IN THE COURT OF APPEAL (CIVIL DIVISION) **App. No. CA-2024-001215**

ON APPEAL FROM THE HIGH COURT OF JUSTICE **Claim No. CL-2022-000383**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
(Sir Nigel Teare, sitting as a Judge of the High Court)

B E T W E E N

CRESCENT GAS CORPORATION LIMITED

Applicant / Judgment Creditor / First Respondent

and

(1) NATIONAL IRANIAN OIL COMPANY

Defendant / Judgment Debtor / Appellant

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

Defendant / Second Respondent

APPELLANT'S SUPPLEMENTARY SKELETON ARGUMENT

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4 December 2024

A. Introduction

1. The purpose of these submissions is to set out NIOC's case in relation to several new arguments and authorities arising out of CGC's Respondent's Notice and Skeleton which could not have been addressed in NIOC's Appellant's Skeleton. These new matters can be divided into three categories.

2. The first is CGC's attack (made by way of Respondent's Notice) on the Judge's finding of fact that NIOC declared a trust over NIOC House in favour of the Fund. This is addressed in Section B below. In summary:

   (1) CGC's claim that the Judge failed to take sufficient account of supposed contradictory evidence does not meet the high bar for challenging factual findings on appeal and, in any event, relies on a mistaken understanding of the law.

   (2) CGC asserts that NIOC failed to establish that the signatories of the declarations of trust had the necessary authority to make such declarations (which assertion is central to NIOC's Second Ground of Appeal). This is incorrect. The fact that the Judge found that NIOC made declarations of trust through the relevant agents necessarily means that NIOC did establish that the agents in question had the requisite authority to do so. CGC's argument in this regard amounts to an attempt to run points on appeal which were not run at first instance. On a straightforward application of the usual authorities, this should not be permitted.

3. The second is a collection of new authorities which CGC relies upon as demonstrating that a person cannot comply with s. 53(1)(b) by having an agent sign a manifestation of a trust on their behalf. In fact, on closer examination, none of the authorities show any such thing. This is addressed in Section C below.

4. The third is a bold argument, contrary to centuries of authority, to the effect that a trust which does not comply with s. 53(1)(b) is void for all purposes, or can be ignored. This is addressed in Section D below.

B. CGC's attack on the Judge's finding that NIOC declared a trust over NIOC House

B.1 Introduction

5. At ¶93-¶113 of its Skeleton, CGC attempts to argue that the Judge should not have found that the 2019 Mortgage Deed and the 2020 Certificate of Title constituted declarations of trust over NIOC House in favour of the Fund.

6. The short answer to this attempt is that the Judge's findings were findings of fact (of precisely the sort which Males LJ declined to allow NIOC to advance on appeal). They cannot be impugned unless CGC is able to establish that the Judge's finding was one which no reasonable Judge could reach (*Volpi v Volpi* [2022] EWCA Civ 464; [2022] 4 WLR 48 at ¶2). This is an extremely high bar, which CGC does not come close to surmounting.

7. CGC advances two arguments: first, that NIOC's declarations could not constitute a present intention to create a trust of NIOC House in favour of the Fund in circumstances in which it believed that the Fund was already the owner of NIOC House; and secondly, that the agents who signed the 2019 Mortgage Deed and the 2020 Certificate of Title were not authorised to declare a trust over NIOC House. There is nothing in either of these points, for the following reasons.

B.2 CGC's argument in relation to the lack of a present intention to create a trust

8. The central submission underpinning CGC's first argument is that a person cannot be taken to declare a trust which that person believes already exists. This is an over-subtle submission which, if it were the law, would produce no end of injustices, especially given that the law in this area is in principle broad enough to encompass declarations made by, in the words of Scarman LJ,[1] "*simple people, unaware of the subtleties of equity*". Parties, which for years believed that a valid trust existed between them, and desired there to be such a trust, and consistently manifested both that belief and that desire, would find their expectations unseated because a trust which they intended to create on a Tuesday was in fact only capable of creation on a Wednesday[2]. Fortunately, it is not the law. An 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. This is made clear by four cases.

9. The first is *Northcliffe* [1925] Ch 651:

   (1) The facts of this case are set out at pp. 652-653. On 18 November 1911, Lord Northcliffe executed a voluntary deed of trust over certain property, including future property. Given the trust was voluntary, the trust over future property was invalid

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1 *Paul v Constance* [1977] 1 WLR 527 at p. 530E.

2 There are any number of situations in which this might arise: for example where the property was not legally vested in the settlor until the Wednesday, or one of the two persons only acquired legal personality on the Wednesday.

(see *Lewin* (20th Ed.) at ¶2-036). Between 1912 and 1922, he acquired various properties. In 1919, he executed a will, which included a statement that he confirmed the trust. The will was itself confirmed by a codicil in 1922.

(2) Following Lord Northcliffe's death, a beneficiary of the will ran exactly the argument which CGC runs: the beneficiary argued that, by executing his will and codicil in 1919 and 1922, Lord Northcliffe could only have been confirming the effect of the deed of trust as it stood in 1911, and he could not be taken to be declaring a trust over after-acquired property (see p. 654).

(3) This argument was shortly rejected by Russell J: "*I am satisfied that when the testator executed his will he recognized, and stated as a fact, that he held the Kent freeholds upon the trusts of the settlement. The position is the same with regard to the other properties, for in each case the testator, by a codicil executed after he had acquired the properties, confirmed and republished his will*" (pp. 654-655).

10. The second is *Grey v IRC* [1958] Ch 690:

(1) The facts of this case are set out at pp. 697-698. On 1 February 1955, Mr Hunter transferred shares to certain individuals, to be held to his order. On 18 February 1955, Mr Hunter orally directed the individuals to hold the shares on certain trusts, but this direction was ineffective because it did not comply with s. 53(1)(c) LPA 1925. On 25 March 1955, Mr Hunter and his transferees then executed declarations of trust which recorded that they had been holding the shares on trust since 18 February 1955, in accordance with Mr Hunter's direction.

(2) At pp. 706-707, Lord Evershed MR raised exactly the point now made by CGC. He noted that the documents signed on 25 March 1955 demonstrated an intention to confirm an existing trust, not to create a new one, and questioned whether the documents could be effective to create a new trust.

(3) Lord Evershed MR had no difficulty in disposing of the point. In circumstances in which Mr Hunter had joined in a declaration that there was a subsisting trust "*the instruments of March 25, 1955, must have effectively established or constituted the relevant trusts.*" This aspect of his judgment was not questioned on appeal ([1960] AC 1).

11. The third is *Paul v Constance* [1977] 1 WLR 527, in which repeated statements by the settlor to the effect that "*The money is as much yours as mine*" were held to constitute declarations of trust, notwithstanding that the words described what was understood to be an existing state

of affairs, as opposed to purporting to alter a prior state of affairs. It follows that an expression of a settled understanding is sufficient to declare a trust.

12. The fourth is *Rowe v Prance* [1999] 2 FLR 787, in which repeated statements by a man to a woman that a boat was "*our boat*" amounted to a declaration of trust, again despite the fact that the words used described an existing state of affairs, and did not expressly alter them.

13. Against these, CGC has not cited a single authority which actually suggests that one cannot declare a trust one believes already to exist. It has cited three authorities, at ¶93 of its Skeleton, but none of them afford it any assistance of any kind. They are:

    (1) *Ong v Ping* [2017] EWCA Civ 2069 at ¶40, which is authority for nothing more than the proposition that the determination of whether or not a person declared a trust involves assessing their objective intent.[3] That is precisely the approach which the Judge adopted – see ¶159 of the Judgment.

    (2) *In re Cozens* [1913] Ch 478. This case is far removed from the present facts, and has no relevance to them. The case concerned a trustee who had helped himself to trust funds and then died, leaving behind pencil entries in his papers noting the sums which he had taken for himself, next to a column marked "*Mtgor*" which made reference to his house. It was suggested that these amounted to evidence that he had declared himself trustee of his house in respect of the sums which he had taken. Neville J rejected that suggestion, finding instead that the papers demonstrated an intention to create a charge by deposit of deeds which was never fulfilled (see p. 487). The case provides no support to CGC.

    (3) *In re Schebsman* [1944] Ch 83, on which CGC relies for the proposition that the Court should not be astute to discover the indications of an intention to create a trust. This case was cited to the same effect in CGC's opening skeleton at trial, so one can assume that the Judge had it well in mind **{SB/49/392}**. It is a case in which a man contracted with his employer for payments to be made to his wife upon his death. Neither the man nor the employer made any mention of a trust, and none was found to exist; see Lord Greene MR at p. 89: "*I cannot find in the contract anything to justify the conclusion that a trust was intended.*" This is completely different from this case, in which it is absolutely

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[3] But see paragraph 31 below in relation to the *ratio* of *Ong v Ping* and the formalities requirements of s. 53(1)(b).

clear that NIOC intended that NIOC House should be held on behalf of the Fund, and believed that it was.

14. Once one recognises that CGC's central submission is unsound, each of the criticisms made of the Judge's findings made at ¶102-¶109 of its Skeleton Argument are exposed as unsustainable:

(1) The criticisms made at ¶102, ¶104, ¶105, and ¶107 consist of no more than different ways of asserting that NIOC could not declare a trust which it believed existed. As the cases cited above show, that is a bad point.

(2) The submission made at ¶103 is that, because NIOC subjectively believed that it held NIOC House as *amin* for the Fund, it could not have objectively manifested an intention to create a trust. CGC says that this is because the beneficiary of an *amanat* under Iranian law holds sole and indivisible title to the asset and does not recognise concepts of split legal and beneficial ownership, with the consequence that a belief in the existence of an *amanat* is factually inconsistent with belief in the existence of a trust. As to this:

(a) The submission is, on its face, a *non sequitur*. The whole point of judging a party's intentions objectively is that they are not determined by reference to that party's subjective intentions or understandings. As the Judge noted at ¶190 of his Judgment: "*Whether signatories to the mortgage deed had those subjective intentions* [to create a trust] *is not relevant. What matters is the objective construction of* [the 2019 Mortgage Deed]."

(b) In any event, the submission turns upon an over-fine conception of the necessary intent to create a trust. The declarant need not have any conception of the subtleties of the law of equity. All that is required is that the person who holds legal title to an asset demonstrates an intention that the asset be held for another (*Paul v Constance* [1977] 1 WLR 527 at pp. 530E-532C). Even if it were necessary to take a subjective belief on the part of NIOC that it held NIOC House under an Iranian law *amanat* into account, NIOC – to its knowledge – remained registered proprietor of NIOC House. Consequently, the practical effect which it intended (and believed it had effected) was that it held legal title to NIOC House on behalf of its "true" owner – exactly the intention required to create a trust.

(3) At ¶106, CGC submits that the Judge "*failed to have regard to the inherent improbability of NIOC intending to declare a trust through the Mortgage Documents*". That submission is wrong as a matter of fact. At ¶189 of his Judgment, the Judge explicitly considered the inherent probabilities, but considered that the clear wording of the 2019 Mortgage Deed outweighed any contra-indication. (And, having done so in respect of the 2019 Mortgage Deed, he must be taken to have impliedly done so in respect of the 2020 Certificate of Title as well.)

(4) Finally, at ¶109, CGC submits that the Judge failed to have regard to the fact that, after the 2019 Mortgage Deed was entered into, HMLR asked Eversheds for a copy of the declaration of trust referred to therein, and no one thought to rely on the 2019 Mortgage Deed itself. Again, that is wrong. The Judge did consider the fact that the parties involved in the 2019 Mortgage Deed and HMLR did not appear to treat the 2019 Mortgage Deed as itself being a declaration of trust – see ¶189-¶190 of the Judgment. In any event, subsequent conduct would be irrelevant to the objective construction of the declaration made. In any event, this point has no bearing upon the 2020 Certificate of Title.

B.3 CGC's argument that there was no evidence that the persons signing the 2019 Mortgage Deed or the 2020 Certificate of Title had authority to declare a trust

15. At ¶74-¶76 and ¶110-¶112, CGC argues that NIOC failed to establish that the persons signing the 2019 Mortgage Deed and the 2020 Certificate of Title had authority to declare a trust. The main problem with this argument is that it rests on a false premise. NIOC did plead and prove the authority of its agents:

(1) At ¶86(9)(x) and (xi) of its Amended Defence, NIOC alleged that the 2019 Mortgage Deed and the 2020 Certificate of Title constituted declarations of trust by it (it being necessarily implicit in that allegation that the agents who signed those documents did so with the authority of NIOC)**{CB/20/309}**.

(2) At response 3(c)(iv) of its Response dated 15.12.23 to NIOC's RFI dated 1.12.23, CGC referred to the 2019 Mortgage Deed and the 2020 Certificate of Title (among other documents) as statements "*made by agents and/or third parties*", denying that they satisfied the legal requirements of "*s. 53(1)(b) of the LPA 1925*". However, it did not deny the actual authority of any relevant signatory to sign the documents in question **{SB/2A/70.1}**. Indeed, the whole focus of CGC's argument on agency at trial was

emphatically not on the authority of the agent but on whether the signature of an agent could suffice for the purposes of s. 53(1)(b) of the LPA 1925.

(3) In the absence of any particularised issue taken by CGC in relation to the authorisation of the persons signing the 2019 Mortgage Deed and the 2020 Certificate of Title, the Judge held that those documents were declarations of trust signed by authorised agents of NIOC; see:

(a) in respect of the 2019 Mortgage Deed: "*The mortgage was executed by NIOC, acting by its attorney … a reasonable person would surely conclude that NIOC had created a trust in favour of the Fund*" (at ¶116, ¶186 and ¶199); and

(b) in respect of the 2020 Certificate of Title: "*On 9 January 2020, as part of the same financing transaction, a Certificate of Title was provided by Eversheds … and there was a material disclosure to the effect that the legal interest in the property was in NIOC and the beneficial interest in the property was held by "the Beneficial Owner", defined as the Fund. This was a further declaration of trust.*" (¶191). It is necessarily implicit in this finding that the Judge regarded Eversheds as acting within its authority on behalf of NIOC, otherwise the 2020 Certificate of Title could not have been any kind of declaration of trust.

16. It is true that there was no focussed argument around the scope of the authority conferred by NIOC upon the signatories of the 2019 Mortgage Deed or the 2020 Certificate of Title, but that is because CGC did not take the point. Its attempt to do so now is an attempt to raise a new issue on appeal. On the well-known principles summarised in *Rhine Shipping CMCC v Vitol SA* [2024] EWCA Civ 580 at ¶23-¶31, this sort of issue cannot be raised at this stage, for three reasons.

17. First, had this point been taken below, there is a real possibility that it would have affected the evidence below. By way of example, NIOC might have adduced factual evidence going to (a) the scope of NTT's authority; (b) the scope of Eversheds' authority; (c) ratification; and/or (d) the Iranian law of agency. The fact that this is a real possibility that it would have done so "*will usually be fatal to the new point being permitted to be raised for the first time on appeal*" (*Rhine Shipping* at ¶26).

18. Secondly, CGC's argument requires findings of fact that the Judge did not make (i.e. that the signatories of the 2019 Mortgage Deed and the 2020 Certificate of Title lacked any authority to declare a trust). Again, this "*will usually be fatal*" to the point being raised on appeal (*Rhine Shipping* at ¶29).

19. Thirdly, it is not conducive to fairness and the efficient use of Court resources for CGC to raise this point now. NIOC and the Court were entitled to know what the issues raised by CGC were at first instance. CGC cannot keep substantial issues like this up its sleeve for deployment on appeal. As made clear in *Rhine Shipping* (at ¶24), this is a point which applies even where the new point would not have affected the evidence or argument at first instance (which this point clearly would have done, for the reasons above).

C. New authorities referred to in relation to NIOC's Ground One

20. At ¶42-¶46 of its skeleton, CGC refers to a number of authorities in support of its argument that s. 53(1)(b) documents cannot be signed by an agent. On proper examination, none of them provide any real support for CGC's case. Nor does the textbook cited at ¶48, D. Hayton, *The Law of Trusts*, which states in terms at ¶6-031: "*In contrast to s. 53(1)(a) or (c), there is no express reference in s. 53(1)(b) to the possibility of an agent's signature, but this may simply be because a duly authorised agent, acting on behalf of a settlor, can be seen as "some person who is able to declare such trust*".

21. *Morton v Morton* [2023] EWHC 163 is not authority for the proposition that a signature of a properly authorised agent cannot satisfy s. 53(1)(b). What is recorded in ¶100 of that judgment is that it was not argued that accounts signed by partnership accountants could satisfy s. 53(1)(b) for the purposes of causing property owned by partners to be held on trust for a partnership. While HHJ Halliwell then went on to make an *obiter* remark that the signature of the accountants could not satisfy s. 53(1)(b), that counts for little in the absence of any suggestion to the contrary.

22. *HRH Tessy Princess of Luxembourg & ord v HRH Louis Xavier Marie Guillaume Prince of Luxembourg* [2018] EWFC 77 at ¶67-¶68 makes the point that, where A holds land on trust for B, the signature of A cannot satisfy s. 53(1)(b) in respect of a sub-trust of the beneficial interest in favour of C; only the signature of someone able to confer the beneficial interest upon the new beneficiary at the relevant time would do so. The case tells one nothing of whether an agent's signature can satisfy s. 53(1)(b).

23. In *Fish v Sky Apartments 2018 Ltd* [2022] EWHC 763 at the final sentence of ¶51 HHJ Halliwell refers to a statement in a legal opinion given by counsel to some administrators. He records the opinion as being to the effect that notices given under section 5 of the Landlord and Tenant Act 1987 could not satisfy s. 53(1)(b) because they were signed by agents. This does not assist CGC. It is a passing observation as to the content of a document before the Court, which did not even relate to the issue there under consideration

(i.e. whether certain investors were the beneficiaries of a constructive trust). The mere fact that HHJ Halliwell recorded that certain advice was given does not mean that he approved of it and, even if it did, the approval was *obiter* and did not have the benefit of argument.

24. CGC relies on *Banbury v Bank of Montreal* [1918] AC 626 at p. 713 for the proposition that a principal cannot be found liable for a representation made as to a third party's credit unless the representation were in writing and the principal signed it personally (pursuant to s. 6 of the Statute of Frauds Amendment Act 1828). NIOC accepts that that is so (subject to the decision in *UBAF*, where the Court of Appeal held that the signature of an agent would suffice where the principal was a corporation[4]). But s. 6 of the 1828 Act is a different provision, with different wording and a different policy objective. It does not assist the Court in construing s. 53(1)(b).

25. Finally, CGC relies on *Cascades and Quayside Ltd v Cascades Freehold Ltd* [2008] L. & T.R. 23 at ¶ 7 for the proposition that, as originally enacted, a notice under s. 99(5)(a) of the Leasehold Reform, Housing and Urban Development 1993 could not be satisfied by the signature of an agent. NIOC accepts that this is so, but this was because s. 99(5) of the 1993 Act, read as a whole, was clear on the point.[5] By contrast, s. 53(1)(b) does not contain any clear prohibition on the use of agents. While, as CGC notes at ¶46 of its Skeleton, Lloyd J suggested that s. 53(1)(b) was to be read in the same way in *St Ermins Property Co Ltd v Tingay* [2003] L&TR 6 at ¶26, this appears to have been a passing remark, which was not of any obvious relevance to the points in issue, or – it seems – the subject of argument.

D. CGC's arguments as to effect of non-compliance with s. 53(1)(b)

26. In answer to NIOC's Ground 3, CGC's primary position is 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 constitute enforcement of the trust against the creditor and would therefore be barred by s. 53(1)(b).

27. The proposition that a trust which did not comply with s. 53(1)(b) may be relied upon to defeat a claim of a third party creditor is supported by *Gardner v Rowe* (1828) 5 Russ. 258 (where a pre-bankruptcy trust was used to defeat the interests of the trustee's creditors in trust assets notwithstanding that the trust was only evidenced in writing after bankruptcy).

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4 See ¶35 of NIOC's Appellant's Skeleton.

5 As CGC notes at ¶47 of its Skeleton, the statute was later amended to allow for signature by agents – see footnote 8 of NIOC's Appellant's Skeleton.

28. In any event, to describe NIOC as attempting to "enforce" a trust against CGC is an abuse of language for two reasons. First, NIOC was the trustee under the relevant trust (and therefore the person *against* whom any "enforcement" of the trust would have taken place), until NIOC conveyed NIOC House to the trust's sole beneficiary. Secondly, from that point, the trust was executed, and to talk about its "enforcement" past that date is a category error: it is akin to talking about enforcement of a debt which has been settled, or a possession claim in respect of land which has fallen into the sea and been destroyed; it simply is not possible. For these reasons, it is submitted that the New Zealand Judge Willy in *Mr A v Commissioner of Inland Revenue* [2006] NZTRA 2 at ¶63 was correct to suggest (*obiter*) that a third party creditor could not rely upon the absence of signed writing to defeat a trust which the debtor "*not only regarded throughout as binding on him but which he has perfected*"[6]. The Judge (it is submitted, correctly) described the contrary proposition – upon which CGC's case relies – as "*A strange and unjust result.*".

29. There is nothing surprising about the above. Section 53(1)(b), and section 7 of the Statute of Frauds before it, were enacted to protect landowners from perjured witnesses falsely claiming that the landowner had declared a trust in favour of a third party. This appears clearly from the preamble to the Statute of Frauds ("*For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury*") and the fact that it is the signature of the putative trustee (or their agent) which is required upon the document evidencing the trust. The section was not intended to protect creditors from an unwelcome discovery that a debtor held assets on trust, and it does not do so.

30. CGC's fallback argument is that the prevailing understanding of how s. 53(1)(b) operates[7] is wrong. CGC accepts at ¶80 that it is arguing against the "*common and perhaps orthodox view*" of the section, but submits that this Court should overturn the prevailing view and hold that failure to comply with s. 53(1)(b) means that no trust comes into effect at all. It relies, for this bold submission, upon an argument distilled from an academic article: *Formalities for Declaring Trusts of Land* Conv. 2021, 3, 263-277, by Dr David Wilde.

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[6] The equivalent New Zealand statutory provision to s. 53(1)(b) is s. 49A(2) of the Property Law Act 1952 which provides "*A declaration of trust respecting any land or any interest in land shall be manifested and proved by some writing signed by some person who is able to declare such trust or by his will.*"

[7] I.e. that failure to comply with the provision renders a trust unenforceable, rather than preventing it from coming into being.

31. It is respectfully submitted that this Court cannot adopt the radical view of s. 53(1)(b) advocated by Dr Wilde because, as Dr Wilde himself recognises, there are two Court of Appeal decisions which endorse – as part of their *ratio* – the orthodox interpretation of s. 53(1)(b) and its effect:

    (1) *Sandhar v Sandhar & Kang Ltd & Ors* [2008] EWCA Civ 238, in which a trust of partnership land declared in favour of a company was found to be proved by subsequent communications with a bank (see ¶11- ¶26); and

    (2) *Ong v Ping* [2017] EWCA Civ 2069, in which a trust was declared over a house in 1986, but a s. 53(1)(b) document was only created in 1988 (see ¶40-¶62).

32. Dr Wilde is critical of the reasoning in both these judgments, but the fact remains that they are judgments of this Court, and are binding.

33. In any event, the orthodox view of s. 53(1)(b) is plainly the correct one, both on the basis of its wording and its legislative history.

34. As to the statutory wording, s. 53(1)(b) stands in stark contrast to sub-sections (a) and (c): the three separate sub-sections were originally separate provisions in the Statute of Frauds. While sub-sections (a) and (c) are explicitly framed as substantive formality requirements that go to validity (*"no interest in land can be created or disposed of except by writing*" and "*a disposition … must be in writing*"), (b) is clearly directed towards evidential requirements which pre-suppose a pre-existing trust: "*a declaration of trust … must be manifested and proved*". As (b) is concerned with evidence, the answer to the question as to who constitutes "*some person who is able to declare such trust*" is not to be found by a comparison with sub-sections (a) and (c), but in the substantive law of agency.

35. Contrary to ¶85 of CGC's submissions, the phrase "*manifested and proved*" does not suggest that the s. 53(1)(b) document must actually <u>be</u> the declaration of trust in order to save the word "*manifested*" from redundancy:

    (1) First, as a matter of language, the argument does not work. For it to work, "manifest" must be capable of meaning "create". That is not its meaning. It means to reveal or make something visible.[8]

    (2) In any event, arguments from redundancy always have to be treated with care. As

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[8] See *The Shorter Oxford English Dictionary*: "*Make evident to the eye or the understanding: show plainly, reveal; display (a quality, condition, feeling, etc.) by action or behaviour; evince; be evidence of, prove, attest*".

Lord Coleridge LC remarked in *Hough v Windus* (1884) 12 QBD 224 at p. 229 "*nothing can be more mischievous, than the attempt to wrest words from their proper and legal meaning, only because they are superfluous*".

36. This is particularly the case in circumstances in which the pair "*manifested and proved*" is lifted from a seventeenth century statute, enacted at a time when parliamentary drafting standards were less sophisticated than they are now.[9] At that time (and for long before and long after), it was the norm to use several words with the same or similar meanings in an attempt to remove any possible doubt as to meaning, or for emphasis (hence: null and void, let or hinderance, have and hold).[10] Modern statutory drafters are consciously moving away from this style,[11] but it would be wrong to construe statutory language from a bygone age as though it were drafted with the modern concern to avoid superfluous language.

37. As to the legislative history:

    (1) When the initial draft of what became section 7 of the Statute of Frauds was drafted by Lord Nottingham in 1673, it read "*All declarations or Creations of Trusts or Confidences by paroll shall bee utterly voyd and of noe effect And where any TRUST or Confidence by paroll shall likewise be utterly void and of noe effect*". This clearly was intended to have a substantive effect, just as sections 53(1)(a) and (c) do today.

    (2) By the time it was enacted, section 7 read "*all Declarations or Creations of Trusts or Confidences of any Lands Tenements or Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to decare such Trust or by his last Will in Writeing or else they shall be utterly void and of none effect.*" The transformation of Lord Nottingham's substantive language into procedural language dealing with modes of proof was effected by a committee of the Lords on 22 April 1675 – see Crawford D. Hening, *The Original Drafts of the Statute of Frauds (29 Car. II c.3) and their Authors* (1913) 61 U. of Pa.L.Rev. 283 at pp. 285, 292.

    (3) Notwithstanding the words "*shall be utterly void and of none effect*", s. 7 of the Statute of Frauds provision was consistently interpreted to mean that the declaration of a trust

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9 See *Bennion on Statutory Interpretation* at Section 10.7.

10 See, e.g. *D. Crystal, The Stories of English* (2004) at pp. 151-153, *Wynne-Finch v Natural Resources Body for Wales* [2021] EWCA Civ 1473 at ¶38.

11 See e.g. Report on Statutory Drafting and Interpretation of the Irish Law Commission ¶6.09 to ¶6.12.

of land need only be evidenced in signed writing and that, in the absence of such writing, the trust is valid though unenforceable; see:

(a) *Ambrose v Ambrose* (1716) 1 P. Wms. 321, in which one man purchased land in the name of another. The nominee only signed a declaration of trust in favour of the beneficiary after the beneficiary had died (at which point it would have been impossible to declare a new trust in his favour[12]), yet that was sufficient to render the pre-existing trust enforceable for the benefit of the deceased's heirs. (The report states that the decision was affirmed by the House of Lords in June 1717.)

(b) *Forster v Hale* (1798) 3 Ves 696 at p. 707, in which Lord Alvenley said in terms: "*It is not required by the Statute, that a trust should be created by a writing; and the words of the Statute are very particular in the clause (sect 7) respecting declarations of trust. It does not by any means require, that all trusts shall be created only by writing; but that they shall be manifested and proved by writing; plainly meaning, that there should be evidence in writing, proving there was such a trust. Therefore unquestionably it is not necessarily to be created by writing; but it must be evidenced by writing* …". This view was endorsed by Lord Loughborough LC on appeal ((1800) 5 Ves 308 at p. 315) and later by Turner LJ in *Smith v Matthews* (1861) 3 De G.F. & J. 139 at p. 151.[13]

(c) *Gardner v Rowe*, in which a pre-bankruptcy trust was validly created notwithstanding that it was only evidenced post-bankruptcy.

(d) *Rochefoucauld v Boustead* [1897] 1 Ch. 196 at pp. 206 and 207, in which it was held that s. 7 related to the evidential requirements of *lex fori* rather than the substantive requirements for creating a trust (which would be governed by the law governing the trust relationship – assumed to be the *lex situs* in that case).

(4) The fact that the words "*manifested and proved*" were kept constant, and the words "*shall be utterly void and of none effect*" were removed, when s. 7 of the Statute of Frauds was re-enacted as s. 53(1)(b)[14], indicates that s. 53(1)(b) was intended to reflect the position accepted by the courts that failure to manifest and prove a trust in signed writing did

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12 See *Re Corbishley's Trusts* (1880) 14 Ch. D 846 and *Re Tilt* (1896) 74 LT 163.

13 See also, to the same effect, *Randall v Morgan* (1805) 12 Ves 67 at p. 74.

14 Following a brief existence as para. 15 of Sched. 3 to the Law of Property (Amendment) Act 1924.

not prevent the trust from coming into existence, but rendered it unenforceable. The removal of the reference to invalidity obviously only reinforces the case *against* it being concerned with validity. As Prof. Youdan observes: "*The modern English provision … does not contain any provision that non-compliance will make the trust "utterly void and of no effect." Indeed, it does not express any sanction for non-compliance and, consequently, it can be taken to have confirmed the interpretation of s. 7 by the cases.*"[15] This is not just the position in England, but in New Zealand as well – see *Team Barry Limited v Forlong* [2005] NZHC 1742 at ¶10-¶12.

38. CGC relies upon various authorities in support of its proposition that the orthodox view of s. 53(1)(b) should be departed from, but none of them can support the weight which CGC places upon them. These authorities are:

(1) A statement by Lord Diplock in *Gissing v Gissing* [1971] AC 886 at p. 905B that "*to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53(1)(b) of the Law of Property Act, 1925 to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust*". That statement (which none of the other four Law Lords adopted) was made in passing as an explanation as to why the common intention constructive trust is important in the context of marital property. Lord Diplock did not consider, and no argument was made regarding, the fine distinction between a trust which has been invalidly declared and a trust which has been validly declared but is unenforceable. There is no reason to think that Lord Diplock intended to say anything about the orthodox view of s. 53(1)(b).

(2) A statement by Lord Bridge in *Lloyds Bank Plc v Rosset* [1991] AC 107 at p. 129C that "*Even if there had been the clearest oral agreement between Mr and Mrs Rosset that Mr Rosset was to hold the property in trust for them … this would, of course, have been ineffective since a valid declaration of trust by way of gift of a beneficial interest in land is required by section 53(1) of the Law of Property Act 1925 to be in writing*". As CGC acknowledges, this is *obiter*. It was also nothing more than a rhetorical point, which did not relate to any argument before their Lordships. It was not intended to address the distinction between validity and enforceability. In any event it also begs the question as to precisely what Lord Bridge

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15 *Formalities for Trusts of Land, and the Doctrine in Rochefoucauld v Boustead* (1984) CLJ 43(2) at ft. 77.

meant by "*ineffective*".

(3) A statement by Millett LJ in *Armitage v Nurse* [1998] 1 Ch 241 at p. 253H that "*I accept the submission made on behalf of Paula that there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries had no rights enforceable against the trustees there are no trusts. But I do not accept the further submission that these core obligations include the duties of skill and care, prudence and diligence.*" This does not assist CGC because in this passage Millett LJ is identifying the core aspects of the trustee-beneficiary relationship, not contemplating the distinction between legal rights and the ability to enforce them (a distinction which is well recognised, for example in the sphere of limitation[16] and stamp tax[17]). In any event, while s. 53(1)(b) imposes procedural bars upon the enforcement of a trust of land in the English Courts, it does not follow that a trust which cannot meet those bars would necessarily be unenforceable. It may, for example, be capable of recognition or enforcement in foreign courts.

39. Finally, CGC submits (at ¶83 of its Skeleton[18]) that, even if a valid trust over NIOC House existed in the Fund's favour at the moment at which NIOC House was transferred to the Fund, CGC should nevertheless be entitled to snatch a trust asset back from the hands of its beneficiary in order to settle a debt owed to it by the trustee.

40. This submission is contrary to both *Gardner v Rowe* and *Dawson v Ellis* (1820) 1 Jac. & W. 524. In the latter case, Mr Ellis contracted to sell land to the Duke of Norfolk, but the contract was not recorded in writing, with the consequence that it was unenforceable pursuant to s. 4 of the Statute of Frauds. Subsequently, Mr Ellis contracted in writing to sell the land to Mr Dawson. He then conveyed the land to the Duke of Norfolk, who had notice of the contract with Mr Dawson. Mr Dawson sued for conveyance of the land to him pursuant to his contract. Sir Thomas Plumer MR agreed with counsel that, even though the

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16 See e.g. *Limitation of Actions,* Consultation Paper No 151 (1998) ¶9.1-¶9.5.

17 Where a failure to stamp a declaration of trust upon which stamp tax is payable means that it cannot be admitted in evidence, but does not mean that the trust is void, see e.g. *McLinden v Shiao Chen Lu* [2022] EWHC 2807 (Ch) at ¶68-¶82.

18 Whilst CGC says, in the last sentence of that paragraph, that the Judge's finding that NIOC acted with the requisite purpose in this case is not open to challenge, Males LJ held in his order granting permission to appeal on 2 September 2024 that, "*If the appeal succeeds on grounds 1 to 3, the justification for making an order under section 423 will fall away*".

contract with the Duke of Norfolk was unenforceable, it was first in time and remained binding upon the conscience of Mr Ellis, and so the Duke of Norfolk was entitled to retain the land. Given that s. 4 was in similar form and to similar effect as both s. 7 of the Statute of Frauds and s. 53(1)(b), there is no reason to take a different approach in this case. Whether or not the trust declared by NIOC was enforceable by the Fund through Court process, it was binding upon its conscience (such that it could not freely have transferred the property to CGC or any other third party besides the Fund), and so the Fund ought to be entitled to retain the property passed to it in execution of that trust. The contrary proposition would, in the words of Judge Willy in *Mr A v Commissioner of Inland Revenue*, be "*a strange and unjust result*"; unsupported by any authority, and counter to the English Court's role as protector of trusts.

Bankim Thanki KC
David Mumford KC
Laura Newton
James Kinman