**Appeal Refs: CA-2024-001204 & CA-2024-001215**

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE** **Claim CL-2022-000383**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**KING'S BENCH DIVISION**
**COMMERCIAL COURT**
**Sir Nigel Teare, sitting as a Judge of the High Court**

**BETWEEN:**

**(1) NATIONAL IRANIAN OIL COMPANY**

**First Defendant/Judgment Debtor/**
**Appellant in appeal CA-2024-001215**

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

**Second Defendant/**
**Appellant in appeal CA-2024-001204**

**and**

**CRESCENT GAS CORPORATION LIMITED**

**Claimant/Judgment Creditor/**
**Respondent**

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# REPLACEMENT APPEAL SKELETON ARGUMENT OF THE RETIREMENT, SAVING AND WELFARE FUND OF OIL INDUSTRY WORKERS

**Filed on 4 October 2024**
**Refiled with bundle references in accordance with PD 52C on 11 November 2024**

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***Bundle references are to the core and supplementary bundles by bundle/tab/page in the form {CB/12/p153} and {SB/42/p324}***

## A: Introduction

1 This appeal raises important issues concerning the effectiveness of documents which, objectively ascertained, are declarations of trust and, in particular, the formalities for declarations of trust for land under s.53(1)(b) of the Law of Property Act 1925 ("**LPA**").

2 The Second Defendant, the Retirement and Welfare Fund of the Oil Industry Workers ("**The Retirement Fund**") appeals against the judgment of Sir Nigel Teare (the "**Judge**") dated 15 April 2024 (the "**Judgment**") **{CB/15/p164}** and his two orders dated and sealed 17 May 2024 (the "**Amended Injunctive Order**" and "**Consequential Order**") **{CB/12/p153 and CB/11/p142}** following trial on 13-19 March 2024, the hand down of Judgment on 15 April 2024 ([2024] EWHC 35 (Comm), [2024] 1 WLR 3487) and a consequentials hearing on 8 May 2024.

3 By Appellant's Notice dated 29 May 2024, the Retirement Fund appealed on four grounds **{CB/3/p25}**. Separately, the First Defendant/Judgment Debtor, the National Iranian Oil Company ("**NIOC**"), also appealed (CA-2024-0215) on similar (but more extensively numbered) grounds to the Retirement Fund **{CB/1/p3}**. Both the Retirement Fund's Ground 1 and NIOC's Grounds 1-3 concerned s.53(1)(b) LPA. On 13 June 2024 the Claimant/Judgment Creditor, Crescent Gas Corporation Limited ("**CGC**") filed statements in response to both appeals under CPR PD 52C, para 19(1) ("**CGC's Response**') **{CB/21/p319 and CB/22/p324}**.

4 On 2 September 2024 Males LJ granted permission to the Retirement Fund to appeal on Ground 1 and also granted NIOC permission to appeal on its Grounds 1-3 whilst recognising that Ground 7 would follow as a matter of course if any of NIOC's Grounds 1-3 succeeds (the same would also be true in the case of the Retirement Fund's Ground 1) **{CB/13/p160}**.

## B: The issues before the Judge

5 The Judgment considered the application of CGC for relief under s.423 Insolvency Act 1986 ("**IA 1986**") and/or ss.1-2 Charging Orders Act 1979 ("**COA 1979**"). The application before the Judge concerned the beneficial ownership of NIOC House, 4-8 Victoria Street, SW1H

0NE (*"***NIOC House***"*) which is a high value commercial property. It is common ground that NIOC was the registered proprietor of the legal title to NIOC House between 6 November 1975 (when it was acquired) and 23 August 2022 on which date NIOC House was transferred to the Retirement Fund (the "**August 2022 Transfer**"). The relief sought under s.423 and ss.1-2 turned on which of NIOC, the Retirement Fund or, indeed, anyone else beneficially owned NIOC House as at the date of the August 2022 Transfer.[1]

6 NIOC and the Retirement Fund contended that the answer to this last question was that the Retirement Fund or, in the alternative, the members[2] owned the beneficial interest in NIOC House pursuant to several arguments.

6.1 Their primary case was one of Iranian law and was to the effect that there had been an *amanat* in favour of the Retirement Fund and/or the members. The Judge noted that, as was common ground between the respective experts, where an *amanat* exists, the owner entrusts an asset to the *amin* but retains ownership of the asset [35]. The question was whether an *amanat* could be recognised under the Hague Convention on the Law Applicable to Trusts and their Recognition.

6.2 The alternative case was that, under English law, either an express trust or a resulting trust arose in favour of the Retirement Fund and/or the members.

7 There were disputes as to the following issues (amongst others):

7.1 With whose monies and on what basis NIOC House was purchased in 1975.

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[1] See the order of Master Brown dated 6 March 2023 at §1 **{SB/6/p84}**.

[2] As appears from [9] of the Judgment, the Fund, which was established in 1947, is one of Iran's largest pension funds with over 170,000 members, comprising both current and former workers within the Iranian oil industry. According to its latest financial statements as at 21 May 2021 **{SB/45/p374}**, the Retirement Fund had total assets of approximately 3,670 trillion Iranian Rials, equivalent to £11.3 billion. The membership of the Fund is open to all employees working in the oil industry in Iran, and includes current and former employees of NIOC and of other Iranian oil companies: currently, approximately 39% of the membership are current or former employees of NIOC, with the remaining members distributed across state and private sector petrochemical, gas, and refining and distribution companies **{SB/48/p391}**

7.2 When the Retirement Fund acquired independent legal personality (CGC contended this was 25 September 2019, NIOC and the Retirement Fund contended this was 2001).

7.3 Whether certain documents both before and after 25 September 2019 constituted written manifestations and proof of declarations of trust for the purpose of s.53(1)(b) LPA, both as a matter of construction of the documentation and in terms of whether they had been signed by an appropriate person.

## C: The Judge's key findings in his Judgment

8 The Judge's crucial findings about events pre-25 September 2019 are as follows:

8.1 The Retirement Fund only acquired legal personality on 25 September 2019 when its Articles of Association were approved by the Board of Cabinet of Ministers – [176] and [185].

8.2 There were five purported declarations of trust pre-25 September 2019 which would have been valid declarations of trust but for their date:

8.2.1 The resolution (in Farsi) of the Board of NIOC dated 16 August 2011 which instructed the Legal Affairs Department to have the title deeds transferred to the "*main*" or "*original*" owner (there are two different translations). The Judge held that, if the translation is "*main*" (as per CGC's translation), there would be a valid declaration of trust – [180].

8.2.2 A letter from the Director of Legal Affairs of NIOC to Cathcarts Solicitors[3] dated 1 February 2014 which instructed Cathcarts to change the designation of ownership on the Land Register so that it records that NIOC holds as Custodian Trustee for the Retirement Fund was a "*clear declaration of trust*" – [182].[4]

[3] Cathcarts Solicitors, headed by Peter James Cathcart, were English solicitors instructed from time to time to advise the Retirement Fund – [24].

[4] The letter itself said "*NIOC holds the land as Custodian Trustee for NIOC Fund*" **{SB/28/p210}**.

8.2.3 Three letters from Cathcarts to the Land Registry dated 12 November 2012,[5] 11 February 2014[6] and 18 March 2014[7] which all state that NIOC holds NIOC House as custodian trustee for the Retirement Fund. The Judge found that, on the basis that Cathcarts were instructed by NIOC to make these statements, they are declarations of trust – [183].

8.3 These declarations of trust before 25 September 2019 were strictly not on point because NIOC could not declare a trust in favour of the Retirement Fund when it lacked legal personality – [177]. In other words, these documents were ineffective to create a trust only because they were written before the Retirement Fund acquired legal personality – [184].

9 It follows that the Judge was satisfied, based on an objective assessment of the evidence, that there was a clear and unqualified certainty of intention, demonstrated by NIOC repeatedly, to create a trust in favour of the Retirement Fund as well as certainty of subject matter in NIOC House – the only issue was certainty of objects given that the Retirement Fund had not yet acquired legal personality.[8]

10 The Retirement Fund appealed against the findings that the pre-25 September 2019 declarations were of no effect, contending that they should have been treated as prospective declarations of trust for the Retirement Fund or in favour of the members (Ground 3). It also appealed against the finding that it only acquired independent legal personality on 25 September 2019 and not 2001 (Ground 4). Males LJ refused permission on both grounds.

11 The Judge's crucial findings about events post-25 September 2019 are as follows:

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[5] The letter itself said "*It is held by NIOC as the Custodian Trustee for the Pension fund*" **{SB/27/p209}**.

[6] The letter itself said "*The property is held by the National Iranian Oil Company as Custodian Trustee for National Iranian Oil Company Pension Fund*" **{SB/30/p213}**.

[7] The letter itself said "*NIOC held on trust for the Pension Fund*" and "*One of the options is for NIOC to enter into a Declaration of Trust confirming it holds the land as Custodian Trustee for NIOC Pension Fund. Please confirm that you will recognise a Declaration of Trust confirming ownership ab initio and will record that NIOC holds as Custodian Trustee on presentation of the Declaration of Trust*" **{SB/31/p222}**.

[8] See *Lewin on Trusts* (20th Ed, 2020) at §5-003, citing *Knight v Knight* (1840) Beav 148 at 172.

11.1 Following the acquisition of legal personality, there was a 25 September 2019 mortgage ("**the 2019 mortgage**"), "*executed by NIOC, acting by its attorney*", Naft Trading and Technology Company Limited ("**NTT**"), which was a "*clear manifestation of an intention to create a trust in favour of the Fund. A reasonable person would surely conclude that NIOC had created a trust in favour of the Retirement Fund*" – [186] and [188]. The same conclusion followed for a letter dated 9 January 2020 from Eversheds, instructed by NIOC, (which the Judge described as a "*further declaration of trust*") – [191].

11.2 The 2019 mortgage and a certificate of title signed by Eversheds on 9 January 2020 did not comply with s.53(1)(b) because they were signed by an agent (or, it follows from previous paragraphs, in the case of the 2019 mortgage, by an attorney) as opposed to an officer of NIOC – [197] and [200]. If the declaration is not manifested in writing, it cannot be enforced – [210], [212].

12 These findings are the subject of the Retirement Fund's Ground 1 and NIOC's Grounds 1-3 on which Males LJ granted permission to appeal and are therefore central to this appeal.

13 The Judge made the following consequential findings for the purposes of CGC's application:

13.1 Because none of the seven declarations of trust found by the Judge complied with s.53(1)(b) (either because, in the case of the pre 25 September 2019 declarations, the Retirement Fund had not been incorporated or, thereafter, because they were signed by an agent), the trust relied upon by NIOC and the Retirement Fund with regard to NIOC House was not so manifested and proved, the August 2022 Transfer was at an undervalue and was not justifiable on the basis that the Retirement Fund beneficially owned NIOC House – [213].

13.2 To similar effect, "*NIOC and the Fund cannot justify that undervalue by the requisite proof that NIOC was subject to a trust in favour of the Fund. CGC has also established that NIOC entered into the August Transfer for the purpose of putting NIOC House beyond the reach of CGC*" – [224]. CGC was accordingly a "*victim*" – [225].

13.3 The Judge concluded that CGC's position would be protected by an order that the Retirement Fund transfer NIOC House to CGC – [213]. §§1-10 of the Consequential

Order seek to provide for this. These provisions have been stayed pending resolution of this and NIOC's applications for permission to appeal.

14 It is clear from the Judgment that the findings of beneficial ownership were determinative of the claims under s.423 IA 86 and s.1 COA 1979:

14.1 Had the 2011, 2012, 2014 or 2019 declarations of trust been effective, the Retirement Fund (or possibly the members of the pension scheme) would have been entitled to the beneficial ownership of NIOC House. See [180], [182], [184], [212] and [213].

14.2 Had the trust been so established, the August 2022 Transfer would have been justifiable and would not have been at an undervalue – [213].

Accordingly, the question of purpose would have fallen away or the purpose would have been to regularise the ownership and recognise the valid declaration of trust. Males LJ agreed, on NIOC's Ground 7, that if the appeal succeeds on their grounds 1 to 3 (equivalent to the Retirement Fund's Ground 1), "*the justification for making an order under section 423 will fall away*".

**D: Relevant principles of statutory interpretation**

15 Whether agents satisfy s.53(1)(b) is a question of statutory interpretation. *Bennion, Bailey and Norbury on Statutory Interpretation* (8th Ed, 2020) sets out the following pertinent principles:

15.1 The legal meaning of an enactment is the meaning that conveys the legislative intention. (§10.9). The primary indication of legislative intention is the legislative text, read in context and having regard to its purpose (§11.1).

15.2 The meaning to be attributed to an enactment consists not just of what is expressed, but also what may properly be implied. Implications may arise either because they are directly suggested by the words of the enactment, or are indirectly suggested by rules or principles not disapplied by the words of the enactment (§11.5).

15.3 The court should assess the likely consequences of adopting opposing constructions, both to the parties in the case and for the law generally. If, on balance, the consequences of a particular construction are more likely to be adverse than beneficial this is a factor telling against that construction (§11.6).

15.4 When considering which of the opposing constructions of an enactment would give effect to the legislative intention, the court should presume that the legislature intended common sense to be used in construing the enactment (§11.7).[9] In that vein, the presumption against absurdity means that the courts will generally avoid adopting a construction that causes unjustifiable inconvenience (§13.4).

15.5 An Act must be read and applied in the context of the general body of law. Ordinary rules of the common law will generally apply to, and may impliedly qualify, express statutory provisions. In appropriate circumstances the common law may be used to supplement an Act that is found lacking in some respect (§25.1).[10]

15.6 On the question of incorporating or attracting common law (see §25.2):

15.6.1 An Act may incorporate aspects of the common law, expressly or by implication.

15.6.2 Where an Act uses a concept that has an established legal meaning it will generally be interpreted in such a way as to have that meaning and to attract ancillary legal rules and principles.

15.6.3 Where an Act uses a similar but not identical legal concept, there is a question as to whether or not the legislative intention is to attract the existing legal rules or principles wholly or in part.

15.6.4 Use in an enactment of a concept, for example relating to age, time or status, will normally attract general legal rules applying to that concept.[11]

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[9] The comment on this paragraph includes the following observation: "***Drafter's silence –*** *When a particular matter is not expressly dealt with in the enactment this may simply be because the drafter thought that as a matter of common sense it went without saying*".

[10] The comment on this paragraph includes the following observation: "*But it is equally axiomatic that, unless Parliament does so, the principle or rule, if relevant, continues to operate in relation to an enactment. So, for example, in R v Morris* [(1865-72) L.R. 1 C.C.R. 90] *Byles J said, 'it is a sound rule to construe a statute in conformity with the common law, except where or in so far as the statute is plainly intended to alter the course of the common law'*".

[11] The comment on this paragraph includes the following example: "*Where there is a provision in a statute requiring a document to be 'signed' by a particular person, with nothing in the subject-*

15.7 Where the legal meaning of an enactment is doubtful, subsequent legislation on the same subject may be relied on as persuasive authority as to its meaning (see §24.19).

**E: Ground 1 – Summary of the Retirement Fund's case on appeal**

16 In summary, the Judge was wrong to hold that an agent or attorney could not sign a document for the purposes of s.53(1)(b) for the following reasons:

16.1 The contrast with s.53(1)(a) and (c) was inapt and wrong given:

16.1.1 the plain meaning of s.53(1)(b) encompasses agents as "*some person who is able to declare*" a trust over land; and

16.1.2 their different purpose as substantive provisions compared with the s.53(1)(b) which is an evidential provision with different effects of non-compliance.

16.2 Under recognised principles of statutory construction, s.53(1)(b) is to be construed against the common law background and necessary implications are to be made. The common law rules of agency provide that the signature of an agent is the signature of the principal – this is, *a fortiori*, the case with an attorney.

16.3 The Judge's interpretation leads to an unprincipled distinction between different classes of agents.

**F: Ground 1 – An agent or an attorney can sign for the purposes of s.53(1)(b) LPA**

*Interpreting the text of s.53(1) LPA – distinguishing between s.53(1)(a) and (c), and s.53(1)(b)*

17 Had the Judge properly applied the principles of statutory interpretation, he would not have held that writing by an agent or attorney does not satisfy s.53(1)(b). S.53 provides as follows:

"*(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol—*

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*matter or context to indicate that personal signature is necessary, then, in accordance with the common law rule, a person may sign by the hand of another authorised for that purpose*".

*(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.*

*(2) This section does not affect the creation or operation of resulting, implied or constructive trusts."*

18 The Judge's approach to the text of s.53(1) demonstrates two related and fundamental errors.

19 First, the Judge's analysis failed to take into account a critical distinction between s.53(1)(b) and s.53(1)(a) and (c), namely that the former is expressed to be an evidential provision and the latter are both substantive provisions[12]. The purpose of s.53(1)(b) is not to specify who is, and is not, entitled to declare a valid trust, but rather how that declaration must be evidenced. It cannot, therefore, create a rule that an agent may not declare a trust on behalf of a principal.

20 Secondly, in concluding that a signature by an agent or an attorney is not sufficient to satisfy s.53(1)(b), he had particular regard (at [194]) to the different wording in s.53(1)(a) and (c), both of which provide expressly that signing may be by an agent. This raises three points:

20.1 It is not an invariable rule of statutory interpretation that an express reference to a concept in one part of a piece of legislation precludes its inclusion by necessary implication in another part of that legislation.[13]

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[12] See *Civil Fraud: Law, Practice and Procedure* (1st Ed, 2018) at §9-014; Charles Harpum, 'Property in an Electronic Age' in Elizabeth Cooke (ed), *Modern Studies in Property Law Volume 1* (Hart Publishing, 2001) at 12.

[13] See *In re Whitley Partners Limited* (1886) 32 Ch. D. 337 at 339-341. See also the discussion in *Bennion* at §§23.12-23.13 of the analogous '*expressio unius*' principle under which "*Where an Act mentions one or more things, by implication it excludes other things of the same kind*" but

20.2 The attempt to contrast s.53(1)(b) with s.53(1)(a) and (c) is inapt and wrong because the literal wording of s.53(1)(b) requires writing signed by "*some person who is able to declare*" a trust over land for the purposes of s.53(1)(b) – an agent is such a person. Had Parliament intended this provision to be restricted to the settlor, it could have used such express, specific wording. It did not do so. Notably, the express terms of s.53(1)(b) do not require writing signed personally by "*the settlor*", contrary to the suggestion in CGC's Response at para 2.

20.3 The Judge failed to take into account that s.53(1)(b) is of a wholly different nature and the wording of s.53(1)(a) and (c) are of limited, if any, relevance to its interpretation. To the extent s.53(1)(a) and (c) were relevant interpretative aides, it was material that transactions effecting substantive ownership changes in land could be executed by agents. If agents could effect the creation or disposition of interests in land[14], there is no logical reason why they would not be permitted to sign written evidence of a declaration of trust. The permissive terms of s.53(1)(a) and (c) point <u>in favour</u> of agents being able to sign writing for the purposes of s.53(1)(b).

21 The Judge noted that this was an "*open question*" and that the practitioners' textbooks do not all speak with one voice – [193]. The best analysis is the paper by Dr Charles Harpum KC (Hon), 'Property in an Electronic Age' which supports the submissions immediately above[15]:

> *"Those who say that an agent cannot make such a declaration point to the fact that in section 53(l)(a) and (c), there is express provision for the particular formal requirements to be executed by an agent who has been authorised in writing. However, both paragraphs (1)(a) and (1)(c) of section 53 require that something is done in writing, and not merely that it should be evidenced in writing. It is therefore unsurprising that there should be an express requirement that, where an agent is to carry out the transaction, he should have to be authorised in writing. In other words, the reason for the express reference to agency in those paragraphs is to require that authority should be given in writing. Section 53(1)(b) merely requires that any declaration of trust be evidenced in*

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"*There is no room for the application of this principle where some reason other than the intention to exclude certain things exists for mentioning some but not others*".

[14] See also s.54 LPA 1925.

[15] Charles Harpum, 'Property in an Electronic Age' (ibid.) at 12.

*writing. The present writer therefore agrees with the view that an agent can declare a trust of land on behalf of his principal if authorised to do so. That agent is "some person who is able to declare such a trust" within the paragraph.*"

22 CGC's Response at para 4 suggests that the Retirement Fund seeks to raise a new argument "*which argues that an agent can declare a trust of land on behalf of his principal if authorised in writing to do so*". This misinterprets the quoted passage which distinguishes written authorisation as a requirement for s.53(1)(a) and (c), not s.53(1)(b) – Dr Harpum is not saying that an agent can declare a trust of land under s.53(1)(b) only if authorised in writing to do so.

23 In any event, the same interpretation as contended for by the Retirement Fund and Dr Harpum has been expressed by other academic commentators in similar terms without expressing any requirement for written authorisation of an agent. For example, Professor Paul S. Davies and Professor Graham Virgo KC (Hon) also note the difference in wording between s.53(1)(b) compared with s.53(1)(a) and (c) but consider that s.53(1)(b), "*does provide that the signed writing may come from 'some person who is able to declare such trust', and this may include an agent. This would be a sensible, practical interpretation; indeed, it has been held that this requirement of writing in paragraph (b) might be fulfilled by the trustee who is to hold the property on trust*", for which they cite *Gardner v Rowe* (1828) 5 Russ. 258 as authority.[16]

24 The only case which is cited in CGC's response is *St Ermins Property Co Ltd v Tingay* [2002] EWHC 1673 (Ch), [2003] L&TR 6. In the course of considering whether notices under s.99(5)(a) of the Leasehold Reform, Housing and Urban Development Act 1993 could be signed by an agent, Lloyd J at [26] drew a comparison with s.53(1)(b) LPA and concluded that because s.53(1)(a) and (c) both expressly provided for writing signed by an agent, and s.53(1)(b) did not, the latter did not permit signature by an agent. This is essentially the same reasoning as the Judge gave below at [194]. However, the Court of Appeal is not bound by the judgment in *St Ermins Property Co Ltd* and it must also be treated with caution:

24.1 Lloyd J's discussion of s.53(1) was *obiter*. The *ratio* of the case concerned his interpretation of s.99(5)(a) which was a differently worded statutory provision.

[16] Paul S. Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, 2019) at 120.

24.2 It is not clear whether s.53(1)(b) was the subject of full or, indeed, any argument on this point – there is certainly no evidence that Lloyd J received the range of argument in this appeal.

24.3 The reasoning is brief and does not demonstrate proper engagement with the principles of statutory interpretation set out above.

25 All the other authorities and textbooks which consider the point are inconclusive. Some writers simply note that there is no provision for an agent to sign under s.53(1)(b) or contend that an agent cannot sign solely by reference to the same reasoning as in *St Ermins Property Co Ltd* and the Judgment below – i.e. by comparing the absence of express references to an agent in s.53(1)(b) with the references in s.53(1)(a) and (b).[17] This reasoning is flawed for the reasons developed in this skeleton. Several writers note that, by such reasoning, it has generally only been "*assumed*" or "*considered*" that an agent cannot sign – however, against that unreasoned assumption, they go on to question why an authorised agent could not be regarded as "*some person who is able to declare*" a trust over land as the Retirement Fund contends above.[18]

26 Some writers cite *Tierney v Wood* (1854) 19 Beav. 330[19] in which property was already held on trust. Sir John Romilly MR held that, under s.7 of the Statute of Frauds 1677, the writing had to be signed by the owner of the beneficial interest, i.e. the person making the new trust; the signature of the original trustee was not sufficient.[20] However, that is a distinct proposition from whether an agent is "*some person who is able to declare*" a trust over land. Accepting the proposition that a trustee is not able, simply because of that status, to declare a trust over

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[17] *Lewin on Trusts* (20th Ed, 2020) at §§3-009 and 3-017, fn 96; Thomas Grant QC and David Mumford QC, *Civil Fraud: Law, Practice & Procedure* (2018) at §9-014, fn 24.

[18] *Underhill and Hayton: Law Relating to Trusts and Trustees* (20th Ed, 2022) at Ch 3, §14-15; Geraint Thomas and Alastair Hudson, *The Law of Trusts* (2nd edn, 2010) at §5.11, fn 38; T.G. Youdan, 'Formalities for Trusts of Land, and the Doctrine in *Rochefoucauld v. Boustead*' [1984] CLJ 43(2) 306 at 316, fn 51.

[19] Some also cite *Kronheim v Johnson* (1877) 7 Ch D 60 in which Fry J simply followed *Tierney*.

[20] It has been noted that, even in *Tierney*, this "*point was not crucial*": Jamie Glister and James Lee, *Hanbury & Martin: Modern Equity* (23rd Ed, 2024) at para 6-004, fn 12.

land[21] does not mean, as a matter of principle, that the agent and attorney authorised to act on behalf of the person with a beneficial interest is not able to declare such a trust. Only one textbook appears to cite *Tierney* expressly for both propositions.[22] Given the absence of detailed discussion on the point, the preferable view is that the principle in *Tierney* did not decide, and does not by itself preclude, the point as to whether an agent is "*some person who is able to declare*" a trust over land.[23]

27 CGC's Response at para 2 suggests that their interpretation of s.53(1)(b) is "*precisely the same as the way courts have interpreted other statutory provisions which address signature by an agent*" and cite two cases to that effect. The first concerns s.99(5)(a) of the Leasehold Reform, Housing and Urban Development Act 1993[24]. The second concerns s.6 of the Statute of Frauds Amendment Act 1828.[25] Such comparisons should be treated with minimal weight:

27.1 These cases concerned different legislation, with different wording, passed for different purposes from s.53(1)(b). The fact that some other acts may exclude the possibility of signing by an agent is neither here nor there. Each statute must ultimately be construed on its own terms: *In re Whitley Partners Limited* (1886) 32 Ch. D. 337 at 339-341.

27.2 Both s.99(5)(a) and s.6 are substantive provisions akin to s.53(1)(a) and (c) whereas s.53(1)(b) is an evidential provision. Any cases which consider whether an agent can satisfy a substantive requirement for signed writing, as opposed to an evidential requirement, must be treated with caution when attempting to draw comparisons with s.53(1)(b) – given their different purposes, one is not comparing like for like.

*Legislative intention, purpose and effect of s.53(1)(b)*

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[21] This proposition itself is disputed – see the discussion in Jamie Glister and James Lee, *Hanbury & Martin: Modern Equity* (23rd Ed, 2024) at para 6-004.

[22] Martin Dixon, Janet Bignell KC and Nicholas Hopkins, *Megarry & Wade: The Law of Real Property* (10th edn, 2024) at §§10-042, fn 317 and §10-049.

[23] See T.G. Youdan (1984) (ibid.) at 316, fn 51.

[24] In *Cascades and Quayside Ltd v Cascades Freehold Ltd* [2008] L&TR 23 the Court of Appeal held that notices under s.99(5)(a) excluded agents, following *St Ermins Property Co Ltd*.

[25] *Banbury v Bank of Montreal* [1918] AC 626 in which the House of Lords held that signed writing under s.6 could not be made by an agent.

28 Aside from the plain meaning of the legislative text set out at §§19-20 above, the established interpretation of s.53(1)(b) as evidential only is underscored both by: (1) its distinctive effect, namely unenforceability rather than invalidity; and (2) by the line of cases providing that the signed writing need not be contemporaneous with the declaration of trust in question.[26] The reason for this is that the purpose of s.53(1)(b) is to prevent fraud. S.53(1)(b) protects against fraud on the owner of property in question by persons claiming to be beneficially entitled. This is why the effect of non-compliance is unenforceability and not invalidity; a trustee would be expected to abide by the terms of the trust in any event.[27] The ability of an owner to act by a duly authorised agent is entirely consistent with that purpose.[28]

29 This contrasts with s.53(1)(a) and s.53(1)(c) which prescribe the substantive requirements for the creation or disposal of an interest in land and the disposition of an equitable interest. The fact that s.53(1)(a) and (c) more precisely define the persons who can effect a relevant transfer arises from the substantive nature of the provisions.

*Common law rules of agency and powers of attorney*

30 As a matter of common law, the types of acts which may be done through an agent are summarised in Article 6 at §2-018 in *Bowstead & Reynolds on Agency* (23rd Ed, 2023):

> *"An agent may execute a deed, or do any other act on behalf of the principal, which the principal might personally execute, make or do; except for the purpose of executing a right, privilege or power conferred, or of performing a duty imposed, on the principal personally, the exercise or performance of which requires discretion or special personal skill, or for the purpose of doing an act which the principal is required, by or pursuant to any statute or other relevant rule, to do in person."*

31 Thus, at common law a person sufficiently 'signs' a document if it is signed in his name and with his authority by somebody else, whether stating '*per procurationem*' or not: *Bowstead*

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[26] See for example *Gardner v Rowe* (1828) 5 Russ. 258 where the wording post-dated the trustee's bankruptcy. In this respect, the Retirement Fund agrees with the Judge's specific analysis on this point below at [208]-[209], citing *Taylor v Taylor* [2017] EWHC 1080 Ch at [50].

[27] Which is why the court ordered an account as between trustee and *cestui que* trust in *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 212.

[28] *Gardner v Rowe* (1828) 5 Russ. 258.

at §2-022; *Newbold v Coal Authority* [2013] EWCA Civ 584; [2014] 1 WLR 1288 at [58] per Sir Stanley Burnton. The exact form of the signature should not be of particular consequence; the crucial question is whether the signature by the agent is permissible: *Bowstead* at §2-023.[29]

32 In *France v Dutton* [1891] 2 QB 208 the issue was whether costs were recoverable in respect of a document signed by a solicitor's agent. Lord Coleridge CJ held:

> *"The question is whether any words in the Act of Parliament make it necessary that this particular act should be done by the individual person who is represented on the face of the document to have done it. I agree with the decision of the Queen's Bench in Reg. v. Justices of Kent (2) [The Queen v The Justices of Kent (1872-73) L.R. 8 Q.B. 305], in which Blackburn, J., explained that at common law, where a person authorizes another to sign for him, the signature of the person so signing is the signature of the person authorizing it; nevertheless there may be cases in which a statute may require personal signature."*

33 In respect of powers of attorney, the common law position that an agent can do anything on behalf of the donor which can lawfully be done by an attorney is replicated in s.10 Powers of Attorney Act 1971 and, for a trustee's attorney, in s.10 Trustee Delegation Act 1999.

34 Whether, in any case, a personal signature is required is, of course, a matter of statutory interpretation but such an interpretation will not be made lightly given the common law principle that an agent and an attorney can do all acts that a principal can lawfully do. This operates as a presumption in the construction of statutes: *Bowstead* at §2-019. It is established that statutes requiring a signature to be given personally, not by an agent, are "*exceptional*" – *Northwood Solihull Ltd v Fearn* [2022] EWCA Civ 40, [2022] 1 WLR 1661 at [30].

35 In *St Ermins Property Co Ltd v Tingay*, Lloyd J observed at [8] that this general proposition would only be displaced if the statutory provision prescribes that the thing to be done "*must be done personally and not by an agent*" or the nature of the thing is such that it requires personal skill or discretion and cannot be delegated. Neither exception applies to s.53(1)(b).

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[29] See *Prempeh v Lakhany* [2020] EWCA Civ; [2021] 1 WLR 1055; also s7(1) of the Powers of Attorney Act 1971.

36 The grammatical meaning and effect of s.53(1)(b) contended for above is supported when read against the context of the common law. It is also notable that neither s.10 Powers of Attorney Act 1971 nor s.10 Trustee Delegation Act 1999 carves out an exception for s.53(1)(b), which one might have expected had Parliament understood there to have been a previously clear intention that s.53(1)(b) excluded agents and attorneys from its scope.

37 The ability of an agent to sign the written evidence is also consistent with the proposition that the terms of the trust may be collected from a document which is not signed by the settlor, provided that the document can be clearly connected with, and is referred to in, the document which is signed: *Forster v Hale* (1798) Ves. Jr 696 at 707; *Ong v Ping* [2015] EWHC 1742 (Ch) at [65]. If s.53(1)(b) can be satisfied by the signed writing cross-referring to unsigned documents for the purposes of establishing the terms of the trust, it logically ought to be satisfied by the signed writing cross-referring to documents, such as a power of attorney, for the purposes of establishing if the signor is a person who is able to declare a trust. This point is closely linked to the point made at §28 above that signed writing need not be contemporaneous with the declaration of trust in question and follows from the distinctive nature of s.53(1)(b) as an evidential provision, not a substantive provision.

38 The congruence between s.53(1)(b) and the principles of agency is also supported by history. Although the LPA was in part an amending and, in part, a consolidating act,[30] the derivation of s.53(1)(b) from s.7 of the Statute of Frauds 1677 is of relevance. The 1677 Statute commenced with a recital that envisages it permitting the writing to be signed by agents without limitation. That recital referred to "…*and* ***signed by the Parties so making or creating the same, or their Agents*** *thereunto lawfully authorized by Writing…*" (emphasis added). There is no wording in s.53(1)(b) which would otherwise prohibit agents from satisfying the signed writing requirement under s.53(1)(b) – either expressly or by necessary implication.

*Consequences of the Judgment – different classes of agents of corporate beneficial owners*

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[30] The LPA 1925 was part consolidatory and part amending and so the principles applicable to consolidatory statutes do not apply (see *Grey v Inland Revenue Commissioners* [1960] AC 1 per Viscount Simonds at pages 13-15 and per Lord Radcliffe at page 17). It is relevant, however, that the LPA 1925 was treated for the purposes of passing the legislation as if it were consolidatory and so subject to minimal scrutiny. It has been noted that the LPA 1925 contains a number of drafting errors and inconsistencies: see Roche: *Historiography and the Law of Property Act 1925: the return of Frankenstein* [2018] CLJ 600-629.

39 The Judge's interpretation overlooks the fact that, as an artificial legal construct, a company is incapable of doing any physical act itself and can *only* sign by an agent.[31] The signature of a director is valid only because the director is an authorised agent of the company, and a company cannot sign (or affix its seal) except through the action of an agent. In the case of companies registered under the laws of England and Wales, the powers of the company are exercised by its directors collectively/its board.[32] That board can, subject to any limitations in its constitution, delegate powers to a committee of directors (which can be comprised of a sole director) or appoint attorneys to exercise powers conferred on directors.[33]

40 As the Judge held at [197] "*A corporate body acts by its officers or, as it was put by counsel for NIOC, the alter ego of a corporate body is its board of directors. Thus, a signature by a director of a company would be a signature by "some person who is able to declare such trust"*." Caselaw permits any director to sign written evidence of a declaration of trust.[34]

41 Thus the construction of s.53(1)(b) adopted by the Judge gives rise to an unprincipled and unjustified distinction between different types of agents. Directors of a corporate body may sign on behalf of a company but other agents may not. Further, it is not difficult to envisage a host of other commercial arrangements whereby a principal may wish to declare a trust or manifest such a declaration through an agent.

42 CGC's Response at para 3 seeks to rely on what the Judge decided at [197] as distinguishing the officers or directors of a company from other agents for the purposes of s.53(1)(b). It is true that an officer or director, whilst also an agent, is distinct from other agents. However, it is well-established that "*in relation to duties that result from drafting (such as those created by statutes or a contract) that are directed at owners of businesses, including companies, it is always a question of construction as to whose acts, omissions and states of mind the drafter intended be attributed to the owner*": *Bowstead* at §1-028. There is nothing in the wording,

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[31] Contrary to CGC's Response at para 3 **{CB/21/p320}**, this is the first of the three alternative arguments made by NIOC under its Ground 2 – see § 34 of NIOC's Appeal Skeleton Argument **{CB/6/p53}**

[32] See Companies (Model Articles) Regulations 2008 (SI 2008/3229) Schedule, 1 Arts 3 & 7.

[33] See Companies (Model Articles) Regulations 2008 (SI 2008/3229) Schedule 1, Arts 5 & 6.

[34] See, for example, *Simpson v Simpson* [2005] EWHC 2098 (Ch) at [64, 65 & 79] in which the writing in 1981 was signed by Harry, one of two directors of the corporate settlor; see too *Schechter v Revenue and Customs* [2017] UKFTT 189 (TC) at [133].

purpose or policy of s.53(1)(b) that provides any principled justification for why officers or directors may manifest and prove a declaration of trust by signed writing, but not other agents.

43 Moreover, the case of *UBAF Ltd v European American Banking Corp* [1984] QB 713 demonstrates that the Court of Appeal has previously been untroubled by the need to distinguish between two classes of agent in this area. It held at 724F-725A as follows "*Since a company, not being a physical entity, can only act in relation to the outside world by its agents, no one nowadays would question that the signature of the duly authorised agent of the company, acting in the course of the company's business, is the signature of the company … We do not, therefore, find any impediment in authority against deciding, and we think that it should now be decided, that the signature on behalf of a company of its duly authorised agent acting within the scope of his authority is, for the purpose of section 6 of Lord Tenterden's Act, the signature of the company*". If it decided any agent was sufficient in the context of a substantive provision, that approach applies *a fortiori* to an evidential provision.

## F: Conclusion

44 As indicated at §14 above, success on Ground 1 (or any of NIOC's Grounds 1-3) would have a determinative effect on the outcome. If NIOC did not beneficially own NIOC House as at the date of the August Transfer, there can be no objection to the transfer as there would be no fraud to the creditors and no basis for a claim under s.423 IA 1986 or under ss.1-2 COA 1979. Put another way, were the transfer of legal title to be unwound, then NIOC would still hold NIOC House on trust for the Retirement Fund.

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