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

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

Filed on 4 December 2024
Re-Filed on 2 June 2025

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A: Introduction

1. This is the supplementary skeleton of the Retirement Fund, filed in response to CGC's respondent's notice ("**RN**") and skeleton argument dated 25 October 2024. The accompanying letter contains the Retirement Fund's request for permission in accordance with CPR PD 52C, para 32. This skeleton argument adopts the same defined terms as the Retirement Fund's Replacement Appeal Skeleton, re-filed on 11 November 2024.

2. The RN raises three points, which this supplementary skeleton responds to in reverse order:

   2.1. RN Point 2.2: whether any agent or attorney purporting to declare a trust on behalf of NIOC had authority to do so (CGC alleging that there was no such authority).

   2.2. RN Point 2.1: whether (as CGC alleges) the Judge erred in law in concluding that the Mortgage Documents declared an English law express trust.

   2.3. RN Point 1: consequences of non-compliance with s.53(1)(b) LPA 1925.

3. RN Point 2.2 concerns acutely fact sensitive issues about the scope of authority advanced on appeal but not raised at trial, despite the execution of relevant documents by NIOC's agents and attorneys being a known part of the Appellants' respective cases – it is too late for CGC to raise these issues now. RN Point 2.1 consists of an attempt by CGC to relitigate the Judge's factual findings and identify omissions and inconsistencies which have no basis in law or fact. As for RN Point 1, CGC contends that the consequence of non-compliance is voidness and invalidity, as opposed to unenforceability, raising detailed points of principle, case law and academic commentary not advanced in their legal and factual case below but which, in any event, do not accurately reflect the proper, well-established state of the law.

B: RN Point 2.2 – was any agent/attorney authorised to declare a trust on NIOC's behalf?

4. CGC's RN Point 2.2 and skeleton argument at §§12(b), 16(g), 17, 108 and 110-113 criticise the Judge for failing to consider whether any of the agents or attorneys whom he found to have declared a trust on NIOC's behalf in favour of the Retirement Fund had authority to do so. CGC fails to identify that this was never a point which was put in dispute at trial by CGC.

5. First, the documents in question which the Judge held to be a clear manifestation of an intention to create a trust were clearly raised in the pleaded cases as being among the

documents which they alleged declared the express trust, as was acknowledged by CGC; the identities of the persons executing them (NTT and Eversheds) was clear from the documents.[1]

6. Secondly, §12 of the Agreed List of Common Ground and Issues set out the following compendious list of issues on the English express trust law case. Notably, it did not identify the issue of whether NTT and Eversheds were authorised agents **{SB/50B/495.57}**:

> *"(a) Whether there was a valid express trust between NIOC and Retirement Fund in respect of NIOC House at the time of the August Transfer?*
>
> *(b) Whether (as a matter of law) it is necessary in order for a trust to be valid that s.53(1)(b) of the Law of Property Act be satisfied? [CGC notes this has not been pleaded; NIOC's position is that this is a point of law that has been fairly taken in its Skeleton]*
>
> *(c) If it is necessary as a matter of law, whether the requirements of s.53(1)(b) the Law of Property Act 1925 were in fact satisfied?*[21] *…*
>
> [2] *NIOC's Amended Defence, para 86(9), (10)* ***{A/2/53}****; Reply to NIOC's Amended Defence, paras 28B and 28C* ***{A/4/131}****; Retirement Fund's Amended Defence, para 32(iii)(c)(D)–(F)* ***{A/3/95}****; Reply to Retirement Fund's Amended Defence, para 7(2)(c)* ***{A/5/144}****.*"

7. Thirdly, the issue relating to agency which fell to be determined was limited to the question of the statutory construction of s.53(1)(b), namely whether or not an agent can provide the requisite signed writing for the purposes of satisfying s.53(1)(b). See:

   7.1. NIOC's trial skeleton argument at §§117-119, noting that this appears to be an open question of law (a point which the Judge noted at [193]) **{SB/50/488-489}**.

   7.2. CGC's trial skeleton at §130 which asserted the signature by an agent will not suffice for the purposes of s.53(1)(b) **{SB/49/434}**.

8. Fourthly, after witness and expert evidence, CGC produced a nine-page document entitled "*The Findings Invited by the Claimant*" **{SB/52A/561.1-561.9}**. This sets out all the facts

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[1] See, e.g.: NIOC's Amended Defence dated 17 November 2023 at §86(9)(x) and (xi) **{CB/20/312}**; Legal Mortgage relating to NIOC House dated 25 September 2019 **{SB/40/273-320}**; Certificate of Title dated 9 January 2020 **{SB/44/334-371}**. See also CGC's Amended Reply to NIOC's Amended Defence dated 15 November 2023 at §§28B-28C **{SB/1/33-34}** and Response dated 15 December 2023 to NIOC's RFI dated 1 December 2023 at para 3(c)(iv) **{SB/2A/70.4}**.

which CGC invited the Judge to make, e.g. "*NIOC House was purchased in 1975 with NIOC's money (or at least not Retirement Fund's money)*". CGC did not invite the Court to make a finding that neither NTT nor Eversheds was an authorised agent. It is too late to do so now.

9. Fifthly, and consistent with this document, CGC's response to the 25 September 2019 mortgage deed ("**2019 Mortgage Deed**") (set out at [189] of the judgment) focused on the intention behind clause 1.4, not NTT's authority to enter into it or to declare a trust.

10. Sixthly, more general issues of agency were referenced or alluded to in CGC's trial skeleton argument at §32 **{SB/49/403}**, NIOC's trial skeleton argument at §§36 and 45 **{SB/50/456, 458-459}**, and the Retirement Fund's trial skeleton argument at §§58 and 63 **{SB/50A/495.20-495.21}**.

11. An appellate court will be cautious about allowing a new point to be raised on appeal that was not raised at first instance (*Singh v Dass* [2019] EWCA Civ 360 at [16]). Generally, a new point on appeal will not be permitted to be raised if it: (a) would necessitate new evidence; or (b) had it been run below, it would have resulted in the trial being conducted differently with regards to the evidence at the trial. The comments of Lloyd LJ in *Mullarkey v Broad* [2009] EWCA Civ 2 at [30] and [49] are instructive, as is [29] where he emphasised that granting permission to appeal on grounds which include new points only shows that there was thought to be a reasonable prospect of success; it does not amount to a grant of permission, binding on all parties, to rely on the new point. These principles apply *a fortiori* to a respondent such as CGC where there is no permission filter for a respondent's notice (that is not a cross-appeal) which raises new points for the first time on appeal or seeks to challenge factual findings.

12. The extent of the agents' or attorneys' authority is an acutely fact sensitive question; the Judge clearly made an implied finding that the agents did have the required authority to declare a trust. In *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337, [2019] 4 WLR 146 at [27] Snowden J identified a spectrum of cases where an appellant seeks to raise a new point:

> *"At one end of the spectrum are cases … in which there has been a full trial involving live evidence and cross-examination in the lower court, and there is an attempt to raise a new point on appeal which, had it been taken at the trial, might have changed the course of the evidence given at trial, and/or which would require further factual inquiry. In such a case, the potential prejudice to the opposing party is likely to be significant, and the policy arguments in favour of finality in litigation carry great weight."*

13. This is such a case. Had CGC put the matter of agents' or attorneys' authority in issue at trial, this would have informed the evidence which was called and the way in which both Appellants advanced their case. This is the purpose of statements of case. As such, the prejudice to the Retirement Fund in allowing CGC to run a new factual case on appeal would be very significant. It is notable that Males LJ refused to grant the Appellants permission on additional grounds **{CB/13/160}**, relying on CGC's statements filed under CPR PD 52C, para 19. For example, §5 of CGC's response to the Retirement Fund's application for permission submitted that the Retirement Fund's Ground 2 "*should be refused as it seeks to raise a new unpleaded case … not advanced at trial and not the subject of factual evidence at trial that is therefore too late to advance … It would also raise questions of Iranian law … which was not pleaded and was not the subject of expert evidence and is therefore too late*" **{CB/22/326}**.[2] CGC's and Males LJ's reasoning applies with equal force to RN Point 2.2 here.

C: RN Point 2.1 – did the Mortgage Documents declare an English law express trust?

Summary of the parties' respective cases on declarations of an English law express trust

14. RN Point 2.1 is developed in CGC's skeleton at §§13a, 14-16, 90-91 and 93-109 and seeks to challenge the Judge's findings at [185]-[191] that both the 2019 Mortgage Deed and the 2020 Certificate of Title (collectively "**the Mortgage Documents**") constituted valid declarations of trust. The essence of CGC's argument is as follows:

    14.1. The relevant legal test is whether, objectively, NIOC should be understood to have manifested a "*present intention*" (CGC's emphasis) to create an English law trust.

    14.2. Although the Judge correctly set out the legal test at [159]-[160], he erred when applying the test to the facts in question by failing to have regard to the relevant background circumstances, including the findings of fact he had previously made, and focussing on the text of the Mortgage Documents in isolation.

    14.3. RN Point 2.1 and CGC's skeleton argument at §§16a) – h) and §§102-109[3] identify eight matters which the Judge is alleged to have ignored in undertaking his analysis.

[2] Similar points were made by CGC at §7 of the response to the Retirement Fund's application **{CB/22/326-327}** and §§5 and 10 of the response to NIOC's application **{CB/21/321-322}**.

[3] These eight matters, whilst not framed identically in both places, appear materially the same.

15. In reality, the eight matters which CGC contends the Judge ignored fall into four categories:

    15.1. The fact that NIOC's primary pleaded and evidential case at trial was one of Iranian law and the Judge's finding that NIOC was under a mistaken belief that NIOC House was subject to an *amanat* (RN Point 2 at §(2); skeleton argument at §103).

    15.2. The mistaken belief held by NIOC, its agent and advisors (including Cathcarts) that the Retirement Fund was already the beneficial owner of NIOC House and the consequent improbability that NIOC intended to declare a trust by means of the Mortgage Documents (RN Point 2 at §§(1) and (3)-(6); skeleton argument at §§102 and 104-107).

    15.3. The apparent lack of authority on the part of NTT and Eversheds as NIOC's agents/attorneys (as applicable) (RN Point 2 at §(7); skeleton argument at §108).

    15.4. The fact that NIOC never identified the Mortgage Documents as the relevant declaration of trust during the relevant time period (RN Point 2 at §(8); skeleton argument at §109).

16. In summary, the Retirement Fund's position is as follows:

    16.1. The Judge correctly identified the legal test, a point which CGC does not challenge.

    16.2. The Judge had the factual background in mind at all points in his judgment, evident in the factual findings he recorded on which CGC relies.

    16.3. It is implausible to suggest that he disregarded this background and his comprehensive findings of fact when he came to assess the objective effect of the Mortgage Documents.

    16.4. CGC implicitly accepts that, read at face value, the wording of the Mortgage Documents manifests and evidences an (objective) intention to create a trust.

    16.5. This being so, the combination of the Judge's self-direction, the actual text of the Mortgage Documents and the context which the Judge well had in mind means that CGC's challenges to the declarations of trust found by the Judge are misconceived.

    16.6. In particular, the fact that NIOC was under the impression that there was a pre-existing trust is no bar to a declaration of trust, whether as a matter of law or fact.

A "present" intention to declare a trust does not undermine the need for an objective assessment

17. As to the legal test, CGC now places great emphasis on the word "*present*" intention to declare a trust, relying upon several authorities. This is despite the fact that:

    17.1. Whilst CGC's trial skeleton argument at §128-129 referred to a "*present irrevocable declaration of trust*", the need for a "*present*" intention to declare a trust was not part of its own formulation of the test to be applied, put forward in the following sentences "*The test is whether a reasonable person, with all the background knowledge available to the settlor, would read the written document relied on as evidencing the creation of trust*" and "*a trust should be created (so-called certainty of words) i.e. an intention to create a legally enforceable relationship involving trust duties*" **{SB/49/433-434}**.

    17.2. CGC concedes that the objective legal test was accurately stated by the Judge at [159]-[160], despite his not referring to a "*present*" intention to declare a trust.[4]

    17.3. The Judge's application of the test at [178], [180], [184] and [188] all adopted wording materially the same as the formulation put forward in CGC's trial skeleton argument, without reference to the need for a "*present*" intention to declare a trust.

18. Moreover, CGC's skeleton argument at §94 may also be read as criticising the Judge's statement of the test for "*not refer[ring] to the background circumstances in terms*". However, CGC recognises at fn 90 that this has no force where the Judge noted expressly at [162] that "*whether there has been a declaration of trust depends upon a consideration of the language used having regard to all the circumstances of the case*" and at [178] considered certainty of intention by reference to "*the reasonable person with knowledge of the background*".

19. As for whether there needs to be a "*present*" intention to declare a trust, as opposed to just an "*intention*", the reality is that the authorities vary. Some talk simply of an intention, some of a "*present intention*", others of a "*present irrevocable declaration*". However framed, the adjective "*present*" is simply intended to refer to the uncontroversial requirement that the three certainties necessary to declare a trust are all satisfied at a single point in time at which the declaration of trust establishes the trust relationship.

[4] See RN Point 2.1 and CGC's skeleton argument at §§16(j) and 93-94, reflecting the unchallenged submission made by NIOC in its trial skeleton at §§106-107 **{SB/50/483}**.

20. Importantly, CGC's rationale for focusing on a "*present*" intention is clearly designed to support its argument that a purported settlor's continuing expression of a mistaken belief as to an already existing trust necessarily precludes a finding of any intention to create a trust subsequently. There are two points to make about this. First, in substance, CGC's focus on a "*present*" intention is a proxy for importing a subjective approach. Such an approach is simply wrong in law, as made clear by Briggs LJ in *Bellis v Challinor* [2015] EWCA Civ 59 at [59]:

> *"A person creates a trust by his words or conduct, not by his innermost thoughts. His subjective intentions are, as Lord Millett said, irrelevant … in the trust context the search is for the objective intention of the alleged settlor."*

21. Similarly, CGC's skeleton argument at §§16i) and 93 only cites a partial quote from *In re Schebsman, Deceased* [1944] Ch 83 at 104 per du Parcq LJ: "*It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jordain talked prose, without knowing it but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the court ought not to be astute to discover indications of such an intention*" (emphasis added to words omitted by CGC).

22. Secondly, even on a subjective analysis, CGC attempts to draw a distinction between beliefs and intentions that is unfounded in principle, authority and human experience. The settlor need not understand that his words or conduct have created a trust if they have this effect on their proper legal construction; nor is technical expression of language necessary.[5] An "*intention*" to declare a trust is therefore not a complex concept to be interrogated with specificity afforded by the benefit of hindsight – it amounts to no more than someone who 'wants' a state of affairs that the common law would recognise as a trust. Moreover, it is artificial to divorce the settlor's state of mind into beliefs and intentions when the former inevitably informs and influences the latter. It is notable that the Court of Appeal in *Paul v Constance* [1977] 1 WLR 527 at 532B-C considered the words "*This money is as much yours as mine*" sufficient to express the requisite intention to declare a trust, notwithstanding the fact that those words were both the declaration of trust and expressed a belief as to an existing state of affairs that was not legally a trust prior to the declaration.[6]

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[5] See: *Snell's Equity* (34th ed, Sweet & Maxwell 2019) at 22-013; *Underhill and Hayton: Law Relating to Trusts and Trustees* (20th Ed, 2022) at 10.1 and 10.3.

[6] *Paul v Constance* [1977] 1 WLR 527 at 532B-C.

The factual matrix underpinning the points the Judge is alleged to have ignored

23. As for the factual matrix, the Judge addressed the chronology of the case at [40]-[148] and set out in more detail at [185]-[191] the chronology of the Mortgage Documents from September 2019 to January 2020 as part of his finding that the Mortgage Deed was objectively a clear manifestation of an intention to create a trust. With regard to CGC's four categories of matters supposedly ignored, set out at §15 above, the following matters are of note.

24. On CGC's first category of matters, the relevance of Iranian law, the Judge noted at [56] that NIOC's board of supervisors had expressed the view in a meeting on 15 December 1979 that NIOC House "*is the property of the Pension Fund*" but went on to find at [60] that "*the most probable explanation for the building being described "as the property of the Pension Fund" is that this reflected a view formed by the Board, some four years after the purchase, without fully considering the legal impact of the fact that the purchase had been made by NIOC with monies borrowed from the Fund and so belonging to NIOC. That view, on the basis of the expert opinion before this court, was a mistaken view*" [emphasis added]. This finding was the main basis for dismissing the Appellants' Iranian law case at [150]-[157].

25. Against this background, the Judge explained his concern at [160] as to whether NIOC, an Iranian entity where Iranian law does not recognise a distinction between legal and beneficial ownership, could have declared a trust at all. Having been referred to *Akers v Samba Financial Group* [2017] UKSC 6, [2017] AC 424 (where it was confirmed that, in the eyes of English law, a trust may be created, exist and be enforceable in respect of assets located in a jurisdiction the law of which does not recognise trusts in any form) the Judge held at [162]:

> "*I accept that for both of those reasons there can be a declaration of trust by an Iranian entity over property in this jurisdiction notwithstanding that Iranian law does not recognise a distinction between legal and beneficial ownership. However, whether there has been a declaration of trust depends upon a consideration of the language used having regard to all the circumstances of the case. I accept the submission of counsel for CGC that one of those circumstances must be the provisions of the law of Iran with which the Iranian entity must be regarded as familiar. However, the weight to be given to that circumstance will depend upon the clarity of the language – the more clearly that the language appears to declare a trust the less significant will be the law of Iran, especially where, as in the present case, the asset in question is within this jurisdiction.*"

26. The Judge's approach is legally and factually unimpeachable and disposes of CGC's point at §16b) and §103. In short, he had full regard to the Iranian law aspect and NIOC's historic mistaken belief that NIOC House was subject to an *amanat* which is to be considered alongside NIOC's (mis-)understanding that NIOC House was already subject to a trust.

27. Turning to CGC's second category of points, the Judge made frequent references to the mistaken belief that there was a trust prior to 25 September 2019. See e.g.:

    27.1. At [97] – [104] the Judge records events of 2014 including the belief of NIOC, the Retirement Fund, NTT and Cathcarts that NIOC held NIOC House on trust (whether as "*Custodian Trustee*" or otherwise). See in particular:

        27.1.1. [97] "*Based on the available documentation and records, the Funds' ownership on the "NIOC House" building is definite and undeniable; one of the most essential of these documents is the "Trust Deed" which is available with the Funds' lawyer, Mr.Cath Carts*." [sic]

        27.1.2. The Judge's acceptance at [99] that this "*confused*" letter derived from a misunderstanding of advice from Cathcarts.

        27.1.3. [104] "*… on 18 March 2014, Cathcarts responded, reiterating that NIOC held NIOC House on trust*."

    27.2. At [108] the Judge set out Mr Cathcart's email of 18 June 2018 stating, "*I have been dealing with this property since the early 1980s" and that "NIOC holds, and has always held, the property on trust for the Pension Fund*".

    27.3. At [109] the Judge recorded Mr Cathcart's advice was that the key "*was to establish that NIOC was only ever a trustee*".

    27.4. At [117] the Judge notes events post-25 September 2019: "*On 29 November 2019 Eversheds wrote to the Land Registry saying that "as the full amount of the purchase price had been paid by the Pension Fund, then the beneficial ownership transferred to the Pension Funds, Savings and Staff Welfare of Oil Industry, for the benefit of the employees". However, this was incorrect. NIOC had borrowed the purchase price from the Funds and agreed to pay interest of 9%*".

27.5. The entirety of [177]-[184] (entitled "*Suggested declarations of trust before 25 September 2019*") is a consideration of purported – but ineffective – declarations of trust when, on the Judge's finding, the Retirement Fund did not have legal personality and, by definition, the declarations were made on a mistaken basis.

28. These references to NIOC's mistaken belief show that the Judge certainly did not ignore this part of the factual background which, for the reasons given above, does not necessarily preclude a finding of an intention to declare a trust, either in law or in fact. There is therefore nothing inconsistent between these findings and the Judge's findings at [185]-[191] that the Mortgage Documents were, objectively, a clear manifestation of an intention to create a trust.

29. CGC's third category of points concerns the authority of NTT and Eversheds to declare a trust on NIOC's behalf. That is the subject of RN Point 2.2 and is addressed below.

30. On CGC's fourth category of points, the fact that the Mortgage Deed was never presented to the Land Registry as the trust deed is a small part of the background but one to which the Judge had regard in any event: see [117].

31. The above background was the context for CGC's submissions recorded accurately at [189]. The Judge's answer to each of the four categories raised on behalf of CGC is individually and collectively a clear and comprehensive scrutiny of the objective meaning of the relevant words of the Mortgage Document against the factual background. The reality is that the Judge had made detailed and numerous findings as to the intention of all relevant parties. Accordingly:

31.1. He did not fail to apply the relevant legal background correctly (this is common ground).

31.2. He did not ignore any relevant factual background – he had the nuances of the case well in mind including the facts that NIOC is an Iranian entity and all attempts to declare a trust prior to 25 September 2019 were based on a mistaken belief and ineffective.

31.3. He did not misconstrue anything (it not being clear what he is alleged to have misconstrued and how).

Further points by way of analogy

32. Further or alternatively, by way of analogy the Retirement Fund relies upon the fact that a mistake as to the current state of affairs does not prevent the court from exercising its equitable

jurisdiction to aid the defective exercise of a power vested in a trustee, whether he thought the power had been exercised previously or not. There are two relevant principles.

33. The first is the principle set out by Scott J in *Davis v Richards and Wallington Industries Ltd* [1990] 1 WLR 1511 at 1530F-H that the court will impute to a disponor the intention to exercise a power which is necessary in order to achieve the intended disposition.

34. The second, and more pertinent analogy here, is the separate but related principle in *Bas Trust Corporation Ltd and Goyet v MF* [2012] JRC 081 (also known as *re Shinorvic* or the *Shinorvic Trust* case), decided by a Bailiff of the Royal Court of Jersey, sitting with Jurats. One of the issues in that case was whether an individual, Mrs B, was validly added as a beneficiary of the trust in exercise of a power reserved to the settlor to do so by instrument. The settlor purported to do so by deed in 1990, but his signature was not validly witnessed and so it was not an 'instrument' as defined in the trust deed. A later 1998 deed, which was validly executed, was expressed to be supplemental to the trust and to the 1990 deed "*in terms of which [Mrs B] was added to the class of beneficiaries*". The Court held, albeit *obiter*,[7] at [76]-[77] that an intention in 1998 to exercise the power to appoint Mrs B could be imputed to the settlor:

> *"76. … where there is an express reference to the power in the recital and positive evidence that the settlor had intended to exercise that power in the document to which he refers in the recital. The Court is merely treating as done what was clearly intended by the settlor to have been done in 1990 and which has been confirmed as having been done by him by means of a duly executed instrument in 1998. If it is acceptable for equity to impute an intention in the necessity cases, it seems to us equally, if not more acceptable, to impute a similar intention in a case such as the present."* [emphases in the original]

35. *Re Shinorvic* was considered in *Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530 (Ch), [2016] Pens LR 193.[8] That case concerned the validity of various deeds of amendment for a pension scheme arising out of the uncertainty as to whether and, if so, when company A had been replaced by company B as principal employer. Timothy Fancourt QC at [112] identified the specific relevant issue as being whether an intended but ineffective disposition made by a

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[7] See [59]. As was noted in *Shannan v Viavi Solutions UK Ltd* [2016] EWHC 1530 (Ch), [2016] Pens LR 193 at [114], the *re Shinorvic* decision "*is carefully and closely reasoned, with the benefit of opinions from very experienced English Counsel and submissions from the Jersey advocates*".

[8] Upheld on appeal without referring to this point: [2018] EWCA Civ 681, [2018] Pens LR 11.

legally invalid deed (which was mistakenly believed to be valid) could subsequently be given effect by a subsequent valid deed whose recitals mentioned the disposition in question.

36. The Deputy Judge noted at [113] that this "*raises a question of law as to the circumstances in which the law will impute the exercise of a power that could have been exercised but that was not in terms exercised*". He further noted this was closely related to the principle in *Davis* cited above, noting that the imputation here was "*rather less of a fiction, in that the parties to the 2001 Deed believed that the power had already been validly exercised, whereas in Davis the trustees did not advert to the need to exercise it at all*". The only case directly on point cited to him was *Re Shinorvic* (see [114]-[116]). He went on to hold at [117] that:

> "*117. From the discussion of the principle* [in *re Shinorvic*]*, it appears to me that what is required is sufficient evidence of intention on the part of Management* [i.e. company B] *to exercise its power to amend rule 61.4(a). Such evidence can be derived from the recital of a previously ineffective exercise of the power, for then the recital acts as an endorsement of what was previously ineffective, such that the intention to exercise is capable of taking effect under the valid deed. Does it then matter that what was previously ineffective was ineffective because the right person did not exercise the power, rather than because there was some defect in execution by the right person, or some other default in performance? In my view it should not matter, since the appointor is treated as exercising the power at the later time, on the basis that there is sufficient evidence of intention to do so.*"

37. There is a strong analogy between the two principles from the above cases and the present factual position. A mistaken belief that either the Retirement Fund was already the beneficial owner of the property under English law should no more prevent the Mortgage Documents taking effect as an objective declaration of trust than the belief that the 1990 deed validly added Mrs B to the class of beneficiaries.

D: RN Point 1 – the consequences of non-compliance with s.53(1)(b) LPA

Core principles – consequences of non-compliance with s.53(1)(b)

38. CGC's RN Point 1 concerns the consequential effects of non-compliance with s.53(1)(b) on a declaration of trust at common law. CGC contends that such a trust is void and invalid, rather than valid but unenforceable. Many points raised in CGC's skeleton argument concerning the effects of non-compliance are important to the Ground 1 in that they concern

the proper approach to interpreting the text, purpose and operation of s.53(1)(b).[9] There are four principles as to the temporal scope and consequences of compliance with s.53(1)(b):

38.1. The requirement for signed writing to manifest and prove a declaration of trust is a requirement of evidence and procedure and not a substantive requirement, as reflected by its status as a matter of procedural law, not substantive law, governed by the *lex fori* for private international law purposes ("**the Procedural Character Principle**").[10]

38.2. The signed writing need not be contemporaneous with the declaration of trust and the date of the writing is immaterial so long as it is in existence when an action is brought to enforce the trust ("**the Separability Principle**").[11]

38.3. A trust, however late the signed writing, takes effect retrospectively as from the date of its creation and not the date on which the signed writing comes into existence ("**the Retrospectivity Principle**").[12]

38.4. A declaration of trust which is not evidenced in writing is valid, not void, but unenforceable by the beneficiary ("**the Unenforceability Principle**").[13]

39. CGC's RN Point 1 appears only to challenge directly the Unenforceability Principle. However, all four principles are closely related and reinforce the distinctive nature and operation of s.53(1)(b) compared with other formalities. In particular, for the Separability and Retrospectivity Principles to hold true, the trust which initially does not comply with s.53(1)(b) cannot be void ab initio, so the Unenforceability Principle must also hold true.

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[9] See, in particular, the Retirement Fund's appeal skeleton argument at §§28-29.

[10] See *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 207; *Underhill and Hayton* at 14.13, fn 1.

[11] See *Forster v Hale* (1798) 3 Ves. Jr. 696 at 707, *Gardner v Rowe* (1825) Sim. & St. 346 at 380 and (1827–1828) 5 Russ. 258 at 1025 and *Rochefoucauld v Boustead* at 204-206.

See also: *Snell's Equity* at 22-037; *Lewin on Trusts* (20th edn, Sweet & Maxwell 2023) at 3-013; A.H. Chaytor, W.J. Whittaker and John Brunyate (eds), *Equity: A Course of Lectures by F.W. Maitland* (rev edn, CUP 2011) ('*Maitland*') at 58-59; *Megarry & Wade: The Law of Real Property* (10th edn, Sweet & Maxwell 2024) at 10-041; *Underhill and Hayton* at 14.14.

[12] See *Gardner v Rowe*; see also: *Lewin* at 3-014; *Maitland* at 58-59; Geraint Thomas and Alistair Hudson, *The Law of Trusts* (2nd edn, 2010) at 5.12.

[13] For strong implicit support, see *Gardner v Rowe* and *Rochefoucauld*. See also: *Snell's Equity* at 22-036; *Megarry & Wade* at 10-041; *Underhill and Hayton* at 14.1 and 14.14; *Maitland* at 58-59.

Distinguishing between invalidity, unenforceability and different formalities

40. When determining the extent of binding legal effects produced by a legal instrument such as a trust, validity, invalidity, voidness, voidability and unenforceability are distinct concepts. Each has different concrete practical effects in terms of whether a trust exists and/or is enforceable, when, to what extent, for what purposes and against whom:[14]

    40.1. First, a valid trust is an extant and subsisting trust which produces legal effects by way of rights and obligations enforceable against other persons.

    40.2. Secondly, an invalid trust is no trust at all and produces no legal effects, rights or obligations enforceable against other persons.

    40.3. Thirdly, a void trust is void ab initio and a nullity – i.e. it is retrospectively invalid from the date of its purported constitution.

    40.4. Fourthly, a voidable trust is valid unless and until it is set aside – i.e. it is only prospectively void and invalid from the date when it is set aside.

    40.5. Fifthly, an unenforceable trust is valid in all respects and consists of rights and obligations, except that certain rights and obligations are not enforceable by and/or against one or more other persons.

41. Case law and commentary does not always distinguish between these concepts with such specificity, particularly where the outcome of a case that someone cannot enforce their rights is unaffected by the distinction between a finding of invalidity or unenforceability.

42. Statutory formalities such as s.53(1)(b) serve a valuable cautionary and evidentiary function and s.53(1)(b) has the additional purpose of seeking to prevent fraud.[15] However, strict insistence upon formalities will sometimes frustrate the settlor's intentions, as is the effect of the judgment and this appeal if the Appellants' cases are dismissed. There is an inevitable tension between giving effect to the intention of the settlor and ensuring compliance with the

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[14] For each proposition, see by analogy the discussion of these concepts in the context of void, voidable and unenforceable contracts and rescission: *Chitty on Contracts* (35th edn, Sweet & Maxwell 2023) at paras 1-093 to 1-097; Thomas Grant QC and David Mumford QC, *Civil Fraud: Law, Practice & Procedure* (Sweet & Maxwell 2018) at §22-030; *Snell's Equity* at para 15-003.

[15] Retirement Fund's appeal skeleton at §§19, 27.2 and 28; CGC's appeal skeleton at §50.

relevant formalities.[16] Every time Parliament legislates for a statutory formality, it strikes different approaches to balancing that tension. There are three relevant forms of drafting, differently worded, producing consequences of non-compliance falling into two categories:

Category (1) of non-compliance consequences – invalid and void

42.1. The transaction "*shall*", "*must*" or "*can only*" be in writing. Failure to comply with such formalities renders the transaction invalid and void. This logically follows from the principle that an invalid transaction is no transaction at all. For example:

42.1.1. If no interest in land can be created or disposed of "*except by writing signed by the person*", non-compliance with s.53(1)(a) LPA 1925 means that there is no interest created or disposition at all.

42.1.2. A disposition of an equitable interest or trust which "*must be in writing signed by the person*", but is not, can be said to be no disposition at all under s.53(1)(c).

42.1.3. A contract for the sale or other disposition of an interest in land which "*can only be made in writing*" is not a contract at all where the parties fail to comply with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989.[17]

Category (2) of non-compliance consequences – valid but unenforceable

42.2. "*No action may be brought*" where the transaction is not in writing.[18] Such formalities generally render the transaction unenforceable by barring claims and remedies to enforce subsisting rights under the transaction, not void or otherwise invalid.[19]

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[16] See: Paul S. Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd edn, 2019) at 119; Michael Haley and Lara McMurtry, *Equity & Trusts* (7th ed, Thomson Reuters 2023) at para 4-003; Simon Gardner, *An Introduction to the Law of Trusts* (3rd ed, OUP 2011) at 88.

[17] In *Firstpost Homes v Johnson* [1995] 1 WLR 1567 at 1571E-H Peter Gibson LJ clarified that non-compliance with s.40 LPA 1925 had rendered contracts unenforceable (see immediately below), whereas its replacement in s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 rendered contracts invalid and void. This was followed in *Pathway to Relief v Ali* [2024] EWHC 1284 (Ch) at [32]-[34] which is cited in CGC's skeleton argument at §49.

[18] See, e.g., s.40 LPA 1925 (repealed and replaced by s.2 LP(MP)A 1989).

[19] For example, many limitation periods under the Limitation Act 1980 say "*no action shall be brought*", expiry of which generally bars the remedy but does not extinguish the underlying legal rights: see Andrew McGee, *Limitation Periods* (9th edn, 2022) at para 2.052 et seq.

42.3. The transaction must be "*manifested and proved*" or "*evidenced*" in writing. On a textual analysis, the words in s.53(1)(b) "*declaration*" and "*declare*" refer to the creation of a trust whereas the words "*manifested*" and "*proved*" both refer to providing evidence of the declaration of trust.[20] The manifestation and proof can only be satisfied by signed writing but the declaration need not be and can be made orally, as per the Separability Principle. Moreover, where the formality requires the transaction, such as a trust, to be "*manifested and proved*" or "*evidenced*" in writing, the deliberate separation between creating the trust and manifesting, proving and evidencing the trust, presupposes that there exists a valid trust capable of being manifested, proved and evidenced. It would follow that the consequence of non-compliance is unenforceability.

CGC's RN Point 1 – non-compliance should result in invalidity

43. Contrary to the principles set out above, CGC makes four main arguments as to why non-compliance with s.53(1)(b) should result in invalidity, each of which is misconceived.

44. First, CGC's skeleton argument at §85 argues that the word "*manifested*" must connote the coming into existence of a trust in order to prevent the phrase "*manifested and proved*" being tautologous. This argument is misconceived. The presumption that every word in an enactment is to be given meaning may be rebutted where it is clear that legislation includes "*surplusage*" in the form of redundant or tautologous wording.[21] The touchstone remains the legislative text, read in context and having regard to its purpose – see the Retirement Fund's skeleton argument at §15.1. For the reasons given above at §42.3, "*manifested*" and "*proved*" are synonyms and form a single requirement as to evidencing the declaration of trust which may be made contemporaneously or separately as per the Separability Principle. [22]

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[20] This is supported by the Oxford English Dictionary definitions. The noun "*declaration*" means "*a formal or explicit statement or announcement*" or "*the formal announcement of the beginning of a state or condition*" and the verb "*declare*" similarly means "*formally announce the beginning of (a state or condition)*" or "*pronounce or assert (a person or thing) to be something specified*". By contrast, "*manifest*" means "*be evidence of; prove*" and "*prove*" means "*demonstrate the truth or existence of (something) by evidence or argument*": they are clearly synonyms.

[21] See *Bennion, Bailey and Norbury on Statutory Interpretation* (8th edn, LexisNexis 2020) at section 21.2, p.662-664; see also section 22.3, p.693, under the heading "*unnecessary words*".

[22] See *Forster v Hale* (1798) 3 Ves. Jr. 696 at 707: "… *It does not by any means require, that all trusts shall be created only be 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"*.

45. Secondly, CGC's skeleton argument at §51, fn 63 understates the extent to which courts may be assisted by pre-LPA 1925 authorities, motivated by the fact that the principal cases on the Statute of Frauds 1677 are clear that s.53(1)(b) is an evidential not a substantive requirement. These cases remain apt for construction of s.53(1)(b). Where there is real doubt as to the legal meaning of a consolidation Act, the rebuttable presumption that consolidation was not intended to change the law comes into play and recourse may be had to earlier legislation and case law.[23] The House of Lords in *Grey v Inland Revenue Commissioners* [1960] AC 1 at 13-15 held that this presumption did not apply to the LPA 1925 because it was not a typical consolidating Act, and that the LPA 1925 must "*be construed so as to give each word the meaning proper to it in its context*". However, it did not positively forbid courts from deriving assistance from legislative history where there is doubt as to the meaning of the LPA 1925, in accordance with the ordinary principles of statutory interpretation.[24] This is equally important to all of the grounds of appeal, as well as RN Point 1, given that pre-LPA 1925 legislative history and cases are relied on by the parties to varying degrees throughout this appeal.

46. Thirdly, CGC's skeleton argument at §84 cites *Gissing v Gissing* [1971] AC 886 at 905A-B and *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 at 129C-D as post-1925 support for its case on invalidity. However, as CGC accepts, the references to validity in those cases, by Lord Diplock and Lord Bridge respectively, were *obiter*, passing references without detailed argument on the effects of non-compliance, given both cases concerned constructive trusts.

47. Fourthly, the fact that CGC does not appear expressly to reject the Procedural Character Principle, the Separability Principle or the Retrospectivity Principle is inconsistent with its rejection of the Unenforceability Principle. CGC's skeleton argument at §86 suggests that "*If there is no later writing, however, it is difficult to see in what respect the trust is nevertheless valid and how it is in law capable of constituting a trust, since enforceability is, per Millet LJ's seminal analysis, fundamental to a trust*". Whilst it is unclear whether the Judge accepted or rejected the Unenforceability Principle as formulated above, his judgment suggested similarly at [210] that "*I do not, however, understand the statements in the textbooks to say that a declaration of trust is valid even if there is no later writing (appropriately signed) which manifests and proves the trust*". However, if the Separability Principle means that there is no temporal restriction on producing the signed writing, then there is no principled basis to

[23] *Bennion* at §24.7.

[24] See *Bennion* at §§24.5 et seq.

determine at which point an unenforceable trust becomes invalid. Both CGC's case and the Judge's findings are logically unstable. The only options consistent with all four principles are retrospective validation of a void trust or retrospective enforceability of a valid trust from the date of the later writing – the latter makes more sense for the reasons given above.

48. Moreover, CGC cites the following comments of Millett LJ in *Armitage v Nurse* [1998] Ch 241 at 253G-H out of context: "*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 have no rights enforceable against the trustees there are no trusts*". However, these comments should not be considered in a vacuum, divorced from the facts at issue in that case. That case concerned a clause in the trust instrument excluding liability for all loss or damage caused by the trustee other than by his actual fraud. Those comments therefore concerned the substantive rights and obligations that must exist for a relationship to be characterised as a trust relationship at common law. By contrast, those comments do not bear on the effects of non-compliance with statutory formalities enacted by Parliament to regulate a trust that would otherwise be valid at common law. Nor do they bear on the effects of non-compliance with a requirement of evidence and procedure as opposed to a substantive requirement.

49. Consequently, there is no justification for the argument made in RN Point 1, which ignores the distinctive text, purpose and operation of s.53(1)(b) compared with other statutory formalities, as well as the legal position which is well-established in authority.

E: Conclusion

50. For the reasons stated above, the Court is invited to dismiss the RN and allow the appeals.

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