relied on by the Appellants, concern cases of *transfers* of property with a trust being created upon transfer. Cases of self-declaration, such as the present, are different. The very question is whether a person has divested themselves of the beneficial interest in property.<sup>17</sup>
24. Indeed, NIOC previously recognised the correct proposition to be found in Gardner v Rowe. After judgment was handed down, NIOC sought to perfect the alleged trust at the Consequential Hearings before the Judge by taking the positive step of creating a memorandum dated 7 May 2024, signed by Mr. Khojasteh Mehr on behalf of NIOC ("**the 7 May Memorandum**") {SB/48A}, which Leading Counsel for NIOC said had been finely tuned to address the Judgment. The Judge rejected NIOC's late application for the Judgment to be reopened and amended. See the Judge's Judgment dated 8 May 2024

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<sup>15</sup> Paragraphs 38-49 of Retirement Fund's Supplemental Skeleton Argument are to materially the same effect {CB/26/361-367}. In the interests of proportionality, CGC does not respond to each of these submissions.

<sup>16</sup> "*It may follow from that established principle that a third party to the transaction creating the trust (such as the Commissioner of Inland Revenue) cannot be heard to rely on s.49A to defeat a trust which the disputant not only regarded throughout as binding on him but which he has perfected.*" [Emphasis added]

<sup>17</sup> See the analysis by Agnew & Douglas in *Self-Declarations of Trust* at 69.

{SB/54/589} and see further the Transcript of the 8 May 2024 Consequentials Hearing, p.25, lines 3-14 {SB/53/569}. NIOC relied on Gardner for the proposition that the 7 May Memorandum could serve to perfect the asserted trust (8 May 2024 Transcript, pp.22-23 {SB/53/568}) and not for any proposition that a writing perfecting the trust was unnecessary. That attempt to rely on Gardner was in any event flawed, because the purported attempt to perfect the alleged trust was not only far too late, but was for the purpose of avoiding its Judgment Debt to CGC.

25. Finally, NIOC's reliance on Dawson v Ellis (1820) 1 Jac. & W. 524 is equally misplaced: the summary of the case provided at paragraph 40 of NIOC's Supplemental Skeleton Argument is incorrect {CB/25/347-348}. The Master of the Rolls held that the case involved only a question of fact, namely whether the "*treaty*" between Ellis and the Duke of Norfolk had "*ripened into a contract*"; he held that it had not, and therefore "*that no actual agreement had been made [between Ellis and the Duke of Norfolk]; he, therefore, decreed a specific performance, and a conveyance to the Plaintiff.*" (p.525). The defendant conceded that in equity a contract for the sale of land which had not been reduced to writing to comply with s.4 of the Statute of Frauds would have priority in equity over a later contract for the sale of the same land. NIOC relies upon the Court's agreement with this concession. However, that *obiter* agreement provides no assistance to NIOC because: (i) it was not concerned with declarations of trust but a conveyance of land; (ii) declarations of trust are treated differently as exemplified by Gardner v Rowe: an unperfected trust would not take priority over a subsequent conveyance; (iii) none of this is concerned with a conveyance for the Avoidance Purpose (as in this case), where different considerations would be in play and the equity against avoidance would trump any other equity (as also follows from Gardner v Rowe); (iv) it is not appropriate on any view to draw comparisons between s.53 of the LPA and s.4 of the Statute of Frauds 1677: Grey v IRC (on which NIOC relies) indicates that guidance on the interpretation of s.53 should not be derived from the Statute of Frauds: Viscount Simonds at pp.17-18.<sup>18</sup>

26. These authorities do not assist the Appellants. If, contrary to CGC's case, NIOC did intend to declare a trust by the Mortgage Documents but s.53(1)(b) was not complied

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<sup>18</sup> As summarised by Wilde, Viscount Simonds held that "*the interpretation of [s.53] should be uninfluenced by the earlier law under the superseded provisions of the Statute of Frauds 1677*".

with, the trust would remain ‘unperfected’ and could not defeat a third-party claim. Any attempt to perfect the alleged trust at the time of or following the August Transfer would, on the unchallengeable findings of the Judge, be for the purpose of avoiding the Judgment Debt and would therefore be incapable of defeating a third-party creditor’s claim.<sup>19</sup>

27. In that light, CGC’s case on the effects of non-compliance with s.53(1)(b) remains as set out in its 25 October 2024 Skeleton Argument. Further to the submissions made there:

- a. In *Hodgson v Marks* [1971] Ch. 892, Russell LJ’s judgment at 933 suggests that the effect of non-compliance with s.53(1)(b) is that the purported trust is void.
- b. In the absence of written evidence, a trust “*does not come into being merely from a gratuitous intention to transfer or create a beneficial interest.*” (*Austin v Keele* [1987] 10 NSWLR 283 (PC) at 291B, per Lord Oliver). Relatedly, Gray & Gray suggest that where a declaration of trust is not evidenced in writing, it is a merely voluntary declaration.<sup>20</sup> It would be illogical for such a declaration to be considered “enforceable”, especially in the context of an application or claim under s.423.
- c. More recently, in *Parker v Financial Conduct Authority (R. v Moore)* [2021] EWCA Crim 956, the Court of Appeal appears to have regarded a declaration of trust over land not originally made using signed writing as void: [71].

**E RETIREMENT FUND’S ATTEMPTS TO RELY UPON ALLEGED ANALOGOUS CASES CONCERNING TRUSTEE EXERCISE OF POWERS**

28. Retirement Fund’s Supplemental Skeleton Argument, at paragraphs 33-36 {CB/26/360-361}, invites analogy with cases concerning the exercise of powers by trustees and the principle that the Court will impute to a disponent the intention to exercise a power which is necessary in order to achieve the intended disposition. Where a trust already exists, then equity may assist in the administration of a trust, to achieve what conscience requires. There is nothing analogous in the present case, where no trust exists and where the question is whether a trust was created. To apply principles concerned with the

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<sup>19</sup> The same would apply to NIOC’s recent reliance on the Amended Defence.

<sup>20</sup> K Gray & S Gray, *Elements of Land Law* 5th ed (OUP, 2008) paragraph 7.1.21.

administration of a trust to the requirements for *creation* of a trust imposed by statute under s.53(1)(b) would be to cut across and undermine the policy of that provision, which is addressed in CGC's Skeleton Argument dated 25 October 2024. Conscience does not dictate the creation of an express trust, *a fortiori* to defeat the Order of Knowles J. The authorities cited by Retirement Fund therefore provide no assistance and are of no analogous weight. In particular:

- a. *Davis v Richards* [1990] 1 WLR 1511. This judgment has been criticised by the Privy Council.<sup>21</sup> It concerned an employee pension scheme managed by trustees. The question in issue was whether a deed executed by two of the three trustees regarding the administration of the pension scheme was effective. In upholding the validity of the deed it was held (*inter alia*) that where trustees act in a particular way the Court will impute to them an intention to exercise powers necessary for the purposes of acting in that way, *provided* that there is no evidence to support a contrary inference that there was no such intention: p.1531. This has no analogous value to the declaration of a trust as it concerns the management of a trust already created. Further, given that the principle involves the controversial concept of imputation/deeming,<sup>22</sup> considerable caution should be applied before 'applying' or extending it by way of analogy. Further and in any event, the judgment confirms that whether to impute an intention is subject to evidence supporting an inference to the contrary.
- b. *Bas Trust Corporation Ltd and Goyet v MF* [2012] JRC 081 (*Re Shinorvic*). For the same reasons as set out above, this has no analogous value.
- c. *Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530 concerned another pension scheme and the question as to the circumstances in which the law will impute the exercise of a power that could have been exercised but was not expressly exercised. It is notable that Timothy Fancourt QC (sitting as a High Court Judge) accepted at [117] that even in that very different context there was a need for "*sufficient evidence of intention*". The guidance as to what might constitute "*sufficient*

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<sup>21</sup> *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, 1412, per Lord Millett.

<sup>22</sup> *Hui Chun Ping v Hui Kau Mo* [2024] HKCFA 32, [28], per Lord Hoffmann.

*evidence*” in the context of purported exercises of powers is of no relevance to the question in the present case of whether there was a present intention to declare a trust and, further, of compliance with the important requirements of s.53(1)(b).

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**3 Verulam Buildings**

RICKY DIWAN K.C.  
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13 January 2025