Neutral Citation Number: [2025] EWCA Civ 1211

Case No: CA-2024-001204
CA-2024-001215

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Sir Nigel Teare (sitting as a Judge of the High Court)
[2024] EWHC 835 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/09/2025

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LADY JUSTICE FALK
and
LORD JUSTICE ZACAROLI

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Between :

(1) NATIONAL IRANIAN OIL COMPANY **(2) RETIREMENT, SAVING AND WELFARE FUND OF OIL INDUSTRY WORKERS**	**Appellants**
- and –	
CRESCENT GAS CORPORATION LIMITED	**Respondent**

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Bankim Thanki KC, David Mumford KC, Laura Newton, Marc Delehanty and James Kinman (instructed by **Eversheds Sutherland (International) LLP**) for **National Iranian Oil Company (**the **Appellant** in CA-2024-001215**)**
David E. Grant KC, Joshua Hitchens and Joshua Cainer (instructed by **Blackstone Solicitors**) for **Retirement, Savings and Welfare Fund of Oil Industry Workers (**the **Appellant** in CA-2024-001204)
Ewan McQuater KC, Ricky Diwan KC, Tariq Baloch KC, Georgina Peters, Professor Paul Davies, Luka Krsljanin and Moeiz Farhan (instructed by **Reed Smith LLP**) for the **Crescent Gas Corporation Limited (**the **Respondent** in both appeals**)**

Hearing dates: 15, 16 & 17 July 2025
Further written submissions filed: 8 & 22 August 2025; 1 September 2025

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Approved Judgment

This judgment was handed down remotely at 10.00am on 30 September 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Judgment Approved by the court for handing down.

Lord Justice Zacaroli:

Introduction

1. This appeal concerns the interpretation and effect of section 53(1)(b) ("**s.53(1)(b)**") of the Law of Property Act 1925 ("**LPA 1925**"), which provides that:

> "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."

2. The principal questions of interpretation are: (1) whether the document evidencing the declaration of trust can be signed by an agent of the person whose interest in the land is the subject of the declaration of trust; and (2) if the answer to that question is, in respect of natural persons, no, how the section is to be complied with by a company, which can generally only act through the agency of natural persons.

3. Despite a provision in materially similar form to s.53(1)(b) having existed since the Statute of Frauds 1677 (the "**Statute of Frauds**"), the researches of counsel have not unearthed any case where these questions have been authoritatively determined.

4. The appeal also raises an important question as to the consequences of non-compliance with s.53(1)(b): assuming that a declaration of trust has been made, but there is no sufficient evidence of it in writing, what is the status and effect, if any, of the declaration of trust? Specifically, as it relates to this appeal, where the person who declared the trust subsequently transfers the property to the beneficiary, is the transfer capable of constituting a transaction at an undervalue within the meaning of section 423 of the Insolvency Act 1986 ("**s.423**")?

Background

5. The respondent, Crescent Gas Corporation Limited ("**CGC**"), is a creditor of the first appellant, National Iranian Oil Company ("**NIOC**"). In 2001, CGC entered into a long term gas sales and purchase agreement with NIOC. NIOC failed to supply any gas pursuant to that agreement. CGC commenced arbitration proceedings in July 2009. After extensive delays, the arbitral panel delivered a Partial Award on Remedies on 27 September 2021, ordering NIOC to pay the principal amount of US$2,429,970,000. NIOC has failed to pay any part of the award.

6. On 15 August 2022, Robin Knowles J granted permission to CGC to enforce the Award and, in November 2022, CGC sought to register an interim charging order against a property in London, called NIOC House, which NIOC had purchased in 1975 and which was registered in the name of NIOC ("**NIOC House**").

7. It was at that point that CGC discovered that NIOC had, on 23 August 2022 (within a week of Knowles J's order of 17 August 2022), effected a transfer of NIOC House (the "**Transfer**") into the name of the second appellant, the Retirement, Savings and Welfare Fund of Oil Industry Workers Fund (the "**Fund**").

8. CGC issued this claim for relief under s.423, on the grounds that the Transfer was a transaction at an undervalue entered into by NIOC for the purpose of putting assets

beyond the reach of a person who is making, or may at some time make, a claim against it.

9. NIOC's and the Fund's primary defence before the judge was that the Transfer did not fall within s.423 because at all times prior to the Transfer, pursuant to a concept of Iranian law known as "*amanat*", the Fund had been the true owner of NIOC House. The argument was that the Fund had entrusted NIOC House to NIOC as an "*amin*". It was common ground that an *amin* has no ownership of property entrusted to it at all, and that an *amanat* cannot be equated with a trust, because Iranian law does not recognise a division between legal and equitable ownership.

10. The judge rejected NIOC's and the Fund's argument based on Iranian law, concluding that NIOC House had been purchased, not as NIOC and the Fund contended with money that belonged to the Fund, but with money which had been loaned to NIOC by the Fund. Under Iranian law, therefore, NIOC House had always been the property of NIOC. The judge accepted that NIOC and the Fund had operated, at least since 1979, in the belief that NIOC House belonged to the Fund, but concluded they had in this respect been mistaken.

11. NIOC's and the Fund's secondary case before the judge was that on numerous occasions between 2004 and 2020, NIOC had declared a trust of NIOC House in favour of the Fund. Although the Fund had been around since the 1960s, the judge found that it only acquired legal personality on 25 September 2019, and that any purported declaration of trust that pre-dated the Fund acquiring legal personality was of no effect.

12. He held, however, that in a mortgage granted by NIOC over NIOC House on 25 September 2019 in favour of Bank Melli (the "**Mortgage**"), the following statement did constitute a declaration of trust:

> "The National Iranian Oil Company is the legal owner of the mortgaged property and the Pension Funds, Savings and Staff Welfare of Oil Industry is the sole beneficial owner of the Mortgaged Property."

13. The judge recited, at §186 of his judgment, that the mortgage was executed by NIOC acting by its attorney, Naft Trading and Technology Co Ltd, an English incorporated company and a subsidiary of the Fund ("**NTT**"). It was signed by a Mr Rahgozar, the managing director of NTT and authorised representative of the Fund (see §135(iii) of the judgment) (i) in the name of NIOC, (ii) in the name of NTT and (iii) as the authorised signatory of NTT in the presence of a Mr Bayat as witness.

14. In a further document dated 9 January 2020, as part of that same transaction, a Certificate of Title was provided by NIOC's English solicitors, Eversheds, which contained a disclosure to the effect that the legal interest in NIOC House was held by NIOC and the beneficial interest was held by the Fund (the "**Certificate of Title**"). The Judge also held that the Certificate of Title contained a declaration of trust. I will refer to the Mortgage and the Certificate of Title together as the "**Mortgage Documents**".

15. Notwithstanding his finding that the Mortgage Documents constituted declarations of trust by NIOC, the judge concluded that they were not effective to create an enforceable trust, because they were signed, not by NIOC itself, but by its agent (see §200 of the

judgment). That was insufficient, he held, because s.53(1)(b) requires the writing to be signed by the legal owner of the land, and not by an agent on their behalf (see §197 of the judgment).

16. The judge regarded the present case as involving NIOC (as trustee) and the Fund (as beneficiary) seeking to enforce the trust against a third party (CGC). Since the trust was not manifested and proved by some writing, it was unenforceable (see §212 of the judgment). Accordingly, at §213, he concluded that "at the time of the August Transfer NIOC was the beneficial owner of NIOC House. The trust relied upon by NIOC and the Fund cannot be established."

17. He found that NIOC had entered into the Transfer with the purpose of putting assets beyond the reach of CGC, and ordered that NIOC House be transferred with full title guarantee from the Fund to CGC.

The grounds of appeal

18. NIOC sought permission to appeal on numerous grounds, but permission was granted by Males LJ on only the following grounds:

    (1) The judge was wrong to conclude that a document signed by an agent cannot amount to "writing signed by some person who is able to declare such trust or by his will" for the purposes of s.53(1)(b) ("**Ground 1**").

    (2) Even if the judge was right in his interpretation of s.53(1)(b), he was wrong to conclude that the documents which he found constituted declarations of trust were not signed by NIOC. They were so signed, on the basis of either (a) the common law, (b) s.44 of the Companies Act 2006 (the "**2006 Act**"), or (c) s.74(4) LPA 1925 ("**Ground 2**").

    (3) Even if the judge was right to find that there was no document which satisfied the requirements of s.53(1)(b), he was wrong to find that the consequence was that NIOC and the Fund could not rely on the trust which had (on the judge's findings) been declared ("**Ground 3**").

19. NIOC was also given permission on its seventh ground of appeal, that there was no proper basis for making the order under s.423, on the basis that this is entirely parasitic on the other grounds. The Fund appeals, also with the permission of Males LJ, on the same ground as NIOC's Ground 1.

20. CGC, by a respondent's notice, seeks to uphold the judge's order on the following additional bases:

    (1) The judge's conclusion that the effect of non-compliance with s.53(1)(b) is that the trust cannot be enforced against a third party creditor of CGC should be upheld on the additional ground that the trust is invalid ("**Respondent's Notice Point 1**");

    (2) The appeal should also fail because:

        (a) The judge was wrong to find that the Mortgage Documents were sufficient to constitute a declaration of trust ("**Respondent's Notice Point 2(a)**") and

(b) The judge failed to consider whether NTT or Eversheds had authority to declare a trust over NIOC House and, had he done so, he ought to have concluded that they did not have such authority ("**Respondent's Notice Point 2(b)**").

Summary of the Court's conclusions

21. The Court is unanimous in deciding that the appeal on Grounds 1 and 2 should be dismissed. I have concluded that the appeal should be allowed on Ground 3. The Chancellor and Falk LJ disagree, and have concluded that the appeal should be dismissed on Ground 3, for the reasons set out in their separate judgments below. It follows that the appeal overall is dismissed.

Ground 1: Signing by an agent

22. S.53 LPA 1925 provides as follows:

> "(1) Subject to the provision hereinafter contained with respect to the creation of interests in land by parol:
>
> (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."

The judge's reasoning

23. The judge addressed the issue at §194 to §200 of his judgment. He noted that Parliament had specifically provided, in paragraphs (a) and (c) of s.53(1), that signing may be by an agent. He concluded that the omission of any reference to an agent in s.53(1)(b) indicated that "some person who is able to declare such trust" is intended to be limited to the settlor himself, and not an agent.

24. As to the argument advanced before him by NIOC that a company must necessarily sign through the agency of a natural person, the judge said that a company 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". Accordingly he drew a distinction between a signature by a director, which would be a signature by some person who is able to declare such trust, and a signature by a mere agent, which would not.

25. The Fund also contended that the law takes a flexible approach to the requirement for signing, and that the touchstone for determining what is a signature is an intention to authenticate a document, citing *Hudson v Hathway* [2022] EWCA Civ 1648; [2023] KB 345. That case, the judge noted, concerned the different question whether a signature by email sufficed for the purposes of s.53(1)(a) and (c). He also noted the comment (at §32 of the judgment of Lewison LJ) that the formalities required by s.53 are necessary in order that property rights in land should be certain. Thus, he concluded, the formality required by s.53(1)(b) reflected a need perceived by Parliament for declarations of trust to be signed by some person who is able to declare such trust, rather than an agent lawfully authorised in writing.

Summary of the parties' arguments on Ground 1

26. NIOC and the Fund contend that the default position under the common law is that a person sufficiently "signs" a document if it is signed in their name and with their authority by somebody else. While a statute may require that in particular circumstances a signature must be given by a particular person, such statutes are exceptional, and on the proper construction of s.53(1)(b), it does not exclude signature by an agent. The appellants developed the case on the construction of s.53(1)(b) as follows:

    (1) At common law, a trust may be declared over a person's property by that person or their duly authorised agent. Nothing in s.53(1) limits the powers of an agent in this respect;

    (2) There is no coherent reason for precluding an agent, who has duly declared a trust on behalf of their principal, from being a person whose writing is sufficient to manifest and prove the trust;

    (3) Nor is there any coherent reason for permitting an agent to sign a document which *effects* the creation or disposition of an interest in land or a disposition of an equitable interest, but precluding an agent (even one authorised in writing) from signing a document which evidences the creation of a trust;

    (4) The incoherence is amplified by a comparison with s.40 of the LPA 1925. As enacted, that enabled an agent to sign a binding contract on behalf of his principal to create a trust over land but, on the judge's interpretation, the written agreement could not be adduced as evidence of the trust then created.

    (5) An agent is therefore "some person" able to declare a trust over land or an interest in land which is owned by their principal.

27. Mr Thanki and Mr Grant submitted that the judge's reasoning, based on the comparison between s.53(1)(b) on the one hand, and sub-paragraphs (a) and (c) on the other, does not withstand scrutiny. Sub-paragraphs (a) and (c) require the disposition itself to be in writing and the reference to signing by an agent who is authorised in writing is explained as a *limitation* on the common law position that a person may sign via an agent. It makes sense to limit an agent's ability to sign to where it is authorised in writing, because that ensures a chain of writing between the principal and the document effecting the disposition of the interest in land.

28. NIOC and the Fund also contend that, even if s.53(1)(b) precludes signature by the agent of a natural person, where a trust is declared by a company, the signature of any person duly authorised by the company will suffice.

29. Mr McQuater, on behalf of CGC, did not dispute that at common law a person can sign a document via a duly authorised agent. It is sufficient to cite in this respect the recent decision of this Court in *Northwood (Solihull) Ltd v Fearn* [2022] EWCA Civ 40; [2022] 1 WLR 1661. That case concerned the validity of a notice and a certificate which was required to be served by a landlord under certain housing legislation. Lewison LJ (with whom Newey LJ and Snowden LJ agreed) referred (at §22) to the "general rule" that "a person is treated as having signed a document if it is signed on his behalf and with his authority", citing Romer LJ in *London County Council v Agricultural Food Products Ltd* [1955] 2 QB 218, at 223-224:

> "It is established, in my judgment, as a general proposition that at common law a person sufficiently 'signs' a document if it is signed in his name and with his authority by somebody else; and in such case the agent's signature is treated as being that of his principal."

30. At §28 to §29 in the same case, Lewison LJ referred to Lord Hoffmann's comment in *General Legal Council Ex p Whitter v Frankson* [2006] 1 WLR 2803 that "there are statutes which, exceptionally, require a personal signature and exclude performance by an agent".

31. As Mr McQuater submitted, however, this takes one back to the core question: whether on its true construction s.53(1)(b) permits "some writing" to be that of an agent. In addition to the contrast between sub-paragraphs (a) and (c) of s.53(1), as pointed out by the judge, CGC relies on the contrast with s.40 LPA 1925, as enacted, where signature by an agent is specifically permitted. It contends that this shows that where the draftsman of the LPA 1925 intended signature by an agent to suffice, this was expressly stated.

32. Mr McQuater submitted that the judge's interpretation also better accords with the purpose of s.53(1)(b), which is to protect the owner of land from the "perils of oral evidence being misused to deprive him of his land". This is achieved by requiring direct settlor involvement in the written proof of the declaration of trust. The appellants' construction, it is contended, would remove the requirement of direct settlor involvement and thereby expose the owner of land to an enhanced risk of fraud.

33. CGC did not dispute that an agent could declare a trust over their principal's property, but submitted that this would require clear, express prior authorisation, which would be unusual (citing, for example, *Reckitt v Barnett* [1928] 2 KB 244, at p.268 per Russell J: "an attorney cannot, in the absence of a clear power to do so, make presents to himself or to others of his principal's property").

Case law and textbook references

34. It is common ground that there is no case that has authoritatively determined the question raised by Ground 1. Certain textbooks have adopted a position on it, and we

were referred to authorities where, although the point did not arise for decision, something was said about it.

35. CGC referred to Megarry & Wade, *The Law of Real Property*, 10th ed. (2024) at §10-49, which contrasts the position under s.53(1)(c) with s.53(1)(b) "where the signature of an agent is not enough". The two cases there cited, however, provide little support for this proposition.

36. The first case cited is *Tierney v Wood* (1854) 19 Beav. 330 ("***Tierney***"). Mr Tierney held land on a resulting trust for Mr Wood. Mr Wood sought – by a paper addressed to Mr Tierney – to declare a trust over the land after his death for his wife, for her life, and then for his offspring. All that was decided in that case was that pursuant to s.7 of the Statute of Frauds the new trust, declared by Mr Wood, had to be evidenced by writing *by him* and not by Mr Tierney. That was because Mr Wood, as the holder of the beneficial interest in the land, was "the person, by law, enabled to declare the trust" over that beneficial interest. The case said nothing in terms as to the position if the necessary writing had been provided by someone acting as Mr Wood's agent.

37. Mr Grant submitted that the case in fact supported the appellants' argument, relying on the following sentence in the judgment of Sir John Romilly MR:

> "A declaration of trust in writing, by Tierney, following that of Wood, would therefore have been merely formal, and would have been valid only so far as it followed his instructions, and would have been void to the extent, if any, that it departed from his directions".

38. It appears, however, that in this passage Sir John Romilly was referring to the *validity* of a trust purportedly declared by Mr Tierney, in support of the point he went on to make, that the "fair conclusion to be drawn from these considerations, is that the person to create the trust, and the person who is, by law, enabled to declare the trust are one and the same." To the extent that he referred to Mr Tierney declaring a trust in writing, it was on the assumption that it "followed" a declaration in writing by Mr Wood. He was not addressing the question whether a written record of the trust signed by an agent of Mr Wood would have complied with s.7 of the Statute of Frauds, and it does not appear that there had been argument presented on that question.

39. On analysis, therefore, *Tierney* does not support the proposition stated in *Megarry & Wade*. It shows only that where a trust is declared by a person who is the beneficial owner of land under a pre-existing trust, then only that beneficial owner can satisfy the need for writing.

40. The second case cited is *Kronheim v Johnson* (1877) 7 Ch D 60. That case simply referred to *Tierney* for the proposition that a trust of a beneficial interest in land must be evidenced by writing by the beneficial owner. On the facts, s.7 of the Statute of Frauds was found not to be satisfied because there was no sufficient writing at all.

41. Other textbooks relied on by CGC do no more than point out (without citing authority) that, in contrast to s.53(1)(c), s.53(1)(b) contains no provision that the declaration of trust may be signed by an agent: see *Lewin on Trusts*, 20th ed, at §3-017; *Civil Fraud:*

Law Practice & Procedure (1st ed) at §9-014; and *Cheshire & Burn's Modern Law of Real Property* (18th ed) at pp.1010-1011.

42. *Equity and Trusts* by Michael Haley and Lara McMurtry (7th ed), at §4-006 states that, in relation to a company, the document must be signed "by" the company and not merely "on behalf of" the company, citing *Hilmi Associates Ltd v 20 Pembridge Villas Freehold Ltd* [2010] EWCA Civ 314; [2010] 1 WLR 2750 ("***Hilmi***"). I deal with that case in greater detail below. For present purposes, I note that it concerned a materially different statutory provision and all that was said about s.53(1)(b) was that it had been cited to the Court as an example of a statutory provision which requires personal signature of a document of a kind relevant to a company (see §17 of the judgment of Lloyd LJ).

43. The appellants, for their part, referred to Paul S. Davies and Graham Virgo, *Equity and Trusts: Text, Cases and Materials*, 3rd ed., at pp.119-120, where the authors adopted the "sensible, practical interpretation" that "some person who is able to declare such transfer" includes an agent. The strongest support for the appellants' position is found in a chapter provided by Charles Harpum, in Elizabeth Cooke (ed): *Modern Studies in Property Law*, Vol 1, "*Property in an Electronic Age*", at p.12:

> "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 (l)(a) and (l)(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 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."

44. CGC also referred to three recent authorities which are said to be consistent with its case. None of them contains anything other than a passing reference to the point that an agent's signature does not count for the purposes of s.53(1)(b), and in none of them was the point the subject of argument and decision.

45. In the first case, *HRH Tessy Princess of Luxembourg v HRH Louis Xavier Marie Guillaume Prince of Luxembourg* [2018] EWFC 77, there is a reference to s.53(1)(b), for the proposition that where legal property is already held on trust, it is only the beneficial owner of the property who is able to declare a trust of that beneficial interest (i.e. the point decided in *Tierney*). CGC relies on the fact that, in quoting the passage from *Lewin on Trusts* to which I have referred above, MacDonald J, at §68, included the sentence stating that s.53(1)(b) contains no provision that the declaration of trust may be signed by an agent. The point was not in issue in the case, and apart from citing the passage from *Lewin*, the judge said nothing about it.

46. In *Fish v Sky Apartments 2018 Ltd* [2022] EWHC 763, at §51, HHJ Halliwell referred without comment to an observation from an opinion of Counsel provided in the case that notices under s.5 of the Landlord and Tenant Act 1987, had they otherwise been apt to do so, would not have been capable of constituting a declaration of trust pursuant to s.53(1)(b) "because they were signed by an agent".

47. In *Morton v Morton* [2022] EWHC 163, at §100, HHJ Halliwell said, of partnership accounts, that while it was likely they were signed by the partnership accountants, "there is no suggestion that they were signed by the partners themselves so as to satisfy the requirements of s.53(1)(b) for a written declaration of trust." As HHJ Halliwell recorded in the previous sentence, however, it was not submitted that any of the partnership accounts could *per se* have satisfied the statutory formalities for any of sub-paragraphs (a) to (c) of s.53(1).

48. CGC also cited other authorities relating to different statutory provisions, which held that the signature of an agent would not suffice. Since the statutory language in question in those cases is materially different, the cases do not help on this appeal.

Declaration of trust by a natural person

49. I will first consider the position as it applies to a declaration of trust by a natural person.

50. There was no real dispute as to the applicable principles of statutory construction. These include:

(1) The primary indication of legislative intention is the text, read in context (including its legal, social and historical context) and having regard to its purpose, for which purpose Parliament is assumed to be a rational, reasonable and informed legislature pursuing a clear purpose in a coherent and principled manner (*Bennion, Bailey and Norbury on Statutory Interpretation*, 8th ed. ("***Bennion***") at §11.1 and §11.2);

(2) That assumption includes that Parliament is generally not taken to have identified a construction which is impractical, irrational or causative of unjustifiable inconvenience (*Bennion* at §13.3 to §13.5);

(3) Statutes are to be construed in the context of the common law – so that when 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 (*Bennion* at §25.2);

(4) In order to understand the meaning and effect of a provision in an Act it is necessary also to have regard to the state of the previous law (*Bennion* at §24.5).

51. I start with considering the state of the law immediately prior to the enactment of the LPA 1925. An equivalent provision to each of sub-paragraphs (a) to (c) had already existed, in the Statute of Frauds, for 250 years.

52. The predecessor to sub-paragraph (a) was s.3 of the Statute of Frauds. This provided (materially) that no interest in land shall:

> "…be assigned granted or surrendered unlesse it be by Deed or Note in Writeing signed by the party soe assigning granting or

> surrendring the same or their Agents thereunto lawfully authorized by writeing or by act and operation of Law."

53. The predecessor to sub-paragraph (b) was s.7 of the Statute of Frauds. This provided that:

> "..all Declarations or Creations of Trusts and Confidences of any Land Tenements or Hereditaments shall be manifested and proved by some Writeing signed by the partie who is by Law enabled to declare such Trust or by his last Will in Writeing or else they shall be utterly void and of none effect."

54. The predecessor to sub-paragraph (c) was s.9 of the Statute of Frauds, which provided that:

> "… all Grants and Assignments of any Trust or Confidence shall likewise be in Writeing signed by the partie granting or assigning the same [or] by such last Will or Devise or else shall likewise be utterly void and of none effect."

55. Of particular relevance to Ground 1, these provisions differed from s.53 in at least the following three respects:

(1) Section 9 did not include the reference to agents that is now to be found in s.53(1)(c);

(2) Section 7 restricted the ability to sign "some writeing" to "the" party who is by law enabled to declare such trust, whereas s.53(1)(b) refers to "some" party able to declare the trust; and

(3) The reference to the consequences of non-compliance ("or else they shall be utterly void and of none effect") was removed from both s.7 and s.9.

56. It is also relevant to note two further provisions in the Statute of Frauds:

(1) Section 4, which precluded an action being brought in a variety of circumstances (including to charge a person upon any special promise to answer for the debt, default or miscarriages of another, or to charge a person upon any agreement made in consideration of marriage, or upon any contract or sale of land) unless "the Agreement upon which such Action shall be brought or some Memorandum or Note thereof shall be in Writeing and signed by the partie to be charged therewith <u>or some other person thereunto by him lawfully authorized</u>"; (emphasis added)

(2) Section 16, which provided that no contract for the sale of goods for the price of £10 or more "shall be allowed to be good" unless "the Buyer shall accept part of the Goods soe sold and actually receive the same or give some thing in earnest to bind the bargaine or in part of payment, or that some Note or Memorandum in writeing of the said bargaine be made and signed by the partyes to be charged by such Contract <u>or their Agents thereunto lawfully authorized</u>." (emphasis added)

57. Mr McQuater pointed to the fact that each of the above provisions, including s.7, referred to a document being signed by "the party" concerned and submitted that

Parliament evinced a clear intention that where some other person as well as "the party" was permitted to sign the document, that was made clear.

58. Mr Grant placed much emphasis in construing s.53(1)(b) on the change from "the" person to "some" person able to declare the trust. In reply, when pressed on the point, he appeared to accept that this had effected a change in the law by expanding the provision so that it now included agents. Following the circulation of the judgment in draft, Mr Grant clarified that he had not intended to concede more than the fact that there was a change in language.

59. Mr Thanki submitted that the wording of s.7 was broad enough to encapsulate an agent and, if anything, the change in language in 1925 made that position clearer.

60. In my judgment, Mr McQuater's submission as to the interpretation of the Statute of Frauds is to be preferred.

61. Each of s.3, s.4, s.7, s.9 and s.16 refers to the need for writing by "the party". In s.3, s.4 and s.16 there is also an express reference to signing by an agent in the alternative. In both s.4 and s.16, the reference is to an agent duly authorised, and not restricted to an agent authorised in writing. In that context, the absence of any reference to signing by an agent of "the party" in s.7 and s.9 provides, in my judgment, a strong indication that Parliament did not intend to allow compliance with either of those sections by the signature of an agent.

62. A similar argument prevailed in a different, and modern, statutory context in *St Ermins Property Co Ltd v Tingay* [2002] EWHC 1673 (Ch); [2003] L & TR 6. The statute in question was s.99(5) of the Leasehold Reform, Housing and Urban Development Act 1993, which governed notices required to be given under Part 1 of the Act. By s.99(5)(a), for a notice under s.13 or s.42 of the Act, the notice must be signed by the tenant. By s.99(5)(b), in any other case, the notice must be signed by or on behalf of the tenant. Lloyd J held that had s.99(5)(a) stood alone, nothing in it would carry the implication that the notice must be signed by the tenant. Having regard, however, to the distinction between the two sub-paragraphs, the wording of s.99(5)(a) was clear, and (whether there were good, bad or no reasons behind the distinction) it required the signature of the tenant personally. The decision was approved by the Court of Appeal in *Cascades and Quayside Ltd v Cascades Freehold Ltd* [2007] EWCA Civ 1555; [2008] L & TR 23.

63. Mr Thanki submitted that there was no need for s.7 to make express reference to an agent, because the language – "…the partie who is by Law enabled to declare such Trust…" – is already broad enough to encompass an agent. I see the force of this, but consider it requires too much work to be done by that language. The phrase "who is by Law enabled" is intended, in my judgment, to identify the person who under the general law is able to declare a trust over "Lands, Tenements or Hereditaments" (i.e. the land, the structures on it and the rights associated with it). That – as *Tierney* established – would be the person in whom the beneficial interest in the relevant land, tenement or hereditament is vested. It does not in my view refer to that person *and* others who that person has appointed as his agent.

64. CGC's interpretation also finds some support in the fact that the requirement of writing could also be satisfied by "his" last will in writing. "His" refers back to the same

"partie" by law enabled to declare a trust, and can only refer to the relevant owner of the interest in land the subject of the trust, because an agent could not, by *his* will, dispose of the property of his principal. The point is not determinative, because it is common ground that a company is capable of satisfying s.7, but is incapable of making a will. Nevertheless, the fact that the *additional* possibility that the requirement for writing is satisfied by a will does not apply to a company does not mean it casts no light on who is referred to by "the partie" in the case of an individual.

65. The parties have not been able to identify any authority which determined whether s.7 of the Statute of Frauds permitted signature by an agent. They did, however, unearth the editions current in 1925 of some of the leading textbooks of the day.

66. The only textbook that expressly referred to the position of agents in the context of s.7 of the Statute of Frauds was *Underhill, The Law relating to Trusts and Trustees*, 7th ed. (1912). It suggested that signature by an agent was not sufficient. At p.79 it was pointed out that a contract to *create* a trust of land could, by s.4 of the Statute of Frauds, be signed by an agent, "but there is no similar provision in s.7 as to an executed trust of lands".

67. The same point was made by F.W. Maitland, in Lecture V of a course of lectures – first published collectively in 1909. He referred to s.7 and s.8 of the Statute of Frauds, and pointed out that, in contrast to the "two famous sections" (s.4 and s.17, although the latter reference appears to be a mistake, and should have referenced s.16), neither said anything about signature by an agent.

68. In two other textbooks cited to us, the question whether the signature of an agent might suffice was not specifically addressed, but the point was made that where land was already held in trust, "the person" who is able to declare a trust referred to the person holding the beneficial interest in the property: see, *Snell, The Principles of Equity*, 18th ed. (1920), at p.51, citing *Tierney*. The same point was made, and the same authority cited, in *Lewin on Trusts*, 12th ed. (1911).

69. The parties did not refer us to any case concerning the ability of an agent to sign a memorandum of a grant or assignment of an equitable interest for the purposes of s.9 of the Statute of Frauds. The text of that provision ("signed by the partie granting or assigning the same") points even more strongly towards signature by an agent being insufficient.

70. Mr Thanki and Mr Grant pointed to certain references in lesser known textbooks, from the first half of the 19th century, which suggested that the signature of an agent was permitted under s.9. On analysis, however, these provide no real support for that proposition.

    (1) *William Hayes, An Elementary View of the Common Law, Uses, Devises, and Trusts, with reference to the Creation and Conveyance of Estates* (1840). At §88, it is stated that the benefit of a trust may be transferred by any form of instrument "provided it be in writing and signed by the party to be bound or by his agent lawfully authorized". The only authority cited for that proposition, however, is the Statute of Frauds, which clearly did *not* refer to agents.

(2) *William Cruise, Digest of The Laws of England Respecting Real Property*, 4th ed (1835). This did no more than recite s.9.

(3) *George Spence, the Equitable Jurisdiction of the Court of Chancery* (1846). At p.506, this repeated the same sentence that appears in *Hayes* at §88. The only authorities cited were *Hayes* (which in turn cited no authority for it) and *Cruise* (which, as noted, did not say anything about agents).

71. In short, insofar as there was any prevailing view in the academic writings that existed by 1925, they suggested that signature by an agent would not suffice for the purposes of s.7 of the Statute of Frauds. There was certainly nothing, so far as the parties have identified, which stated in terms that an agent's signature *would* comply with either section.

The language of s.53(1)(b)

72. I have already noted the two key differences between s.7 and s.53(1)(b): the change from "the party" to "some person", and the removal of the words "or else they shall be utterly void and of none effect". As to the second difference, I address this in detail under Ground 3 (and merely note here that it was in fact no change from how s.7 had been applied for centuries before).

73. As to the first difference, on the basis of my conclusion as to the meaning of s.7 of the Statute of Frauds, the appellants can succeed only if they establish that this was intended to expand the range of persons whose signature sufficed for the purposes of evidencing the creation of a trust to include agents. For the following reasons, I do not think the change can bear the weight put upon it by the appellants.

74. First, if the reference to "some" person was intended to expand the range of persons whose signature sufficed, so as to encompass signature by an agent, this was an odd way to do it. That is particularly so, given the adjacent provision, paragraph (c), made just such a change to the existing law (s.9 of the Statute of Frauds) and did so by making express reference to agents.

75. Second, although we were not shown any pre-legislative materials which explained the change from "the partie" to "some person", there is at least a plausible explanation in the fact that case law had established, by 1925, that where a trust was declared by one person, a settlor, upon conveying property to another, as trustee, to hold on trust for a third person, the writing to satisfy s.7 of the Statute of Frauds could be provided either by the settlor or by the trustee: see Professor T.G. Youdan in *Formalities for Trusts of Land, and the Doctrine of Rochefoucauld v Boustead* (1984) 43(2) CLJ, p.306, at p.317, and *Graham Virgo, The Principles of Equity & Trusts*, 5th ed., at pp.123-124. That was certainly the case in *Gardner v Rowe* (considered in detail below).

76. Third, although the comparison with sub-paragraphs (a) and (c) is not in itself persuasive (for the reasons advanced by the appellants – see §27 above, and as explained by Charles Harpum in the article referred to at §43 above), the comparison between s.53(1)(b) and s.40 LPA 1925 is more compelling. The latter is the successor to s.4 of the Statute of Frauds. It has since been amended, but in 1925 it provided that no action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or a

memorandum or note thereof, is "in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised." Like s.4 of the Statute of Frauds, the person did not need to be authorised in writing. It cannot, therefore, be seen as a *limitation* on the otherwise applicable rule as to the power of a person to act through an agent. The contrast with s.53(1)(b) is important, for similar reasons to those given above in relation to s.7, and it suggests that where the legislature intended signature by an agent to suffice, this was stated in terms.

The purpose of s.53(1)(b)

77. Finally, there is support for CGC's argument in the purpose of the statute. The purpose of the Statute of Frauds was made clear in its preamble:

> "For prevention of many fraudulent Practices which are commonly endeavoured to be upheld by Perjury and Subornation of Perjury…"

78. So far as s.7 is concerned, the purpose was evidently to protect landowners from the risk that another person would falsely claim that the land or an interest in it had been transferred to them, or declared in trust for them. I see no reason why the purpose of s.53(1)(b) is not the same. Such changes as were made to the provision do not, in my judgment, suggest any change in its purpose.

79. There is a debate between the parties as to whether the purpose of s.53(1)(b) extends to the protection of third parties, including creditors, of the landowner. That is of particular relevance to Ground 3 (and, for reasons explained under that Ground below, I do not accept that the purpose does so extend), but it does not matter for the purposes of Ground 1.

80. Mr Thanki's submission, that to exclude agents from s.53(1)(b) would be incoherent, is based in part on the lack of a plausible explanation as to why a landowner may have been bound by a disposition of its land effected by an agent, at least where the agent is authorised in writing, but cannot be bound by a declaration of trust evidenced in writing by an agent, even where that agent is authorised in writing.

81. In my judgment, however, there is greater incoherence on the appellants' interpretation. No-one suggests that s.53(1)(b) could be limited to agents authorised in writing, and there is no explanation for limiting the circumstances in which a landowner may be bound by a conveyance of its land to the case of an agent authorised in writing, but allowing a landowner to be bound by a declaration of trust over its land by an agent where the agent has no written authorisation. Having regard to the purpose of the section, there is as much risk of fraud for a landowner where it is alleged that a trust was declared by an agent, whose authority to do so is not evidenced in writing, as where it is alleged that the landowner himself declared an oral trust.

82. The appellants' submission, that agents authorised only orally are permitted under s.53(1)(b) because it is about evidence, not about formality of execution, does not meet this point.

83. Mr Thanki's submission about incoherence was also based on the oddity that, on his submission, an agent could (under s.40) have entered into a written contract to declare

a trust, but that would not qualify as evidence of the trust itself under s.53(1)(b). I do not think the existence of these remote possibilities outweighs the greater incoherence I refer to in §81 above.

84. Moreover, in practice, wherever an individual, A, confers authority in writing on another, B, to create a trust over A's property, the likelihood is that such written authority will itself contain the requisite evidence of the trust. Unusually, perhaps, that is not so in this case, for reasons discussed below in connection with Respondent's Notice Point 2(b).

Conclusion where the declaration of trust is by a natural person

85. For all of the reasons set out above, I conclude that s.53(1)(b) requires written evidence of the declaration of a trust over land to be signed personally by the settlor or, if relevant, the person holding the relevant interest which is the subject matter of the trust, and not by their agent.

Signing by a company

86. The appellants contend that, even if a natural person must sign personally, a company can *only* sign a document through the action of an agent, and since it is not suggested that s.53(1)(b) precludes a company from creating an enforceable trust over land, it must be construed as permitting the necessary writing to be signed by a duly authorised agent of the company.

87. The appellants cite in support the decision of the Court of Appeal in *UBAF Ltd v European American Banking* [1984] QB 713 ("***UBAF***"). That case concerned a claim for fraudulent misrepresentation. By s.6 of the Statute of Frauds Amendment Act 1828:

> "[N]o Action shall be brought whereby to charge any Person upon or by reason of any Representation or Assurance made or given concerning or relating to the Character, Conduct, Credit, Ability, Trade, or Dealings of any other Person, to the Intent or Purpose that such other Person may obtain Credit, Money, or Goods upon, unless such Representation or Assurance be made in Writing, signed by the Party to be charged therewith."

88. In *Swift v Jewsbury and Goddard* (1873-74) LR 9 QB 301 at p.312, it had been decided that a man should not be liable for a fraudulent misrepresentation as to another person's means unless he put it down in writing, and acknowledged his responsibility for it by his own signature. The justification for excluding the signature by an agent of a natural person was explained by Lord Coleridge CJ in *Swift*, at pp.311 to 312:

> "the subject of section 6 is the charging of a person for an act of fraud, and it may well be—and, without diving very deep for motives, one cannot help seeing that there was an excellent motive for that enactment—that a person should not be proved fraudulent without the matter which is the evidence of his fraud resting on his own signature to a document to be produced,—that it should not rest, as before that time it might have rested, on the conflict of evidence as to oral communications. If you mean

> to charge a person with a fraudulent act, whereby you have been damnified in respect of the conduct of another, you shall not charge that person unless you can produce his own handwriting for the statement of fraud by which you say you have been misled."

89. The representation relied upon in *UBAF* was in a letter signed by the defendant bank's "assistant secretary", a Mr Macheras. The defendant sought to strike out the claim on the basis that the assistant secretary's signature on the letter was not sufficient for the purposes of s.6. The Court of Appeal held that, for the purposes of s.6, a written representation was made by a company if it was signed by its duly authorised agent acting within the scope of his authority. On the facts there was an issue that would need to go to trial, as to whether the assistant secretary had signed the letter in the course of his ordinary duties, and whether the letter was within his general authority to sign. It was not necessary, however, to show that the assistant secretary had been authorised by a resolution of the board to sign the letter.

90. Ackner LJ, giving the judgment of the Court, observed at p.719F-G that a corporation cannot sign a document otherwise than by some human agency. It was submitted by counsel for the defendants in that case (Mr Leonard Hoffmann QC as he then was) that in order for a corporate person to lose the protection of s.6 the signature must be of a person who is the corporation's "alter ego". Ackner LJ described that description as "largely meaningless", and observed that Mr Hoffmann had been compelled to accept (rightly, thought Ackner LJ) that if Mr Macheras had been specifically authorised by a resolution of the board to sign the representations, then the defendants would have been bound: see p.719H to p.720A.

91. Having quoted the passage cited above from *Swift v Jewsbury*, Ackner LJ said, at p.723 H:

> "None of this, however, appears in the least appropriate to the case of a corporation which is incapable of signing any document at all save by some human agency…"

92. At p.724D-G, he concluded as follows:

> "In any event, even if 80 years ago or so it was assumed that the signature of a duly authorised officer or employee, acting in the course of his duties in the business of the company, was not the signature of the company, then it must also be recalled that it was not until *Barwick v. English Joint Stock Bank*, L.R. 2 Ex. 259 in 1867 that it was finally decided by the Court of Exchequer Chamber that the doctrine of vicarious liability extended to the fraudulent act of the agent of the company committed in the course of its business and for its benefit. The law relative to corporate activities has developed considerably over the years and cannot be taken to have stood still all this time. Parliament is continually placing the obligation on corporate bodies to serve notices in writing of one kind or another and, in the case of local authorities, has expressly provided for such documents to be signed by the proper officer: section 234(2) of the Local

> Government Act 1972. 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."

93. Mr McQuater first submitted that *UBAF* is a case confined to s.6 of Statute of Frauds Amendment Act 1828, and it has no application to s.53(1)(b). I do not accept this. The rationale for requiring, in the case of natural persons, that it is their own signature on the relevant representation is because a person ought not to be found liable in fraud for such a representation where his personal involvement in making the statement rests on a conflict of oral evidence. A similar rationale underpins s.53(1)(b): the owner of land ought not to be fixed with personal liability as a trustee where the question whether they have declared a trust rests on a conflict of oral evidence. The reasoning of Ackner LJ applies with as much force, in my view, to s.53(1)(b).

94. Had this case arisen in 1984, when *UBAF* was decided, I would have been inclined to follow that decision. The law relating to execution of documents by a company has, however, moved on since then, as Mr McQuater submitted.

95. In the passage from *UBAF* quoted above, Ackner LJ said that no-one would question that the signature of a duly authorised agent was the signature of the company. At that time, there was no statutory mechanism for the execution of documents, generally, by a company. Provision was made in the Companies Act 1948 only for the execution of contracts or deeds. By s.32 of that Act:

(1) Where a contract, if made between private persons, was required to be in writing and under seal, then it may be made on behalf of the company in writing under its common seal;

(2) Where a contract, if made between private persons, was required to be in writing, signed by the person to be charged therewith, then it may be made on behalf of the company "in writing signed by any person acting under its authority, express or implied";

(3) Where a contract, if made between private persons, would be valid if made by parol only, then it may be made by parol on behalf of a company "by any person acting under its authority, express or implied."

96. This was replaced, without material change, by s.36 of the Companies Act 1985. In 1989, however, s.36A was added, which made provision for the execution of documents, generally, by a company:

> "(1) Under the law of England and Wales the following provisions have effect with respect to the execution of documents by a company.
>
> (2) A document is executed by a company by the affixing of its common seal.

> (3) A company need not have a common seal, however, and the following subsections apply whether it does or not.
>
> (4) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect as if executed under the common seal of the company.
>
> (5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed."

97. On the enactment of the Companies Act 2006 this was further revised, s.44 of that Act providing as follows (with contracts being governed by s.43):

> "(1) Under the law of England and Wales or Northern Ireland a document is executed by a company-
>
> (a) by the affixing of its common seal, or
>
> (b) by signature in accordance with the following provisions.
>
> (2) A document is validly executed by a company if it is signed on behalf of the company-
>
> (a) by two authorised signatories, or
>
> (b) by a director of the company in the presence of a witness who attests the signature.
>
> (3) The following are "authorised signatories" for the purposes of subsection (2)-
>
> (a) every director of the company, and
>
> (b) in the case of a private company with a secretary or a public company, the secretary (or any joint secretary) of the company.
>
> (4) A document signed in accordance with subsection (2) and expressed, in whatever words, to be executed by the company has the same effect as if executed under the common seal of the company."

98. Section 44 does not in fact apply to NIOC, as it applies only to companies incorporated under the Companies Acts (see s.1 of the Companies Act 2006). The position in relation to overseas companies is governed by regulation 4 of the Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009 ("**Regulation 4**"). I return to the detail of Regulation 4 when considering Ground 2. For present

purposes, however, what matters is that statute now prescribes how a company (whether one incorporated here, or an overseas company) may itself execute a document, as opposed to how a document may be executed by an agent on its behalf.

99. That distinction was explained in *Hilmi* (see above at §42). That case concerned the giving of notice by four tenants under s.99(5) of the Leasehold Reform, Housing and Urban Development Act 1993. At the time (as I have noted above at §62), the sub-section distinguished between notices given by the tenant, and notices given by or on behalf of the tenant. Three of the tenants were individuals and signed personally. The fourth tenant was a company, and the notice was signed by a Mr Hickey, who said in a witness statement that he was a director and authorised to sign on behalf of the company. The question on the appeal was whether his signature amounted to signature of the notice "by the company".

100. Lloyd LJ, with whom Pitchford LJ and Ward LJ agreed, noted (at §7) the changes to company law made by the Companies Act 1989, specifically the introduction for the first time, in s.36A, of a provision regarding the execution of documents other than contracts and deeds by a company.

101. In an earlier case, *City & Country Properties Ltd v Plowden Investments Ltd* [2007] L & TR 225, HHJ Reid had concluded that the way in which a company could itself sign a document was regulated by s.36A of the Companies Act 1985, so that the signature of a single director was insufficient. In *Hilmi*, HHJ Dight had reached the opposite conclusion, finding that the concept of execution is reserved for more formal situations, and did not apply to notices. His reasoning (cited by Lloyd LJ at §14 of *Hilmi*) was that the purpose of requiring the tenant's personal signature under s.99(5) was to ensure that the tenant "really knew what he was doing" and that:

> "A company, being an artificial person, can only act through agents and whether it 'signs' a document via a single officer or 'executes' a document in accordance with section 36A of the 1985 Act it does so through agents. Thus compliance with section 99(5) has to be via an agent of the company in any event. However, whenever a company acts through the agency of an officer authorised to so act on its behalf the company has, in my judgment, personal knowledge of the transaction in which its officers are acting. In doing so the purpose of section 99(5) … will have been fulfilled."

102. At §17, Lloyd LJ noted that counsel for neither party had been able to find any case in which a court has had to consider how a company can and does sign a document personally, other than contractual documents which were governed by other legislation. Mr Thanki submitted that there was one obvious case – namely *UBAF* – which, being Court of Appeal authority, was binding on the Court in *Hilmi*, and that the failure to refer to it renders the decision in *Hilmi per incuriam*. I do not accept this, as explained at §105 below.

103. At §21 and following, Lloyd LJ addressed the distinction that was advanced by counsel for the appellant in that case, between documents of a degree of formality such that one could speak of their "execution" by a company, and other less formal documents (including notices under s.99(5) of the Leasehold Reform, Housing and Urban

Development Act 1993) where it would be unnatural to speak of them being "executed". He concluded (at §26 to §27) that it posed serious difficulties:

> "This interpretation of section 36A would result in there being four different categories of document made (to use a general word) by a company: contracts governed by section 36, deeds governed by section 36A and section 36AA, other documents "executed" by a company governed by section 36A, and yet other documents made by a company but not "executed" by a company, to which none of these sections would apply. The fourth category would be those documents which it is not natural to describe as being "executed" by a company. Mr van Tonder was not able to put forward a submission as to what documents would fall into the third and the fourth categories respectively, save that he said a notice under section 13, or correspondingly under section 42, of the 1993 Act would be in the fourth category, not governed by section 36A. That reading of the 1985 Act would give rise to a remarkable degree of confusion and uncertainty, as to which documents fall into which category. Moreover there would be no general rule applicable to the fourth category of documents. I can see no proper basis or justification for differentiating between types of document made by a company (other than contracts and deeds) for this purpose and in this way."

104. Lloyd LJ continued (at §28):

> "…at any rate in the context where some degree of formality is required to make a document valid and effective for some particular legal purpose (and the point can only arise in such a context), it is appropriate and natural to speak of the execution of the document, as a matter of ordinary language. That is so even for a document to be made under hand rather than by deed. In particular, it is so for a document which is to be signed by, as distinct from on behalf of, a legal entity such as a limited company."

105. Accordingly, he concluded (at §31), that "Section 36A of the 1985 Act did prescribe how a company registered under the Companies Acts could itself sign a document which was required for some formal legal purpose." That must now be read as referring to s.44 of the Companies Act 2006. The failure to cite *UBAF* to the Court of Appeal in *Hilmi* does not, in my view, detract from Lloyd LJ's conclusion or reasoning. As I have already observed, there was no statutory mechanism for a company to execute documents, other than contracts and deeds, when *UBAF* was decided, and Lloyd LJ's reasoning is firmly based on the change in the law brought about by the Companies Act 1989. *UBAF* was not, therefore, an authority which bound the Court of Appeal in *Hilmi* to reach the opposite conclusion.

106. *Hilmi* is not in itself determinative of the answer so far as s.53(1)(b) is concerned, nor is the fact that Lloyd LJ (at §17) identified s.53(1)(b) as the only other statutory provision requiring a personal signature that had been cited to the Court in *Hilmi*. The

nature of the requirement for written evidence of a declaration of trust is considered in depth under Ground 3 below. As explained there, s.53(1)(b) goes to the evidence required to prove a declaration of trust, not to its validity. It is not required, therefore (to borrow the language of Lloyd LJ quoted above) "to make the document valid and effective for some particular legal purpose". On the other hand, the requisite written evidence does serve an important legal function – enabling the beneficiary of the trust to establish its existence so as to be able to obtain its enforcement in court proceedings. That, in my judgment, is a sufficient legal purpose to constitute the degree of formality needed to engage s.44 of the Companies Act 2006.

107. For these reasons, I consider that the signature of an agent, whether a natural person or a company, does not suffice for the purposes of s.53(1)(b). I would therefore dismiss the first ground of appeal.

Ground 2: execution "by" a company

108. NIOC contends, in the alternative, that the Mortgage Documents were signed *by* it and not on its behalf. It does so on three bases.

109. First, following *UBAF*, it contends that a company can only sign via an agent, so that a document signed by its duly authorised agent is treated as signed "by" the company. I reject that argument, for the reasons already given above under Ground 1.

110. Second, it contends that the signature on the Mortgage Documents satisfied the requirements of Regulation 4. That substitutes a revised version of s.44 which provides, relevantly, that:

> "(1) Under the law of England and Wales or Northern Ireland a document is executed by an overseas company-
>
> (a) by the affixing of its common seal, or
>
> (b) if it is executed in any manner permitted by the laws of the territory in which the company is incorporated for the execution of documents by such a company.
>
> (2) A document which-
>
> (a) is signed by a person who, in accordance with the laws of the territory in which an overseas company is incorporated, is acting under the authority (express or implied) of the company, and
>
> (b) is expressed (in whatever form of words) to be executed by the company,
>
> has the same effect in relation to that company as it would have in relation to a company incorporated in England and Wales or Northern Ireland if executed under the common seal of a company so incorporated."

111. The judge did not address the possibility that NIOC had complied with Regulation 4 for the simple reason that NIOC did not advance this case at trial.

112. Mr Thanki contended that NIOC's case was sufficiently pleaded before the judge, that the judge's finding that the Mortgage Documents were executed by NIOC acting by its attorney was a sufficient finding that NTT was duly authorised to execute the documents, and that it was therefore for CGC to advance a case that NIOC had *not* complied with Regulation 4.

113. So far as the pleadings are concerned, NIOC pleaded in its defence (at paragraph 86(10)) simply that the Mortgage and other documents were evidence in writing for the purpose of s.53(1)(b). CGC pleaded in its reply (at §20(2)(a)(iv)) that s.53(1)(b) was not complied with. Those documents on their face revealed that they were executed by someone purporting to be authorised to do so *on behalf of* NIOC.

114. NIOC sought further information as to CGC's denial that the documents relied on by NIOC constituted declarations of trust. In response, CGC pleaded, among other things, that NIOC could not rely upon statements made by agents and/or third parties since that did not satisfy the requirement for writing in s.53(1)(b).

115. Nobody appears to have focused on the possibility that signature of an authorised person on behalf of NIOC was a signature *by* NIOC. Given the terms of Regulation 4, had NIOC wished to advance such a case it would have needed to plead the requirements of Regulation 4 including, critically, that NTT was authorised in accordance with Iranian law. It did not do so. It adduced no evidence of Iranian law to establish such authorisation, and did not run an argument based on Regulation 4 at trial. The judge's observation that the Mortgage Documents were executed by NIOC acting by its attorney (see §186 of the judgment) cannot be regarded as a finding that NTT was authorised in accordance with Iranian law, as this was not an issue that was before him for decision.

116. While there is no general rule that a case needs to be exceptional before an appellate court will allow a new point to be taken on appeal, the court must nevertheless exercise caution before doing so. It will consider all relevant factors, including the nature of the proceedings in the lower court, the nature of the new point and any prejudice that may be caused to the opposing party: *Notting Hill Finance Ltd v Sheikh* [2019] EWCA Civ 1337; [2019] 4 WLR 146. At §27 to §28 of that case, Snowden J, with whom Longmore and Peter Jackson LJJ agreed, referred to cases at one end of the spectrum of possible cases, where the policy arguments in favour of finality of litigation carry greater weight, and where the appeal court would be less likely to allow the new point to be run. These are cases where there has been a full trial involving live evidence and cross-examination in the lower court, and where the new point, if taken at trial, would have changed the course of the evidence or required further factual enquiry. This is such a case. At the very least, the parties would be required to investigate, and call evidence, on Iranian law, if NIOC were permitted to take this point.

117. The third way NIOC puts its case under Ground 2, based on s.74(4) LPA 1925, can be disposed of shortly. This sub-section provides:

> "Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any

> interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person; and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised."

118. It is doubtful whether s.74(4) applies to the creation of a trust, because that does not involve any conveyance of an interest in property. Mr Thanki himself submitted in relation to Respondent's Notice Point 1 that a declaration of trust involves the creation of a new interest, not the conveyance of an existing interest: see, for example, *Commissioner of State Revenue v Rojoda Pty Ltd* [2020] HCA 7, a decision of the High Court of Australia, at §44, per Bell, Keane, Nettle and Edelman JJ:

> "it is fundamental that the creation of a trust involves the creation of new equitable obligations, which are 'annexed to the trust property' or 'engrafted' or 'impressed upon it'. The creation of a trust never involves the 'movement' of property in the sense of a conveyance of title from one person to another."

119. As against this, however, it might be said that the broad definition of "conveyance" in section 205 of LPA 1925 (including a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will) extends to a declaration of trust.

120. It is unnecessary to resolve that point, because even if s.74(4) does apply, it only gets NIOC so far. Assuming it is correct that NTT was authorised under a power of attorney to execute a declaration of trust on behalf of NIOC, all that s.74(4) does is permit Mr Rahgozar, as an officer of NTT, to execute the declaration of trust by signing it in the name of NIOC. There is nothing in the section, however, that renders that signature the signature *of* NIOC (as opposed to the signature of someone authorised to act on its behalf, and in contrast to s.74(3)). Section 74(4) does not therefore solve NIOC's difficulty in the face of my conclusion that s.53(1)(b) requires the signature to be that *of* NIOC.

121. After circulation of the draft judgment, Counsel for NIOC indicated that NIOC relied also on s.74(3). Although this had been referred to briefly in its grounds of appeal and written skeleton, at the hearing Mr Thanki relied only on s.74(4). Mr McQuater noted that s.74(3) – which dealt with individuals not corporations and so did not appear relevant – had not been relied on in oral submissions by Mr Thanki, and passed over it. No mention was made of s.74 in reply by Mr Thanki. In fact, Mr Thanki had been right to place no reliance on s.74(3) in oral submissions. That subsection provides that

> "Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, he may as attorney execute the conveyance by signing the name of the corporation in the presence of at least one witness who attests

> the signature, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance."

122. The way the point was put in NIOC's skeleton was as follows:

> "The 2019 Mortgage Deed was signed by Mr Rahgozar, who was appointed for that purpose by NTT (NIOC's attorney) to sign the 2019 Mortgage Deed in the name of NIOC, which he did in the presence of a witness (Mr Bayat). On this basis too, the 2019 Mortgage Deed is to be treated as having been signed by NIOC."

123. In Counsel's email sent after the circulation of the draft judgment, NIOC's case was said to be that the effect of s.74(4) was to render Mr Rahgozar's signature that of NTT in its capacity as attorney; whereupon the effect of s.74(3) was to render NTT's signature that of NIOC. This attempt to combine the effect of subsections (3) and (4) does not work. As Mr McQuater said at the hearing (to which there was no response), s.74(3) deals with execution by an individual as attorney for a corporation (referring to a person who, as attorney for a corporation, signs in the presence of a witness). Its effect was to render Mr Rahgozar's signature that of NTT, because NTT is the relevant "corporation" and Mr Rahgozar is the relevant "attorney" for the purposes of s.74(3). It does not have the further effect of rendering NTT's signature that of NIOC.

Ground 3: The consequence of non-compliance with s.53(1)(b)

The judgment

124. The judge addressed the consequences of the absence of writing at §201 to §213 of his judgment. At §203 to §206 he cited textbooks in which the consistent view expressed is that an unwritten declaration of trust is valid but unenforceable by the beneficiary against the trustee. He observed, at §208, that it has long been understood – certainly so far as the Statute of Frauds is concerned – that the necessary writing may be subsequent to the declaration of trust and, once it exists, the trust can be enforced, noting that this was recently confirmed by HHJ Paul Matthews sitting as a judge of the High Court in *Taylor v Taylor* [2017] EWHC 1080 (Ch); [2017] 4 WLR 83 at §50.

125. At §210 he said:

> "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. That would be to ignore the requirement in section 53(1)(b). To be enforced a trust of land must be manifested and proved in writing (appropriately signed)."

126. NIOC's argument before the judge (as recorded at §211) was that s.53(1)(b) went to enforceability *by a beneficiary* of the declaration of trust. The judge said, however (at §211), that the present case involved a trustee and beneficiary seeking to enforce the trust against a third party creditor of the trustee, and there is no language in the section

which suggests that the manifestation in writing is not required in the context of this case. Accordingly, he concluded at §213 as follows:

> "For these reasons I must conclude that the answer to Issue 1 is that at the time of the August Transfer NIOC was the beneficial owner of NIOC House. The trust relied upon by NIOC and the Fund cannot be established. English law has very strict formalities with regard to the proof of a declaration of trust respecting land and requires such a trust to be "manifested and proved by some writing signed by some person who is able to declare such trust". The trust relied upon by NIOC and the Fund with regard to NIOC House was not so manifested and proved. I must also conclude that the answer to Issue 2 is that the August Transfer was at an undervalue. It was not justifiable on the basis that the Fund beneficially owned NIOC House."

127. He reiterated this conclusion at §224, finding that NIOC and the Fund cannot justify the undervalue by the requisite proof that NIOC was subject to a trust in favour of the Fund. Since CGC had established that the Transfer was undertaken for the purpose of putting NIOC House beyond the reach of CGC, the court had the power, pursuant to s.423, to make such order as it thought fit to restore the position to what it would have been if the transaction had not been entered into.

Identifying the issue raised by Ground 3, and the parties' arguments in outline

128. It is important correctly to identify the issue that arises for decision under Ground 3. Framing the debate as one of "enforcement" of a trust against CGC tends to obscure the issue. Since August 2022 there has been no trust at all, the legal and equitable estates having both vested in the Fund as a result of the Transfer. As Mr Thanki submitted, it is a misnomer to speak of *enforcing* a trust which has been performed or perfected by the transfer of the legal estate to the beneficiary.

129. The ultimate question is whether the judge was correct to find that the Transfer amounted to a transaction at an undervalue for the purposes of s.423. For that purpose, it is necessary to determine the nature of NIOC's interest in NIOC House immediately prior to the Transfer and whether the transfer of that interest to the Fund was the transfer of something with any significant value.

130. Under s.423, the Transfer could be impugned if it was (a) a gift, or otherwise entered into on the basis that no consideration was received; or (b) a transaction for a consideration the value of which, in money or money's worth, was significantly less than the value, in money or money's worth, of the consideration provided by NIOC.

131. Transaction is defined by s.436(1) of the Insolvency Act 1986 as "a gift, agreement or arrangement, and references to entering into a transaction shall be construed accordingly." As the Supreme Court recently noted in *El-Husseiny v Invest Bank* [2025] UKSC 4; [2025] 2 WLR 320, ("***El-Husseiny***") at §30, the inclusion of "arrangement" makes for a broad definition of "transaction".

132. The definition of "transaction at an undervalue" for the purposes of s.423 is the same for the purposes of s.238 and s.339 of Insolvency Act 1986 (transactions at an

undervalue in the context of corporate and personal insolvency respectively). There is no good reason for giving different meanings to the concept in each of these statutory provisions: see *El-Husseiny* at §72. It follows that it is appropriate to consider the implications of the parties' contentions as to the consequences of the lack of written evidence of a trust of land in the context of each of those statutory provisions.

133. The value of the consideration provided, and received, under a particular transaction is a question of fact, although it may also raise issues of law: *Phillips v Brewin Dolphin Bell Lawrie Ltd* [2001] 1 WLR 143, at §20. Regard must be had to "reality and common sense": *Agricultural Mortgage Corp Plc v Woodward* [1994] BCC 688 at p.697A. Value is to be considered from the perspective of the debtor: *Re MC Bacon Ltd (No.2)* [1990] BCLC 324, at p.340g. It is to be valued at the time of the transaction: *Phillips v Brewin Dolphin* (above) at §26.

134. There is no doubt that the transfer of legal title in NIOC House fulfils the definition of a "transaction". Having regard to the purpose of s.423, however, the Transfer will not fall within s.423 if it "had no effect on the availability or value of assets otherwise available to meet the claims of creditors": see *El Husseiny* at §59.

135. CGC did not dispute that in the case of valid and enforceable trust obligations, the transfer of the legal estate from the trustee to the beneficiary falls outside the scope of s.423 because it does not involve the transfer of any significant value: see, for example, *Re Schuppan (a bankrupt) (No.2)* [1997] 1 BCLC 256, at p.267b, per HHJ Maddocks sitting as a judge of the High Court; *Kubiangha v Ekpenyong* [2002] EWHC 1567 (Ch); [2002] 2 B.C.L.C. 597, at §15, per Launcelot Henderson QC, as he then was, sitting as a deputy judge of the High Court. It contends, however, that those cases have no application in the case of a trust of land which is not evidenced in writing.

136. The critical question, therefore, is whether the lack of sufficient writing to satisfy s.53(1)(b) immediately prior to the Transfer has the consequence that the beneficial interest in NIOC House remained with NIOC, such that it was the *Transfer* which had the effect of transferring the beneficial interest to the Fund.

137. The judge concluded that NIOC was indeed the beneficial owner of NIOC House at the time of the Transfer, because the trust relied on by the Fund "cannot be established" (see §213 of the judgment). If he was wrong about that, then his conclusion that there was a transaction at an undervalue – because the Fund could not establish by the requisite proof that NIOC House was held on trust for it – cannot stand.

138. NIOC contends that s.53(1)(b) does not prevent NIOC and the Fund from relying on the fact that, on the judge's findings, NIOC had validly declared a trust of NIOC House in favour of the Fund. It submitted that s.53(1)(b) is a provision concerned only with how a declaration of trust is evidenced, and it does not alter the true disposition of property rights, citing *Gardner v Rowe* (1828) 5 Russ. 258 ("***Gardner***") and *Rochefoucauld v Boustead* [1897] 1 Ch 196 ("***Rochefoucauld***") (cases to which I will return in detail below). The textbooks are therefore correct to conclude that an unwritten declaration of trust is valid, but unenforceable, and the judge was wrong to conclude that NIOC had the beneficial interest in NIOC House at the time of the Transfer.

139. CGC's case, as developed in its post-hearing written submissions, is that a "non-compliant" declaration of trust (by which it means a trust of land which is not

sufficiently evidenced in writing for the purposes of s.53(1)(b)) creates no enforceable obligation requiring the putative trustee to hold the land on trust for the putative beneficiary. As a result, the putative trustee holds the legal interest unencumbered by any trust obligations.

140. CGC accepts that the orthodox view is that a trust of land which is not sufficiently evidenced in writing is nevertheless a valid trust. It contends, under its Respondent's Notice Point 1, that the orthodox view is wrong, but it maintains that, even if it is not correct to "label" the trust as invalid, the putative trustee does not become subject to any obligation which can be enforced in equity by a putative beneficiary. Put another way, it says, a non-compliant declaration should not have any status, or be capable of proof "for any purpose" until the section is complied with, and a declaration that cannot be proved cannot be enforced. It follows, CGC contends, that the consideration provided by NIOC was the full value of the beneficial interest in NIOC House, because immediately prior to the Transfer, that full value would have been available to NIOC's creditors. At most, the Transfer resulted in NIOC being released from an unenforceable trust obligation, something of little or no value.

141. CGC further contends that, given that the purpose of s.53(1)(b) is to safeguard against fraud, there has to be an effective sanction for non-compliance. Without writing, the trust cannot be proved for any purpose, and so it is unenforceable for any purpose, including for the purpose of defeating a creditor's claim. The consequence of admitting evidence of the trust in the context of CGC's s.423 claim would amount to "enforcement of the trust against the creditor". It submitted that NIOC's case would turn the purpose of s.53(1)(b) on its head, because it would transform an anti-fraud provision into an instrument of fraud. It would permit a debtor to make an oral, unevidenced declaration of trust over its land, then wait and see if a creditor successfully pursues it: if so, it could rely on the unevidenced declaration of trust to defeat the creditor's claim and, if not, it could retain its land free of the trust.

142. As to the correctness of the orthodox view, CGC points to authorities (*Gissing v Gissing* [1971] AC 886, at pp.905 to 906, and *Lloyds Bank v Rosset* [1991] 1 AC 107, at p.129) in which there is passing reference to the point that, at least until such time as s.53(1)(b) is complied with, there is no valid trust. It suggests that this is supported by the requirement that s.53(1)(b) requires the trust to be both "manifested" and "proved", the former being otiose unless it connotes the coming into existence of the trust. It also relies on Millett LJ's seminal analysis in *Armitage v Nurse* [1998] Ch 241, at p.253, that there is an irreducible core of obligations owed by trustees to beneficiaries "and enforceable by them" and that "if the beneficiaries have no rights enforceable against the trustees there are no trusts".

The consequence of there being insufficient written evidence of a trust of land

143. As I have already observed, s.7 of the Statute of Frauds provided that in the absence of writing the trust was "utterly void and of none effect". Those words, however, were not construed by the courts as meaning that a lack of sufficient evidence meant there was no trust.

144. In *Ambrose v Ambrose* (1716) 1 P. Wms. 321, for example, in a decision later affirmed by the House of Lords, it was held that a declaration of trust by a person in whose name land was purchased, although it was signed only after the death of the beneficiary, was

sufficient to render the pre-existing trust enforceable for the benefit of the deceased beneficiary's heirs. The point was indorsed in *Forster v Hale* (1798) 3 Ves 696 (upheld on appeal by Lord Loughborough LC, (1800) 5 Ves 308, at p.315). In that case, a trust was declared by implication from various letters, but not signed or dated. The Master of the Rolls, Sir R.P. Arden, at p.707, said:

> "It is not required by the Statute, that a trust should be created in writing; and the words of the Statute are very particular in the clause (sect. 7) respecting the declarations of trust. It does not by any means require, that all trusts shall be created only in writing; but that they shall be manifested and proved by writing; plainly meaning, that there should be evidence in writing, proving, that there was such a trust. Therefore unquestionably it is not necessarily to be created by writing: but it must be evidenced by writing; and then the Statute is complied with; and indeed the great danger of parol declarations, against which the Statute was intended to guard, is entirely taken away."

145. This passage also answers a point made by CGC, that "manifested", in order not to be otiose, must be read as imposing a requirement that the trust must be *created* in writing. The section has consistently been interpreted as requiring no more than that the trust must be proved by written evidence.

Rochefoucauld

146. That was the clear conclusion reached in *Rochefoucauld*. The plaintiff owned certain estates in Ceylon, subject to a mortgage. In 1873, the mortgagees sold the estates to the defendant, who raised large sums by mortgage. The defendant became bankrupt in 1879, but obtained his discharge in 1880. The estates were then sold by the defendant or his mortgagees. The plaintiff's case was that, on the basis of certain letters and other evidence, the defendant had purchased the estates as trustee for her, subject to a lien for his advances. The plaintiff brought an action against the defendant for a declaration that the defendant purchased as her trustee. The defendant pleaded that the estates were conveyed to him as beneficial owner. He also pleaded that the trust claimed by the plaintiff was not evidenced in writing, and relied on s.7 of the Statute of Frauds as a defence.

147. At trial, Kekewich J held that no trust had been proved. The Court of Appeal found that the evidence proved that the defendant purchased as trustee for the plaintiff, and held that he therefore held the estates as trustee. The Court was not convinced that the letters on which the plaintiff relied to establish the trust were insufficient to satisfy s.7, but held that even if so, parol evidence was admissible.

148. Lindley LJ, giving the reserved judgment of the Court, noted that s.7 required the plaintiff to prove by some writing signed by the defendant that there was a trust, and the terms of that trust. He continued, at p.206:

> "But it is not necessary that the trust should have been declared by such a writing in the first instance; it is sufficient if the trust can be proved by some writing signed by the defendant, and the date of the writing is immaterial. It is further established by a

> series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it to be so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant…"

149. The preponderance of view in academic writing in recent years appears to be that the circumstances in *Rochefoucauld* are better analysed as giving rise to a constructive trust, because it was unconscionable for the defendant, having acquired the estates on the basis that he would hold them on trust for the plaintiff, to deny the existence of the trust. In his article, *The Nature of the Trust in Rochefoucauld v Boustead* in Charles Mitchell (ed) *Constructive and Resulting Trusts* (2010) at p.95, Professor Swadling defends the analysis that the trust was an express one, but recognises that this is not the dominant view. A constructive trust is outside the scope of s.53(1)(b) (because of s.53(2)) and would also have been outside the scope of s.7 of the Statute of Frauds (because of s.8 of that Act). It is unnecessary to resolve that issue on this appeal, for there is no doubt that the Court of Appeal's decision in *Rochefoucauld* was made on the basis that the trust was an express trust. There would have been no need to apply the principle that the Statute of Frauds may not be used as an instrument of fraud if the trust was analysed as a constructive trust, because the statute would then have had no application at all. At p.208, in the context of an argument based on the Statute of Limitations, Lindley LJ said:

> "The trust which the plaintiff has established is clearly an express trust within the meaning of that expression as explained in *Soar v Ashwell*. The trust is one which both plaintiff and defendant intended to create. This is not one in which an equitable obligation arises although there may have been no intention to create a trust."

150. The nature of the requirement for writing arose in the context of an argument advanced by the plaintiff that the Statute of Frauds had no application because the relevant estates were in Ceylon. In rejecting that argument, Lindley LJ said (at p.207):

> "The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries."

151. *Rochefoucauld* is clear authority, therefore, for the proposition that a lack of sufficient evidence in writing does not affect the *validity* of the trust but goes only to the question whether it can be proved as a matter of procedure of the English court. Put another way, sufficient writing is required to evidence the trust, not to perfect it. As Professor Swadling put it in *The Nature of the Trust in Rochefoucauld v Boustead* (above) at p.104:

> "it is well established that section 7 was not a rule of validity but a rule of evidence. As the Court of Appeal itself recognised in

> *Rochefoucauld*, it was a rule describing how, if it came to litigation, an allegation that a declaration of trust respecting land must be proved."

152. *Rochefoucauld* created an important carve-out from the protection that s.7 afforded to a trustee in relation to a trust that is not sufficiently evidenced in writing. CGC accepts that it recognised an exception to the extent that such a trust is enforceable by the beneficiary if reliance on the statute would itself be in furtherance of a fraud. It contends, however, that this has no application here, because the principle derived from *Rochefoucauld* applies only where property is transferred to the trustee on the basis that it will be held on trust for the beneficiary (a "3-party case", as opposed to the position in this case, where NIOC itself declared a trust over NIOC House – a "self-declaration case").

153. Mr Thanki accepted in argument that "as things stand" the *Rochefoucauld* principle is limited in this way, and I consider that he was right to do so. The description of the principle by Lindley LJ at p.206 of *Rochefoucauld* is of a 3-party case: "it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself". It has been confirmed as being limited to a 3-party case in Canada (*Morris v Whiting* (1913) 15 DLR 254, at pp.257-258) and in Australia (*Wratten v Hunter* [1978] 2 NSWLR 367 at pp.369-371). Those cases explain that the reason the *Rochefoucauld* principle applies is because a person to whom land is conveyed as trustee would not have received it but for the acceptance of the trust obligation, and equity considers it a fraud for that person to deny the trust and claim the land as his own. That reasoning does not apply in a self-declaration case, where to allow parol evidence to establish the existence of a trust, on the ground that otherwise the putative trustee would be using the statute in furtherance of a fraud, would denude the statute of all effect.

Gardner

154. The conclusion that an absence of sufficient writing does not affect the validity of the trust that has been declared is also supported by the decision in *Gardner*.

155. In that case, Lord Mount Edgecumbe granted a lease to George Wilkinson in 1812, permitting him to dig for tin and other minerals on land called the Wheal Regent Sett in Cornwall. In 1813, Wilkinson executed a deed, declaring that he was trustee of the lease for Mr Rowe. In the intervening period, Wilkinson had committed an act of bankruptcy, the consequence of which was that his property passed to his assignees in bankruptcy. The assignees brought an action seeking a declaration that the declaration of trust had been executed fraudulently with a view to protecting Rowe from the effects of Wilkinson's insolvency, and that the lease was part of the bankruptcy estate.

156. Rowe's defence was that he was the beneficial owner of the lease, it having been purchased in the name of Wilkinson for his benefit. The court directed a trial of the issue "whether the name of Wilkinson was used in the lease of 23d of January 1812, as trustee for Rowe". The jury determined that it was.

157. The question then arose whether the trust "could not prevail because there was no written declaration of trust within the Statute of Frauds other than the indenture of 24th

August 1813, which being executed by the bankrupt after his bankruptcy could not operate to defeat the claim of his assignees".

158. The report of the decision of the Vice-Chancellor (Sir John Leach) is at (1825) 2 Sim. & St. 346. Having observed that there was no previous authority on the point, the Vice-Chancellor identified the question (at p.353) as being: "can the bankrupt be said to have any interest in this mine at the time of his bankruptcy?". Although Wilkinson could have recovered possession of the mine by force of his legal title, "but he would then have recovered, not in respect of his interest, but by converting a statute made for the prevention of fraud into an instrument of his own fraud". It was not disputed that, if the deed of August 1813 had been executed before bankruptcy, it would have prevailed against the assignees. The Vice-Chancellor continued:

> "This deed, therefore, in respect of the moral obligation on the trustee to give effect to his trust, would not in such case have been considered a mere voluntary deed. If, in respect of the moral obligation affecting the trustee, this declaration of trust would have prevailed against the assignees if executed the day before the bankruptcy without any other consideration, I cannot find a principle why it should not prevail against the assignees if executed the day after bankruptcy, especially when it is considered that a trust does not pass by assignment in the bankruptcy."

159. While the result was clear, the reasoning – particularly as to where the beneficial interest in the lease lay at the time of Wilkinson's bankruptcy – is equivocal. On the one hand the Vice-Chancellor referred to the "moral" obligation on Wilkinson. On the other hand, whatever language was used to describe the obligation, it prevented the declaration of trust from being a mere voluntary deed and enabled it to prevail against the assignees, on the basis that "a trust" does not pass by assignment in the bankruptcy. It also enabled the Vice-Chancellor to answer the question he posed (did Wilkinson have any interest in the mine at the time of his bankruptcy?) in the negative.

160. The judgment on appeal of the Lord Chancellor (Lord Lyndhurst) (1828) 5 Russ. 258, at pp.261-262 is clearer on the point:

> "Assuming the bankrupt to have been a trustee for Mr Rowe, there was nothing, I think, to prevent him from making a valid declaration of trust, notwithstanding his bankruptcy. It is true that the property of a trader cannot be assigned by him after his bankruptcy: the property is no longer his; it is vested in his assignees. But property held in trust, is not the property of the bankrupt. It does not pass to his assignees. The only question therefore, as it appears to me, in this case is, whether the declaration contained in the deed was founded upon a previous trust, or was altogether fraudulent. That question, however, has been decided in substance by the jury upon the trial of the issue; for they have found that the name of Wilkinson was used in the original deed as a trustee for Rowe."

161. It is true that, in *Gardner*, by the time the matter came before the Court, Wilkinson had signed a declaration sufficient to satisfy the Statute of Frauds. That does not detract from the critical conclusion in the decision, however, that *before* such writing was produced there was a trust over the lease which prevented it from passing to the trustee's assignees upon bankruptcy. The Lord Chancellor, in contrast to the Vice-Chancellor at first instance, referred to this as a trust, not merely a moral obligation. It is not correct, in my view, to characterise the subsequent writing as having "perfected" the trust (as CGC contends in its supplemental skeleton at §23). That would turn s.53(1)(b) from a rule of evidence into a rule of validity.

162. *Gardner* is binding on us. Mr McQuater reserved the right to challenge its correctness in the Supreme Court, but submitted that it is in any event distinguishable, since it was a 3-party case, such that the absence of writing could have been overcome by applying the principle in *Rochefoucauld*. There is some support for that view in the first instance judgment, where the Vice-Chancellor referred to the fact that if Wilkinson had recovered possession of the mine by force of his legal title, he would have recovered "by converting a statute made for the prevention of fraud into an instrument of his own fraud." That was not, however, the basis upon which the case was decided on appeal. The basis of the Lord Chancellor's decision was that there was a trust over the lease (as found by the jury as a matter of fact) prior to Wilkinson's bankruptcy, and that the existence of that trust prevented the lease passing to Wilkinson's assignees, notwithstanding that the trust had not been evidenced in writing at the time of the bankruptcy. The later execution of the written deed therefore satisfied the Statute of Frauds.

163. Mr McQuater also contended that it is impermissible to rely on authorities concerned with the Statute of Frauds when interpreting s.53(1)(b), citing *Grey v Inland Revenue Commissioners* [1960] AC 1. That case concerned the interpretation of s.53(1)(c) LPA 1925. At p.13, Viscount Simonds noted the presumption, when construing a consolidating Act, that the Act is not intended to alter the law, but that this "must yield to plain words to the contrary". The predecessor to s.53(1)(c) in the Statute of Frauds was s.9, which referred to "grants and assignments" of trusts, whereas s.53(1)(c) used the word "dispositions" of trusts. Viscount Simonds concluded that, although the LPA 1925 was a consolidating Act, it consolidated various pieces of prior legislation, including the Law of Property Acts of 1922 and 1924 which had themselves been pieces of *amending* legislation. Lord Radcliffe, at p.17 found that these earlier enactments contained numerous amendments to the Statute of Frauds, which were "avowedly changes". Accordingly, there was no direct link between s.53(1)(c) and s.9 of the Statute of Frauds. As such "it is inadmissible to allow the construction of the word 'disposition' in the new Act to be limited or controlled by any meaning attributed to the words 'grant' or 'assignment' in section 9 of the old Act."

164. This does not help CGC when it comes to the consequences of non-compliance with s.53(1)(b). There is indeed an important difference between s.7 of the Statute of Frauds and s.53(1)(b), namely the absence in the later provision of the words "or else they shall be utterly void and of none effect" found at the end of s.7. If anything, however, as observed by Professor T.G. Youdan in *Formalities for Trusts of Land, and the Doctrine of Rochefoucauld v Boustead* (1984) 43(2) CLJ, p.306, at fn77 on p.321, this can be taken to have confirmed the interpretation of s.7 in the previous cases on the Statute of Frauds. Looking at s.53 in isolation, the orthodox view is supported by the stark contrast

between sub-paragraphs (a) and (c) which require the creation or disposition of an interest in land, and the disposition of a subsisting equitable interest or trust, to be *in* writing, and s.53(1)(b), which requires only that the declaration of trust be evidenced in writing. That clear distinction would be of no effect if the absence of writing rendered a declaration of trust invalid.

165. In my judgment, the orthodox view is therefore clearly established in law: if a trust has been declared, but there is insufficient evidence to satisfy s.53(1)(b), the trust is nevertheless valid.

166. The three more recent authorities on which CGC relies do not, on analysis, detract from that conclusion. In *Gissing v Gissing*, Lord Diplock referred, at p.905A-B, in a passage explaining the difference between express trusts and implied, resulting or constructive trusts, to it being necessary "to constitute a valid declaration of trust", for the declaration of trust to be "in writing", citing s.53(1)(b). This is a misstatement of s.53(1)(b) and, in circumstances where the distinction between an invalid trust and one which has been validly declared but not yet evidenced in writing was not addressed at all, it cannot be taken as a rejection of the orthodox view. The same is true of the passage relied on in *Lloyds Bank Plc v Rosset*, at p.129C, where Lord Bridge referred *obiter* and in passing to the need for a valid declaration of trust of land to be "in writing".

167. In the passage relied on by CGC from *Armitage v Nurse*, at p.253H, Millett LJ said:

> "I accept the submission made on behalf of [the plaintiff] 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."

168. The plaintiff's submission in that case had, however, been as to the *content* of the duties that formed the irreducible core of obligations owed by a trustee: see the passage from the plaintiff's argument at p.245D-E. Millett LJ was not concerned with the different question as to the nature of the obligations arising from a declaration of trust of land, where that trust was insufficiently evidenced by writing.

169. CGC relies in support of its contention that the orthodox view is wrong on an article by Dr David Wilde, *Formalities for Declaring Trusts of Land*, [2021] 3 Conv 263. Dr Wilde argues that the "conventional interpretation" is wrong. As he notes at p.271, however, there are two recent decisions of the Court of Appeal that adopt the orthodox approach: *Sandhar v Sandhar & Kang Ltd* [2008] EWCA Civ 238, at §26; and *Ong v Ping* [2017] EWCA Civ 2069. Although he criticises these cases on the basis that the reasoning is not compelling, they are binding on us. In *Ong v Ping*, a valid declaration of trust by Madam Lim was found to have been made in April 1986, even though it was not evidenced sufficiently in writing signed by her until two years later (in a letter in which she in fact expressed a wish to revoke the trust): see Sir Colin Rimer's judgment at §59 and §62.

170. The fact that, in contrast to Dr Wilde's article, the leading textbooks (including *Snell on Equity*, 34th ed at §22-036; *The Law of Trusts* by Thomas and Hudson, 2nd ed., at §5.12; *The Law of Trust and Trustees* by Underhill and Hayton, 20th ed., at §14.14; and *Lewin on Trusts*, 20th ed., at §3-013 and 3-014) endorse the orthodox view (as recorded

by the judge at §203 to §206 of his judgment) further supports the conclusion in favour of this view.

171. In its supplemental written submissions, CGC's argument, assuming the orthodox view to be correct, is first expressed as follows: "a non-compliant declaration of trust creates no enforceable obligation requiring the putative trustee to hold the land on trust for the putative beneficiary", with the consequence that the whole of the beneficial interest in NIOC House remained vested in NIOC, and available to meet claims of its creditors.

172. In my judgment, there is no material difference between the argument expressed in this way, and the argument that the orthodox view is wrong, such that the lack of writing means there is no valid trust. For all the reasons I have set out above in support of the orthodox view, I reject this way of putting the argument. It fails to meet the point that the lack of writing does not affect the *validity* of the trust which has been declared, and fails to give any meaning to the conclusion that the trust exists from the moment of its declaration.

173. It is important in my view to define precisely what is meant in saying that a trust of land which is not yet evidenced sufficiently in writing is "unenforceable". S.53(1)(b) does not itself say anything about the enforceability or non-enforceability of the trust. While it is true that without the necessary evidence a beneficiary could not enforce the trust against the trustee, that is the indirect consequence of the inability to prove the existence of the trust, not a direct consequence of non-compliance with the section. I agree, in this respect, with the view expressed by Professor Swadling in *The Nature of the Trust in Rochefoucauld v Boustead* (above) at pp.107 to 108, that s.7 of the Statute of Frauds (and, by implication s.53(1)(b)) is "no more a rule of 'enforceability' than validity".

174. The other way CGC puts the case, on the face of it, avoids that problem, since it focuses on s.53(1)(b) as an evidential requirement. It contends that, as s.53(1)(b) requires that a declaration of trust "must" be proved by the requisite writing, it follows that a "non-compliant" declaration should not be capable of proof *for any purpose* unless and until the section is complied with. Accordingly, NIOC is itself unable to prove that it had declared a trust over NIOC House, and cannot rely on the fact that it had done so to show that the Transfer effected a transfer of only the legal estate.

175. Although more promising, I do not accept this argument. In the absence of any authority in its favour, it is necessary to consider the argument from first principles. In my judgment, it still fails to give effect to the conclusion that the absence of writing does not affect the validity of the trust that has been declared, and it is contrary to (or at least not supported by) a purposive construction of s.53(1)(b).

176. In addressing the first point, it is important to keep in mind that what matters for the purposes of s.423 (as it does for s.238 or s.339) is whether the judge was correct to find that the absence of writing at the time of the Transfer meant that the beneficial interest in NIOC House remained vested in NIOC. Viewing this from the perspective of NIOC (in accordance with *MC Bacon*, above), it is difficult to escape the logic that a *validly* declared trust by A in favour of B has the consequence of separating the legal and beneficial interest in the property, vesting the latter in B, and subjecting A to the obligations of trustee. The effect of s.53(1)(b) is merely that B is unable to prove its existence, which matters if, but only if, A denies that it made the declaration (a point to which I will return when considering the purposive interpretation of the section).

177. The necessary logic of CGC's argument, that without the requisite evidence in writing the beneficial interest remains in A, is that it is the provision of the writing that causes the beneficial interest to vest in B (and thus to cause the economic value in the property to be transferred to B). I do not accept that the provision of evidence as to a pre-existing fact (the declaration of trust) has that effect. That is particularly so given the range of circumstances in which the requirement for sufficient writing might be satisfied (see, for example, Thomas and Hudson, *The Law of Trusts* (2nd ed) at §5.10; Underhill and Hayton, *Law of Trusts and Trustees* (20th ed) at §14.14; and *Lewin on Trusts* (13th ed, 1928) at p.49): the writing can take any form, including a letter, any memorandum or a recital in another document; it need not be addressed to the beneficiary; it is effective however long after the creation of the trust, and may be provided in a pleading or affidavit after proceedings have been commenced.

178. It is also unnecessary that the writing is accompanied by any particular intention on the part of the trustee. In *Ong v Ping* (above) for example, the requisite evidence was contained in a letter, dated two years after the original (but insufficiently evidenced) declaration of trust, in which the trustee expressed the wish to her solicitors that the trust be cancelled. The validity of the trust – as from the time of its declaration, not merely from it being evidenced in writing – is emphasised by the fact that the original declaration was held to be irrevocable, notwithstanding the absence of writing. The requisite writing might later be found without any positive action on the part of the trustee at all, for example if it is discovered after his death in the safe where he locked it away.

179. In *Hudson v Hathway* [2022] EWCA Civ 1648; [2023] KB 345, the Court of Appeal held that an email subscribed with a person's first name was sufficient to constitute the signing of a document for the purposes of s.53(1)(c)). Accordingly, a simple email exchange in which the trustee answers "yes" to a question as to whether they had made the earlier declaration of trust will suffice.

180. Accordingly, I do not accept that the later provision of written evidence confirming the existence of the previously declared trust has any substantive impact on the location of the beneficial interest. It is not, in particular, the cause of A (in my above example) being divested of the beneficial interest in the property.

181. If that is so, I do not see how the transfer of the legal interest from A to B can have the consequence of divesting A of the beneficial interest in the property or of transferring that beneficial interest, or its value, to B. A could have achieved the same result in two steps, by producing a signed memorandum of the trust before executing the transfer. In that case if (which I consider to be correct) the first step did not transfer the beneficial interest to B, then the second step takes place in the context of a valid *and evidenced* trust and (as is common ground) involves no transfer of any value to B (see §135 above). A written transfer of the legal estate may well cover both steps, where it recites the reason for the transfer, viz the pre-existing trust. Where there is no issue, so far as A is concerned, that it has declared a trust, then I do not see how transferring the legal estate without having first provided (or at the same time providing) written confirmation of the trust makes any difference.

182. This conclusion accords with the purpose of s.53(1)(b). As I have noted under Ground 1, the purpose of the Statute of Frauds was identified in the preamble, as the prevention of fraudulent practices commonly endeavoured to be upheld by perjury and subornation

of perjury. The purpose of s.7 was to protect the owners of land from the loss of their land through the perjury of others making false claims as to the existence of a trust over the land. As the Master of the Rolls said in *Forster v Hale* (above at §144), once there is written evidence from the trustee, which may be long after the declaration of trust, the danger of parol declarations, against which the Statute was intended to guard, is entirely taken away.

183. Mr McQuater submitted that the purpose of s.7 and of s.53(1)(b) went further, and was also intended to provide protection to the creditors of landowners. He submitted that the original intended purpose of s.7 included the protection of creditors and that, although this was watered down so that s.7 became only an evidential requirement, it ought not to be watered down further "to say that you don't even need to comply with that vis a vis creditors". This was supported, he said, by the legislative history of s.7, which is helpfully described in the paper by Professor Youdan (above) at pp.307-314. Professor Youdan points out that the Act was passed after much debate and revision. He cited the concerns of Lord Nottingham, who it appears was responsible for drafting the statute, as to the effects of informal trusts on third parties such as creditors, which was reflected in his draft of the provisions relating to the formalities of trusts: "All declarations or creations of trusts or confidences by parol shall be utterly void and of no effect…" Professor Youdan notes, however, that while this would have provided protection for creditors, it was *not* the effect of the provision eventually passed – at least as interpreted by the courts. Mr McQuater submitted that just because the protection for creditors had been watered down to an evidential requirement does not mean that it should be watered down further to say that s.53(1)(b) need not be complied with "vis-à-vis creditors".

184. In my judgment, this legislative history provides no support for the proposition that it is any purpose of s.53(1)(b) to protect creditors. Whatever may have been Lord Nottingham's purpose, the language of his draft did not survive into the provision as enacted. Whether or not the "utterly void and of none effect" language at the end was intended to protect creditors, the courts had clearly established long before 1925 that those words were themselves of no effect, and they do not appear in s.53(1)(b). A requirement that a declaration of trust be evidenced by some writing is incapable in itself of providing any protection for creditors: there is no requirement of publicity; the section is complied with where the trustee signs a written note of the trust then locks it away in a safe; and it is complied with where the trustee only produces a written note much later.

185. Mr McQuater's complaint that NIOC's argument in this case turns the purpose of the statute on its head, such that it is being used as an instrument of fraud, confuses two different things: the risk of fraud perpetrated on the trustee (NIOC) as the owner of the land, and the risk of the trustee (NIOC) perpetrating a fraud on its creditors. It is the former which is addressed by s.7 and s.53(1)(b). The latter is addressed (today) by s.423. *Gardner* demonstrates the difference between the two. There *was* a question in that case about a fraud being perpetrated on creditors, but that related wholly to the original creation of the trust, and was answered by the jury's finding that the mine was acquired by Wilkinson at the outset for the benefit of Rowe. That was not the mischief with which the Statute of Frauds was concerned. Similarly, in the present case, there is no suggestion that the declaration of trust via the Mortgage in 2019 was a fraud on NIOC's creditors. It is CGC's interpretation which turns the purpose of the statute on

its head, because it seeks to prevent reliance on the trust *by NIOC*, the person for whose protection the writing requirement is imposed.

186. The fact that the evidence necessary to prove a declaration of trust can post-date it, without any limit of time, and after proceedings have commenced, reinforces this view. There is long-standing authority for the last proposition: see *Lewin on Trusts*, 13th ed., (1928) at p.49: "The statute will be satisfied, if the trust can be manifested and proved by any subsequent acknowledgement by the trustee, as by … his answer in Chancery, or by an affidavit…". Mr McQuater accepted this proposition, noting it was established, for example, by *Nab v Nab* (1717) 10 Mod 404, one of the cases cited in that passage from *Lewin*.

187. A colourful example is provided by another of the cases cited by *Lewin*, namely *Cottington v Fletcher* (1740) 2 Atk 155. The plaintiff, while a Roman Catholic, assigned land to the defendant. He subsequently conformed to the Church of England and brought proceedings for a re-assignment of the property, contending that he had only assigned it in trust for himself (so as to avoid the penalties of a statute barring Roman Catholics from owning property). The defendant resisted the claim, claiming reliance on the Statute of Frauds, but in his answer admitted that the property had been assigned to him for the purposes stated by the plaintiff. The Lord Chancellor held that had the defendant's demurrer to the bill stood alone, then his reliance on the Statute of Frauds would have succeeded, but by admitting the trust in his answer he could no longer rely on the Statute of Frauds.

188. Having regard to the purpose of s.53(1)(b), and the fact that it is a rule of evidence not validity, there is in my judgment a simple justification for this. If the putative trustee is before the Court as a party to proceedings in which the question of the existence of the trust arises, and admits its existence, then the mischief at which the section is directed is removed. There is no need for any proof at all, as to the existence of a trust, if the trustee admits its existence, and a provision which goes only to the nature of the evidence required to prove the trust is simply irrelevant. As the appellants submitted in their post-hearing submissions, evidence is only strictly admissible in proceedings in relation to matters which are in issue, citing *Akhtar v Boland* [2014] EWCA Civ 872; [2015] 1 All E.R. 644, per Sir Stanley Burnton at §16:

> "Where an allegation made by one party in proceedings is admitted by the other party in unqualified terms, that other party must not seek to adduce evidence or raise arguments to the effect that that admission is not binding on him. The court has no jurisdiction to investigate a fact that has been admitted, unless the party making the admission obtains the permission of the court under CPR 14.1(5) to withdraw the admission and does so."

189. There is no reason, in my judgment, why the same is not true under s.53(1)(b). This is to be distinguished from the position under s.4 of the Statute of Frauds (which among other things provided that *before an action could be brought* on a guarantee, there must be a signed memorandum or note of the contract). Because this required the existence of writing before the action could be brought, it has been held that an admission made after proceedings were commenced is insufficient: see James Williams, *The Statute of Frauds, Section Four* (Cambridge University Press, 1932) citing, for example *Lucas v*

Dixon (1889) 22 QBD 357. Even then, however, an admission in one action may provide the necessary evidence in a second action following discontinuance of the first.

190. CGC submitted, in its reply submissions, that the conclusion in *Nab v Nab* was ripe for reconsideration, citing a decision of the trial division of the Supreme Court of Queensland, *Livin the Dream v Attorney-General* [2025] QSC 21, at §17-21. In that case, the applicant was entitled to rely upon an admission of the existence of a trust contained in an affidavit signed by the respondent (as sufficient evidence for the purposes of the Australian equivalent of s.53(1)(b)), where that affidavit had been made before the applicant commenced its action. But the view was expressed that an affidavit signed after the commencement of the action would not suffice. That case, in turn, cited three authorities. The first two of these (*Dudgeon v Chie* (1954) 55 SR (NSAW) 450, and *Fletcher v Burns* (1997) 12 BPR 22937), cited at §16 and §17 of the judgment, related to the Australian equivalent to s.4 of the Statute of Frauds, concerning contracts. As I have noted above, the statutory language is materially different. The third case, *Oliver v Renwick Street Pty Ltd* [2024] NSWSC 346, did concern the Australian equivalent of s.53(1)(b), but – as the appellants submitted in their reply post-hearing submissions – the reasoning there was also based on contract cases, without noting the difference in language. The Australian cases do not, in my judgment, provide a persuasive reason for reconsidering the English law position so far as s.53(1)(b) is concerned.

191. The picture is complicated on the facts of this appeal because the judge found that NIOC entered into the Transfer with the requisite purpose under s.423, and there is no appeal against that finding. That does not, however, mean that it was the Transfer that *in fact* had the effect of putting NIOC House beyond the reach of its creditors. The point is best tested in the context of s.238, where a transaction at an undervalue – if entered into within two years of the onset of liquidation – is avoidable in the liquidation without the need to prove any particular state of mind on the part of the company. The only question, therefore, under s.238, is whether the provision of signed writing proving the existence of the trust, or the transfer of the legal estate to the beneficiary before such writing has been provided, is the cause of the beneficial interest in the asset being vested in the beneficiary. That would be critical in any case where the declaration of trust was outside the two-year period, but the signed evidence was within it (see s.240(1)(a) of Insolvency Act 1986). For the reasons set out here, I do not think that it is.

192. NIOC cited certain authorities from the United States, which have firmly rejected the notion that third party creditors are entitled to take the benefit of the equivalent in the US to s.53(1)(b). *Bogert's The Law of Trusts and Trustees* at §62 refers to the fact that a majority of American States have enacted a form of the Statute of Frauds that closely tracks s.7 of the English statute. At §69, the authors make the point that where the American statutes include wording similar to that in s.7 of the Statute of Frauds, to the effect that the absence of writing renders the trust void, this has generally been construed as meaning "not enforceable over the objection of the trustee". They point to "many cases" where creditors' attempts to attack the trust on the ground that it is unenforceable have been rejected. Mr Thanki took us to one such case, in the Supreme Court of California, *Cardoza v White* (1933) 27 P.2d 639. In that case (where the facts closely mirrored those on this appeal) property was transferred by a Mr Nunes to a Mr Callaghan, subject to an oral declaration of trust in favour of a third person. Callaghan carried out the terms of the trust. Creditors of Mr Nunes argued that the transaction

could not be upheld as a trust because it was not evidenced in writing. Langdon J rejected that argument, holding:

> "But an oral trust in real property cannot be held wholly void; it is merely unenforceable when, in an action brought to compel performance of its terms, the party to be charged asserts its invalidity. Callaghan, the party obligated, did not refuse to recognize the trust. On the contrary, he carried out its terms. A creditor of the trustor has no right to challenge the voluntary completed performance by a trustee in such a situation."

193. Neither this case, nor any of the others cited in the US textbooks to which we were referred, is binding on us. The reasoning, however, accords with the view I have set out above as to the purpose and effect of s.53(1)(b).

194. That leaves the possibility that because A, in my example, has the practical ability to prevent B enforcing the trust by refusing either to acknowledge the existence of the trust, or to admit it in the context of proceedings, and thus take advantage of s.53(1)(b), the later admission or provision of evidence, or the performance by A of the trust, constitutes the giving up of something of value. This might be thought of as 'ransom value': a claim by B to enforce the trust against A depends on A providing a signature confirming the existence of the trust, and A can in practice require some measure of payment from B for doing so. In fact, CGC's only case as to the value of what was given up by NIOC (being that determined by the judge) is that it was the *whole* value of the beneficial interest in NIOC House. I do not accept this argument (whether it is based on giving up value equal to the whole of the beneficial interest, or some lesser ransom value).

195. CGC's argument in this respect follows from the conclusion (which I accept, as noted above) that the principle in *Rochefoucauld* does not apply in a self-declaration case. It follows, as CGC contends, that a person who *has* declared a trust over land is able to prevent the beneficiary from enforcing the trust, provided that (and for as long as) the beneficiary is unable to point to evidence in writing of the trust's existence and terms, signed by the trustee, even if the trustee knows full well that he did declare a trust. The fact that the law would countenance such behaviour is recognised as the price to pay for ensuring the protection of landowners generally against the risk of fraudulently claimed trusts.

196. In some sense, therefore, it would be correct to say, in a self-declaration case, that the consequence of the absence of writing is that the putative trustee *can* deal with the trust property inconsistently with the trust, for example by taking the income for himself or disposing of it to a third party. I do not accept, however, that this means that as a matter of law the trustee is "absolutely entitled" to the property, as suggested by Davies and Virgo, *Equity and Trusts: Text, Cases and Materials* (3rd ed), at p.120, or that it follows that if the trustee does give effect to the trust he is transferring something of value to the beneficiary.

197. For the reasons given above, that would be to ignore the consequence of the orthodox view explained above that, although the beneficiary is *as yet* unable to prove the existence of the trust with the requisite writing, there is nevertheless a valid trust. If A acts inconsistently with the trust, for example by appropriating part of the property, or

its income, to himself, that is still a breach of trust, even if B would not succeed in a claim for breach of trust unless and until sufficient writing is provided by A or obtained by B. (A would remain indefinitely vulnerable to a claim for breach of trust: all that would be required would be a written admission – even if inadvertently made – as to the existence of the trust.)

198. It is one thing to say that A can in practice prevent B from enforcing the trust, by failing to admit or provide the requisite signed evidence, but another to say that the law should treat A, in a case where A does not dispute that it has created a trust, as retaining the beneficial interest in the property (or something else of significant value in money or money's worth) unless and until it does so. The mischief at which the section is directed is the risk of fraud played *on the trustee*, and there is no such risk where the trustee accepts the existence of the trust and acts in accordance with it. Accordingly, having regard to the fact that s.53(1)(b) is a rule of evidence, intended to protect a landowner from false claims as to the existence of a trust, I do not accept CGC's argument that the lack of sufficient writing means that the trust cannot be proved "for any purpose". The section, instead, precludes someone who is asserting a trust against a trustee who disputes it, from proving the trust. Specifically, it does not preclude the trustee from relying on a trust which it in fact declared.

199. This is not to extend the rule in *Rochefoucauld* that the statute should not be used as an instrument of fraud, because I accept that the trustee in fact remains able to dispute the trust, even if to do so is fraudulent, and also remains able to rely upon the statute as protection against a claim to assert the trust, even if to do so would be a breach of that trust. It is, instead, to prevent reliance on the statute for a purpose for which it was not intended. To do otherwise would be to construe the section in a manner against the interests of the person (the landowner who had declared a trust) for whose protection it was enacted, on the premise that they *could* choose to act either dishonestly or in breach of that trust, or both. That would not, in my view, be an appropriate basis for construing the section.

Respondent's Notice Point 2(a): did the Mortgage Documents constitute a declaration of trust?

200. CGC contends that the judge was wrong to find that the Mortgage Documents constituted declarations of trust.

201. There was no real dispute between the parties as to the relevant legal principles. The question whether a trust has been declared is an objective one: whether a reasonable person, armed with the background knowledge available to NIOC, would have understood that NIOC was manifesting, through the Mortgage Documents, an intention to create a trust: *Ong v Ping* [2017] EWCA Civ 2069, per Sir Colin Rimer at §40.

202. The judge applied that test in concluding that the Mortgage was a declaration of trust. He noted, at §187 of the judgment, that while not expressly referring to a trust, clause 1.4 of the Mortgage stated that NIOC was the legal owner of NIOC House, and that the Fund was its sole beneficial owner, the necessary consequence of which, in English law, is that NIOC is the trustee of NIOC House for the Fund. He found, at §188, that "A reasonable person would surely conclude that NIOC had created a trust in favour of the Fund."

203. At §189 the judge referred to various objections raised by CGC, to the effect that (1) it was implausible that NIOC would have declared a trust in a transaction with a third party; (2) there was no evidence from the signatories as to their intentions; (3) although Blackstone Solicitors acted in connection with the Mortgage, Mrs Nawaz of that firm made no reference to the Mortgage in her witness statement; and (4) the Land Registry refused to register the Mortgage because they had not seen the trust deed. His answer to each of these points was that they were either irrelevant to, or did not detract from, the objective meaning of clause 1.4. He reached a similar conclusion in relation to the Certificate of Title at §191.

204. CGC contends that in reaching this conclusion the judge wrongly ignored a number of relevant background circumstances:

(1) NIOC already believed that ownership of NIOC House was vested in the Fund;

(2) It did so because it believed that it held the property as *amin* under the Iranian doctrine of *amanat*, in circumstances where Iranian law does not recognise any split title;

(3) The Fund's solicitor, Mr Cathcart, believed that the Fund was already the beneficial owner of NIOC House based on his (flawed) "custodian trustee" analysis;

(4) The appellants and Mr Cathcart were unaware that the Fund did not have separate legal personality;

(5) It was inherently improbable that NIOC intended to declare a trust through the Mortgage Documents;

(6) The negotiations leading to the execution of the Mortgage proceeded on the mistaken basis that the Fund was already the beneficial owner of NIOC House;

(7) There was no evidence that the agents in question had authority to declare a trust; and

(8) After the Mortgage was entered into, HMLR asked Eversheds for a copy of the relevant declaration of trust, but no such document was provided and, conspicuously, they did not rely on the Mortgage.

205. The question whether there has been a declaration of trust is a question of fact: *Paul v Constance* [1977] 1 WLR 527, per Scarman LJ at p.531H to p.532B. Unless the judge made an error in determining what constitutes, in law, a declaration of trust, the question on appeal therefore is whether there was sufficient evidence to justify the judge's conclusion of fact.

206. Points (1) to (3) and (6) boil down to the submission that the judge was wrong to ignore the fact that NIOC, the Fund and their advisers were acting under the mistaken belief that NIOC House already belonged beneficially to the Fund. The fourth point (that the appellants were unaware that the Fund lacked separate legal personality) goes to the same issue, since it negates the possibility that the appellants knew that the pre-2019 declarations of trust relied on were ineffective.

207. CGC contends that this is inconsistent with the need for a "present intention" to declare a trust. It contends that the requirement for a present intention means that a person cannot be taken to have declared a trust which they believe already exists. It is necessary to distinguish, it says, between (i) an erroneous prior and continuing belief that ownership was vested in the Fund and (ii) the need for a positive act to 'correct' that erroneous belief by language signalling a clear, unequivocal and irrevocable intention to immediately constitute a trust at a particular point in time (i.e. on the date when the Mortgage Documents were executed).

208. The appellants contend, on the other hand, that insofar as the authorities refer to a requirement for a "present intention" to constitute a trust, this means no more than that the three certainties required to create a trust (certainty of intention, certainty of object and certainty of subject) must coincide. Specifically, the reference to a present intention precludes a declaration of trust arising where the intention is that it should arise only upon the occurrence of some further step to be taken in the *future*.

209. The appellants contend, therefore, that it is not necessary to show that the declaration of trust was intended to effect a *change* in the relationship between trustee and beneficiary and that, conversely, an effective declaration of trust can be found even where the settlor believes he is confirming a pre-existing arrangement.

210. The appellants pointed to five authorities in support of that proposition.

211. First, *Re Northcliffe* [1925] Ch 651. In 1911, Lord Northcliffe settled on trust certain existing property, and property he may acquire in the future. This was an ineffective declaration of trust, insofar as it referred to freehold property not then owned by Lord Northcliffe. Subsequently, having acquired further properties, Lord Northcliffe made a will in which he stated "I also confirm the undermentioned deeds and settlement" (referring to the 1911 settlement). It was contended by a beneficiary of the will that Lord Northcliffe had, by his will, merely confirmed that the 1911 settlement was to be regarded as valid and binding, but he had no intention to declare himself trustee of the freeholds. Russell J found, however, that the will constituted a valid declaration of trust over the later acquired properties, reading it as "a declaration by the testator that he holds the Kent freeholds upon the trusts of the settlement".

212. Second, *Grey v IRC* [1958] Ch 690. On 1 February 1955, a settlor transferred shares in a company to the appellants (trustees of existing settlements in favour of his grandchildren) as his nominees. On 18 February 1955, the settlor orally directed the appellants to hold the shares on the trusts for his grandchildren. On 25 March 1955, the appellants executed declarations of trust, the operative parts of which stated that the trustees acknowledged that they had been since the preceding 18 February "and are now" holding the shares upon the specified trusts. The Court of Appeal held that the direction of 18 February 1955 was a purported disposition of an equitable interest in the shares, and failed for lack of writing by reason of s.53(1)(c) LPA 1925. The declaration of 25 March 1955 was, however, held to be valid. Lord Evershed MR, at p.707, said this:

> "Whatever might be or have been the effect (if any) of the trustees' acknowledgment or declaration that they had so held the shares since the preceding February 18, it clearly follows, in my judgment, that (on the hypothesis that the oral directions on

> February 18 had no legal effect) the instruments of March 25, 1955, must have effectively established or constituted the relevant trusts."

213. This aspect of the decision was not addressed or challenged when the case went on appeal to the House of Lords.

214. Third, *Paul v Constance* (above). In that case, the deceased had set up a bank account into which he paid the proceeds of a damages claim following an injury at work. He was then living with the plaintiff as man and wife. At various times he said to the plaintiff: "the money is as much yours as mine." The Court of Appeal held that this was sufficient to constitute a valid declaration of trust. Scarman LJ, with whom Cairns and Bridge LJJ agreed, said (at p.531G) that "there must be clear evidence from what is said or done of an intention to create a trust". The judge at trial had concluded that there was. On appeal, as Scarman LJ noted at p.532A-B, the question was whether there was sufficient evidence to justify the judge's conclusion. The judge had accepted the submission of counsel for the plaintiff that the words used by the deceased on more than one occasion conveyed "clearly a present declaration that the existing fund was as much the plaintiff's as his own", and Scarman LJ considered that the judge had been right to do so. He said, at p.532E-F:

> "It might, however, be thought that this was a borderline case, since it is not easy to pin-point a specific moment of declaration, and one must exclude from one's mind any case built upon the existence of an implied or constructive trust, for this case was put forward at the trial and is now argued by the plaintiff as one of express declaration of trust. It was so pleaded and it is only as such that it may be considered in this court. The question, therefore, is whether, in all the circumstances, the use of those words on numerous occasions as between the deceased and the plaintiff constituted an express declaration of trust. The judge found that they did. For myself, I think that he was right so to find. I therefore would dismiss the appeal."

215. Fourth, *Rowe v Prance* [1999] 2 FLR 787. However, this is simply an example – similar to *Paul v Constance* – of the court finding an express declaration of trust (of a boat) from various statements and the conduct of the 'trustee', including repeated use of the word "our" in relation to the boat.

216. Fifth, *Grant v Grant* (1865) 34 Beav. 623, where a husband was found to have declared a trust over certain chattels for his wife. The case established that, while there must be clear, unequivocal and irrevocable words declaring a trust, it was not necessary to use technical words, such as "I hold the property in trust for you". Sir John Romilly MR said, at p.625: "Any words that shew that the donor means, at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust." He continued, at p.626, that, although it was not sufficient to say "I intend to give it to you", because in that case "the thing is not complete":

> "But if the donor makes an express declaration that "I do now give it", I am opinion that is sufficient. I am also of opinion that it is sufficient if he makes a declaration "I have already given it".

217. In my judgment, these cases make good the proposition advanced by the appellants. There is no indication in either *Northcliffe* or *Grey* that the settlor was aware of the invalidity of the original declaration (and so was consciously correcting an erroneous belief) or that this was a necessary ingredient before the later declaration – confirming what was believed to be an existing trust – could be effective as the declaration of trust. The fact, as confirmed by *Paul v Constance*, that a sufficient intention to declare a trust can be inferred from words and conduct repeated over a period of time is inconsistent with a requirement that the declaration of trust must coincide with a point in time at which there is intended to be a change in the relationship. That is also confirmed by *Grant v Grant* which shows that words indicating an intention to declare a trust in the future are insufficient, but words confirming having done so in the past will suffice.

218. It may in a particular case be necessary to pinpoint the moment that a trust arises (for example where the timing of the creation of a trust is relevant for tax purposes), but that does not mean that no trust can be held to exist unless it is possible to point to a single occasion which constitutes *the* declaration of trust. The inquiry, as *Ong v Ping* shows, is a broader one than that: would the reasonable observer understand from a person's words and conduct that they were manifesting an intention to hold property on trust for another.

219. In fact, I understood CGC to accept that a declaration of trust need not effect an intended change in the relationship. In its supplemental skeleton dealing with Respondent's Notice Point 1, it accepted "a present intention – which *may* be manifested alongside a statement of past belief as to the existence of ownership and/or a trust … – is a necessary ingredient of a declaration of trust." The problem, it contends, for NIOC is that its erroneous statement (in the Mortgage Documents) of prior and continuing belief that ownership was vested in the Fund was not coupled with the requisite present intention to declare a trust.

220. That, however, is an overly restrictive interpretation of the Mortgage Documents. It would be obvious, to the reasonable person viewing the Mortgage Documents, with the knowledge that NIOC believed that NIOC House had long been beneficially owned by the Fund, that NIOC was at the very least confirming, as at the date of the Mortgage Documents, that the property was held on trust. In my judgment, the judge was entitled to find that this suffices to establish the requisite intention for the declaration of a trust.

221. CGC was unable to identify any authority for the proposition that there must also be a *present* intention to create a trust, in the sense that this precluded a declaration of a trust which the trustee already believes to exist. In its skeleton argument it cited *Re Cozens* [1913] Ch 478, at p.487, for that proposition. All that Neville J said there, however, was that he was not satisfied by the evidence that there was ever any present and irrevocable intention on the part of Cozens to declare himself a trustee, as the evidence suggested instead that he intended to create a charge.

222. CGC placed some reliance on an article by Sinead Agnew and Simon Douglas, entitled *Self-Declarations of Trust* (2019) 135 LQR p.67. The authors point out the important role played by a declaration, in a self-declaration case (as opposed to a "3-party" case),

because the declaration is the only legally relevant transaction. They suggested, at p.79, that two things are required for an express trust to be effectively declared: "(a) an intention to hold rights for the benefit of another and (b) an intention that by the settlor's very words or action, the trust relationship should be immediately constituted." As is made clear over the following two pages, however, what they mean by this is that there must be an intention that the putative trustee is from that moment – *as opposed to some point in the future* – divested of its beneficial interest in the property. In each of the cases referred to by the authors in this section of the article, the person seeking to establish the trust was found to have the intention of doing so pursuant to some further step, such as by a formal declaration of trust drawn up by lawyers (as in *Rabin v Gerson* [1986] 1 WLR 526). Where that step did not take place, it was insufficient to fall back on the general intention to create a trust, manifested by the instructions to lawyers, because that intention was *not* that the person declaring the trust was immediately divested of their beneficial interest in the property. Nothing in this article undermines, in my view, the proposition that a declaration of trust can be effective even if it is understood (whether rightly or wrongly) to confirm an existing position.

223. As to the second of CGC's criticisms of the judge, that the parties believed that the property was subject to an Iranian law *amanat*, as Mr Mumford submitted, a settlor need not understand the legal consequences of their intentions. What matters is an intention that the beneficial interest in property held at law by the settlor should vest in someone else. That is precisely the effect, in English law, of an intention that property should be subject to an *amanat* under Iranian law. The fact that Iranian law does not recognise a split title is irrelevant, when the question is as to the consequence, in English law, of the settlor's intention.

224. CGC's fifth point of criticism of the judge is that he ignored the implausibility that NIOC would have intended to declare a trust in documents that related to the creation of a charge in favour of a third party, the bank. This is a straightforward disagreement with the judge's decision on the facts. Mr Thanki took us to a number of email exchanges prior to the execution of the power of attorney, which indicated that: the bank would have preferred NIOC to be removed from the title documents, so that the bank would be dealing with the underlying reality that the Fund owned the property; but the Fund's solicitor (Mr Cathcart) preferred that NIOC should retain its position as "custodian trustee"; and Mr Cathcart indicated that he would work with the solicitors acting for the bank "to clarify the issues of ownership and also look at the sort of documentation which will be required by the bank's solicitors to properly affect [sic] a legal charge over the property". The implausibility objection was taken before the judge by CGC and clearly taken into account by him (see §189 of the judgment). The evidence to which Mr Thanki took us shows that he was right to reject it. Given the bank's need for clarity over the ownership position as between NIOC and the Fund, where both entities were identified as mortgagor in the Mortgage Documents, it is entirely plausible that NIOC would have used the Mortgage Documents to declare a trust over the property.

225. CGC's seventh point is addressed below under Respondent's Notice Point 2(b).

226. As to its eighth point, Eversheds' own understanding of the position, the subjective understanding of NIOC's and the Fund's lawyers is irrelevant, since the test is an objective one.

227. For these reasons, I reject the argument made in Respondent's Notice Point 2(a).

Respondent's Notice Point 2(b): No evidence of authority

228. I have already referred to the judge's finding that the Mortgage Documents constituted declarations of trust by NIOC. It is implicit in this finding that those who signed the documents were authorised to do by NIOC. As to the Mortgage the judge said expressly that it was executed "by NIOC, acting by its attorney, NTT."

229. CGC contends nevertheless that the judge's finding that NIOC made declarations of trust cannot stand because the appellants failed to adduce any evidence that any of NTT, Mr Rahgozar or Eversheds were authorised to execute a declaration of trust on NIOC's behalf. Mr McQuater submitted that it was for the appellants to establish that the Mortgage Documents constituted declarations of trust, that in order to do so they needed to establish that they were signed with NIOC's authority, and that they failed to do so. Indeed, they did not even seek to establish as much at trial.

230. It is accepted by the appellants that the judge did not make any actual finding that NTT, Mr Rahgozar or Eversheds were duly authorised to make a declaration of trust on behalf of NIOC. That, however, is because the point was never in issue.

231. I have referred to the relevant pleadings at §113 to §114 above, in connection with Ground 2. As there noted, NIOC relied on the Mortgage Documents which were signed by someone purporting to be authorised to do so by NIOC. So far as relevant to Respondent's Notice Point 2, NIOC pleaded reliance on the Mortgage Documents as constituting declarations of trust and, following CGC's denial of that proposition, sought further information of that denial. In that further information, CGC put in issue whether signature by an agent was sufficient, as a matter of law, to comply with s.53(1)(b). It did not, however, put in issue that those who made the declarations of trust were authorised to do so.

232. In my judgment, this is the mirror image of the point raised by Ground 2: whereas it was for NIOC to plead and establish that the signature of Mr Rahgozar, NTT or Eversheds constituted that of NIOC for the purposes of Regulation 4, it was for CGC, faced with a pleading that the Mortgage Documents were declarations of trust by NIOC, and with a request for information of its bare denial of that plea, to put in issue the authority of those who executed those documents to act on behalf of NIOC. The point not having been taken at trial, it is too late to do so on appeal, for similar reasons as those set out above under Ground 2. If the authority of Mr Rahgozar, NTT or Eversheds to declare a trust on behalf of NIOC had been put in issue, NIOC and the Fund would have had the opportunity to call evidence on the point.

233. Mr McQuater suggested that we could find, on the basis of the documents before us on this appeal, that there was no basis for the contention that either NTT or Eversheds was authorised to declare a trust. He pointed, in the case of NTT, to the fact that the case on NTT's authority is based on a written power of attorney, and that on its face it is inconsistent with there being any authority to declare a trust over NIOC House.

234. Pursuant to the power of attorney, dated 25 July 2018, NIOC appointed NTT to be its attorney to "sign, or execute and deliver as deeds, as the case may be, any agreements, leases, deeds of grant, pledge for loan security, mortgages and legal charges (the

"Documents") to which [NIOC] is a party", and "any other documents which are referred to in the Documents or which are ancillary to or related thereto or contemplated by the provisions thereof", and to "do and perform any and all of the other acts, matters or things in connection with the Documents". The power of attorney was expressly stated, however, not to cover the sale or transfer of ownership of NIOC House.

235. Mr McQuater submitted that this wording was clearly incapable of authorising NTT to declare a trust over NIOC House, since it was limited to executing documents relating to the intended mortgagee in favour of the bank over NIOC House. As with any contract, however (it being common ground that the power of attorney is governed by English law) it must be construed in light of the background context within which it was executed. Mr Thanki highlighted a number of elements of that context which are at least potentially relevant in this regard.

236. First, it was the common understanding of those involved in executing the power of attorney that the benefit of NIOC House was already, and had for a long time been, vested in the Fund. That tends to suggest that what was envisaged by the prohibition on the sale or transfer of ownership of NIOC House was any sale or transfer of ownership away from the Fund.

237. Second, the email exchanges prior to the execution of the Mortgage, to which Mr Thanki took us (referred to above at §224, and for the same reasons there given) provide an arguably plausible justification for the power of attorney extending to making a declaration of trust over NIOC House.

238. It is not possible, therefore, to conclude on the basis of the material before us that there is no prospect of NIOC establishing that NTT was authorised to declare a trust over the Property. The point cannot be determined either way without a further trial. For that reason, this is a clear case, in my judgment, where it is too late for CGC to put in issue NTT's authority to declare a trust over NIOC House on behalf of NIOC.

Conclusion

239. For the above reasons, I conclude as follows:

(1) NIOC declared a trust over NIOC House in favour of the Fund, at least by execution of the Mortgage.

(2) The Mortgage Documents did not constitute sufficient evidence in writing of the declaration of trust, because they were signed by NTT, Mr Rahgozar and/or Eversheds in their capacity as agent of NIOC, and that is insufficient for the purposes of s.53(1)(b).

(3) The Mortgage Documents were not signed *by* NIOC (as opposed to being signed on its behalf by a duly authorised agent).

(4) Immediately prior to the Transfer, however, there was nevertheless a valid trust over NIOC House in favour of the Fund, such that the Transfer did not constitute a transaction at an undervalue for the purposes of s.423.

(5) Accordingly, for my part I would dismiss the appeal on Grounds 1 and 2, but allow the appeal on Ground 3, with the consequence that the order of the judge would be

set aside, and the legal and beneficial ownership of NIOC House would be re-transferred to the Fund.

Lady Justice Falk

240. I am very grateful to Zacaroli LJ for his clear exposition and analysis of the issues. I agree with the conclusions he has reached on Ground 1 and Ground 2, but for the reasons I have set out below I am unable to agree with him on Ground 3, with the result that I would dismiss the appeal. On that approach it would be unnecessary to deal with the Respondent's Notice. However, given the disagreement between us I should confirm that I agree with Zacaroli LJ's rejection of Respondent's Notice Points 2(a) and (b) for the reasons he gives. Respondent's Notice Point 1 is addressed below.

Grounds 1 and 2

241. I agree with Zacaroli LJ's reasoning on Grounds 1 and 2, and only wish to draw out a few points by way of emphasis. All but the last of these points relate only to Ground 1.

242. First, both the Statute of Frauds and s.40 LPA 1925 (as enacted) indicate that Parliament made specific provision for signature by an agent where that was intended to be permitted. Section 40 (materially set out at §76 above and, like s.53, derived from the Statute of Frauds) is of particular relevance in demonstrating that the argument that the references to an agent authorised in writing in s.53(1)(a) and (c) are intended as limitations on the common law position that agents may sign on behalf of their principals cannot be correct. Section 40 permitted signature by a person "lawfully authorised", with no requirement for that authorisation to be in writing. Further, the fact that s.53(1)(c), unlike its predecessor, includes an express reference to an agent, whereas no such reference was included in s.53(1)(b), is indicative of a deliberate choice by the legislature to permit signature by an agent (if authorised in writing) in the case of s.53(1)(c) but not to permit signature by an agent in the case of s.53(1)(b).

243. Secondly, the language in s.53(1)(b) which refers to a person "able" to declare a trust ("enabled" under s.7 of the Statute of Frauds) is not an obvious choice of language to denote authorisation of an agent. In contrast, both s.53(1)(a) and (c) use the more conventional term "authorised", as did ss.3, 4 and 16 of the Statute of Frauds. Rather, the reference to "able" naturally applies to the ability (or capacity) of a person to declare a trust: see *Tierney v Wood* (§63 above).

244. Thirdly, as Zacaroli LJ explains, the most reasoned support for the appellants' position on Ground 1 is found in the chapter provided by Charles Harpum in Elizabeth Cooke (ed): *Modern Studies in Property Law*, Vol 1, "*Property in an Electronic Age*" at p.12 (§43 above). I do not find that reasoning compelling. While s.53(1)(b) is an evidential requirement and in that respect is different from s.53(1)(a) and (c), I do not see why it is less important than those provisions for that reason. And the argument that the references to agents in those provisions is explained by the need for authorisation to be in writing is not consistent with s.40 LPA: see above.

245. Fourthly, I do not consider it to be particularly surprising that agents may be authorised to execute documents within s.53(1)(a) and (c) but not within s.53(1)(b). Section 53(1)(a) and (c) deal with conveyancing transactions that (certainly in the case of s.53(1)(a)) will generally be effected by formal legal documents. There is sense in

including a provision that enables an agent to sign such a document on behalf of a principal who may not be available when the formal legal document has been prepared and is ready for execution. In contrast, declaring a trust does not involve formality and requires evidence of an intention to create a trust. It is not surprising that the law should insist on written evidence of that intention from the settlor or the trustee. Another policy choice would have been for s.53(1)(b) to have allowed signature by agents authorised in writing, as in s.53(1)(a) and (c), but as Zacaroli LJ points out at §84 an appropriate authorisation might well satisfy s.53(1)(b) itself, because it is not onerous. So there would be little practical utility in extending s.53(1)(b) in that way.

246. Fifthly, I agree with Zacaroli LJ's response to Mr Thanki's submissions that to exclude agents from s.53(1)(b) would be incoherent. Mr Thanki relied on the fact that it was common ground that an appropriately authorised agent could declare a trust, and submitted that an agent could also contract to do so within s.40 LPA. Declaration of a trust by an agent would certainly be unusual (as CGC submitted), as would a contract to declare a trust. I do not consider that the existence of these, in normal circumstances unlikely, possibilities outweighs the greater incoherence of landowners being bound by evidence of a trust from an agent who is not authorised in writing (with the attendant risk of fraud), whereas they would not be so bound by actions of such an agent under s.53(1)(a) or (c).

247. Finally, I would add an observation in relation to *UBAF* and the appellants' argument that s.53(1)(b) must be construed as permitting a company to sign by an agent, since it cannot sign personally (relevant to both Ground 1 and Ground 2). As Zacaroli LJ has explained, *UBAF* predated the important changes made by the Companies Act 1989. Unsurprisingly in the context of the facts of that case, *UBAF* also did not explore the possibility of execution of a document in a formal manner using a company's common seal. In the (relatively unusual) situation where a company intended to declare a trust, the obvious way to do so would have been by deed, which prior to 1989 could readily be executed through use of the company's common seal. Thus it would have been perfectly possible for a trust to be declared by a company and evidenced in compliance with s.53(1)(b) without that provision being required to be interpreted as permitting signature by an agent. As explained in *Hilmi*, the 1989 Act dispensed with the need for a common seal and for the first time made specific provision for the execution of documents that were neither deeds nor contracts, allowing the alternative of use of a common seal or signature in accordance with s.36A(4) (see §96 above).

248. *UBAF* decided that signature by a duly authorised agent could fall within s.6 of the Statute of Frauds Amendment Act 1828. I do not consider that it binds us in respect of different legislation concerning trusts over land, legislation which must be applied in the light of the prevailing company law.

Ground 3

249. Ground 3 was expressed as follows:

> "The Judge erred in law in finding that CGC is entitled to rely upon s. 53(1)(b) LPA 1925 to prevent NIOC and the Fund from relying upon the fact that, on the Judge's findings, NIOC had validly declared or there otherwise arose a trust of NIOC House

> in favour of the Fund; the Fund is not attempting to enforce the trust against NIOC."

250. This rather obscures the key issue which, as Zacaroli LJ points out, is whether the judge was correct to find that the Transfer amounted to a transaction at an undervalue for the purposes of s.423. There is no appeal against the judge's conclusion that the Transfer was undertaken for the purpose of putting NIOC House beyond the reach of CGC, so s.423 would apply if the Transfer was either for no consideration or for a consideration the value of which, in money or money's worth, was significantly less than the value, in money or money's worth, of the consideration provided by NIOC: see s.423(1)(a) and (c). For ease of reference I will refer to these tests together as an "undervalue".

251. NIOC is of course correct that the Fund is not seeking to enforce a trust against NIOC, and to point out that since August 2022 there has been no trust in existence which could be enforced. However, it would also be wrong to analyse the dispute as involving enforcement of the trust against CGC, so to that extent I would disagree with what the judge said at §212 (although I do not consider it to be material to his decision). CGC has applied for relief as a "victim" of the Transfer (that is, a person prejudiced or capable of being prejudiced by it: ss. 423(5) and 424) and – if an undervalue is shown to exist – has standing on that basis. The statutory question that the court must therefore answer is whether the Transfer was made at an undervalue. That question directs attention to the position as between NIOC and the Fund. Did NIOC receive something of significantly less value than it provided?

252. In answering that narrow question (as opposed to the question of purpose), the position of CGC is irrelevant. It is indeed the case that CGC relies on s.53(1)(b), but as the putative victim of the transaction it is entitled to do so if the effect of that provision is that the Transfer was in fact made at an undervalue. The objection under Ground 3 is that it was not so entitled. That objection is not made out in my view.

253. As Zacaroli LJ explains, the question whether NIOC received something of significantly less value than it provided is a factual one, and regard must be had to reality and common sense.

254. When asked to identify what consideration NIOC received in exchange for NIOC House, Mr Thanki relied on the "prior moral obligation under the unenforceable trust", which he submitted NIOC as trustee could honour without offending insolvency legislation. The trust was binding on NIOC's conscience, such that it could not have transferred NIOC House to anyone other than the Fund. NIOC received consideration in the form of a release from its obligations as trustee, and in any event the distribution of property to the beneficiary of a bare trust could not be characterised as being voluntary or at an undervalue. The Transfer perfected a valid trust, which was simply unenforceable by the Fund. CGC was not therefore a "victim". Mr Thanki placed particular reliance on *Gardner v Rowe*.

255. The first difficulty I have with this is one of commercial reality and common sense.

256. The starting point is that it was common ground, and was expressly confirmed by Mr Thanki in oral submissions, that without evidence satisfying s.53(1)(b) a beneficiary of a trust over land which has been declared by its beneficial owner cannot enforce the trust. In my view Mr Thanki was correct to do so. *Rochefoucauld v Boustead* is limited

to cases where property is transferred to a trustee (a "3-party case") rather than cases where a trust is declared by the beneficial owner of property (a "self-declaration" case): see §152 and §153 above, with which I agree, and further below.

257. It follows that, absent evidence complying with s.53(1)(b), the beneficiary in a self-declaration case requires something from the trustee in order to enjoy the benefits of the trust. The trustee can choose to confer the benefits of the trust on the beneficiary but, without such evidence, they cannot be compelled to do so. And it is in the trustee's "gift" as to whether to change that state of affairs, either by producing written evidence or – assuming for present purposes that the trust is a bare trust – by perfecting the trust through a transfer of the property to the beneficiary. I accept that evidence complying with s.53(1)(b) may be produced unwittingly, as Zacaroli LJ has described, but that does not mean that there is any certainty at all that it will in fact be produced. Most importantly, the trustee could not be forced to produce it.

258. Unless and until evidence complying with s.53(1)(b) is produced the beneficiary could not, for example, a) take legal action to obtain the income; b) require the asset to be transferred to him under the principle in *Saunders v Vautier* (1841) Cr. & Ph. 240; or c) obtain redress (or an injunction) if the trustee decided to deal with the property or diminish its value, for example by encumbering it to secure the trustee's own borrowings. The beneficiary would also not realistically be able to turn their "rights" under the trust to account for their own benefit, for example by borrowing on the security of it, or by selling the beneficial interest for anything like the full value of the property, because the value of the beneficiary's interest would depend entirely on the chance that the trustee would produce the requisite written evidence that would allow the trust to be enforced.

259. I accept that, if the requisite written evidence were produced, the effect would be that the court would treat the trust as having existed from the date it was declared (albeit that Mr McQuater did not concede that a breach of trust could be established for what might then be regarded as past defaults, an issue which does not arise in this case). However, whatever the position for the past, it seems to me that if the trustee does provide such evidence, or perfects the trust by transferring the property, they are in reality providing something of substantial value to the beneficiary. In the former case a right which could not previously have been enforced – and which the beneficiary could not realistically have exploited for his own benefit – is now one that can be both enforced and exploited. Where the trust is perfected the beneficiary has both the legal and beneficial title, so any complications caused by the trust arrangement are entirely at an end.

260. The Transfer was clearly a "transaction" within s.423 and the judge found that NIOC undertook it with the purpose of putting assets beyond CGC's reach. Having failed on Ground 1 and Ground 2, NIOC's only remaining defence to the application of s.423 is that NIOC's "moral obligation" had the effect that there was no undervalue. But, as I have sought to explain, in the real world that obligation would be worth very considerably less than the value of NIOC House. The value of property is usually determined by reference to what it might be sold for. It would be extraordinary if the benefit of the "moral obligation" could be sold for a significant sum, or at least anything approaching the open market value of the property.

261. As Zacaroli LJ says at §133 above, the value of consideration is a question of fact (though, as in this case, it may also involve an issue of law: *Phillips v Brewin Dolphin Bell* at §20). Further, it must be assessed from the perspective of the debtor and as at the date of the transaction. Immediately prior to the Transfer the trust was unenforceable by the Fund. NIOC could, from its perspective, have retained the rent and otherwise dealt with NIOC House for its own benefit. However unlikely that would have been to occur in practice, the Fund would have had no legal remedy if NIOC had done so. That, in turn, must fundamentally affect the value of what the Fund can be regarded as having provided in exchange for the Transfer.

262. I therefore do not agree that the Transfer had "no effect on the availability or value of assets otherwise available to meet the claims of creditors" (*El Husseiny v Invest Bank* at §59). Rather, the Transfer had the effect of depleting or diminishing assets available for creditors (*El Husseiny* at §53). It is also worth noting the analysis of Lady Rose and Lord Richards in *El Husseiny* at §55, pointing out that s.423 is not in terms restricted to the debtor's own property. Thus, even if the Fund was regarded as (at least "morally") the beneficial owner of NIOC House, that would not by itself preclude the application of s.423.

263. So far, I have addressed what I see as a factual difficulty with NIOC's position. That is not how the issue was approached by the judge. However, I do not consider that he was in error. This is because, in the absence of evidence complying with s.53(1)(b), the analysis which the judge adopted was legally correct.

264. As Zacaroli LJ has explained, the judge was responding to NIOC's argument that s.53(1)(b) "went to the enforceability by a beneficiary of a declaration of trust in land". In the absence of evidence existing by the date of the Transfer which complied with s.53(1)(b), the trust could indeed not have been enforced by the Fund as beneficiary. I would add that it could not be enforced by anyone else, but the critical point for the purposes of s.423 is the position as between NIOC as trustee and the Fund as beneficiary, not the position of anyone else: see above. As the judge held, the trust failed the requirement that it be "manifested and proved" by writing signed by NIOC. That meant that the court was obliged to treat NIOC as the beneficial owner as at the date of the Transfer. This is what the judge did at §213 and §224.

265. This approach does not require a trust to be treated as "invalid" or "void" in the absence of evidence complying with s.53(1)(b) (CGC's Respondent's Notice Point 1). On that, I agree with Zacaroli LJ's analysis at §143 to §145 and §169 to §170. But it is important to note the effect of the cases to which he refers. The key point is that, <u>if</u> such evidence is produced, that will have the effect of proving the existence of the trust as from the date from which it was declared. It does not follow that, if such evidence has not been produced at any stage, the court must nonetheless analyse a transaction as though it had been. This may well be why Lord Diplock in *Gissing v Gissing* and Lord Bridge in *Lloyds Bank v Rosset* (see §166 above) referred to writing being required for a declaration of trust over land to be "valid". Without it, the courts cannot treat a trust as existing.

266. Before turning to *Gardner v Rowe*, I should say a little more about *Rochefoucauld v Boustead*. With the caveat of what I say in the immediately preceding paragraph, I agree with Zacaroli LJ's analysis of *Rochefoucauld*. However, I would elaborate a little further on what he says at §153. The reason why the trust was enforced in

Rochefoucauld was that it was regarded as an equitable fraud, or in modern parlance unconscionable, for the defendant to receive property on the understanding that it would be held on trust and then to deny the trust: see on this Fancourt J's discussion of *Rochefoucauld* in *Archibald v Alexander* [2020] EWHC 1621 (Ch); [2020] 2 FLR 1123 at §28 to §35, which in turn considers the Court of Appeal decision in *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [2010] 2 FLR 1240. That discussion largely relates to constructive trusts, but the essential point is the same.

267. In contrast, there is no such unconscionability in a self-declaration case, where an application of the approach in *Rochefoucauld* would denude s.53(1)(b) of effect. It is important to bear this in mind when assessing the "moral obligation" on which Mr Thanki relies. Absent unconscionability or (perhaps) some form of detrimental reliance that would support a constructive trust, s.53(1)(b) should be applied in accordance with its terms.

268. I should add that I found the discussion by Professor Swadling in *The Nature of the Trust in Rochefoucauld v Boustead* (referred to at §149 above) illuminating. Professor Swadling makes the point that s.53(1)(b) is a rule about evidence, not enforceability as such (although non-enforceability is the consequence of an absence of evidence). In contrast, s.40 LPA stipulated that "no action may be brought". In the case of s.40 the existence of a contract could be proved by oral (or other) evidence, and indeed has some effect in equity – see for example *Dawson v Ellis* (1820) 1 Jac. & W. 524, 525. It just could not be enforced. In the case of s.53(1)(b), evidence that does not comply with it is inadmissible to prove the existence of the trust.

269. As already indicated, the linchpin of Mr Thanki's submissions under Ground 3 was *Gardner v Rowe*. I do not consider that it assists NIOC, for the following reasons.

270. First, in *Gardner v Rowe* a deed recording the trust had in fact been produced. As we have seen, it is of no moment that it was produced after the date on which the trust was declared. Once produced, evidence complying with s.53(1)(b) proved the existence of the trust from that date. With the benefit of the deed, therefore, there was a trust that could be proved to have existed prior to Wilkinson's bankruptcy, such that the property did not pass to his assignees. The trust was indeed "valid" when the dispute came to court, but only because that crucial evidence had been produced. In this case it was not.

271. Secondly and relatedly, the Lord Chancellor described the "only question" as being "whether the declaration contained in the deed was founded upon a previous trust, or was altogether fraudulent". That question had been decided by the jury. That was the critical issue. It does not arise here, because there is nothing equivalent to the deed.

272. Thirdly, we are concerned with the interpretation of s.423 of the Insolvency Act 1986. *Gardner v Rowe* does not bind us in relation to that question. It does not determine whether the action taken by Mr Wilkinson after his bankruptcy might now be regarded as falling foul of that provision, let alone whether a transfer of legal title such as the Transfer in this case does so.

273. Zacaroli LJ takes the view that the absence of writing does not affect the validity of the trust declared, and that CGC's argument that, absent compliance with s.53(1)(b), the trust should not be capable of proof for any purpose is not consistent with a purposive construction. I have already addressed the question of "validity". The straightforward

meaning of s.53(1)(b) is that, without evidence complying with it, the court cannot recognise the existence of the trust. Section 53(1)(b) is mandatory ("must" be manifested and proved), and is not in terms limited to cases where the trustee denies the existence of the trust. If there is such evidence, the trust would be treated as validly made with effect from the date of its declaration.

274. The question that then arises is whether, notwithstanding the straightforward meaning of the words used, a purposive construction of s.53(1)(b) has the effect of confining it to a case where the trustee denies the existence of the trust. I do not consider that it does. It is true that the Statute of Frauds was enacted for the prevention of "fraudulent practices", but that does not determine that s.53(1)(b) must be read as confined to preventing fraudulent claims by beneficiaries. The position is no different in principle to a vendor under a (genuine) oral contract for sale relying on what became s.40 LPA to avoid performing the contract, or a landowner or indeed anyone else relying on what is now s.53(1)(a) or (c) if the required formalities were not complied with. Neither would be regarded as outside the scope of the legislation. There is no requirement to prove fraud in order for those provisions to apply.

275. *Rochefoucauld v Boustead* shows that what is now s.53(1)(b) cannot be relied on in a "3-party" case because the Statute of Frauds "does not prevent the proof of fraud" (p.206). In contrast, in a self-declaration case there is no such "fraud" that would prevent a landowner from relying on s.53(1)(b) even if a trust has been declared: see above. I do not see this as a point about whether s.53(1)(b) was intended to provide protection for creditors (see §183 above), rather the application of a straightforward interpretation of the statute.

276. It is true that a landowner who was prepared to admit the existence of a trust could readily produce evidence complying with s.53(1)(b), including (at least under the law as it currently stands) after proceedings have commenced. But they could not be compelled to do so. Further, the facts of this case are different. The Transfer was made without any such evidence being produced (including in the Transfer itself, which made no reference to a trust), voluntarily and with the purpose of putting NIOC House beyond the reach of CGC.

277. I should add that I am not persuaded that s.53(1)(b) has no application if the trustee admits the trust in proceedings (§188 above, referring to *Akhtar v Boland*) or is otherwise confined to cases where the trustee does not wish to accept the existence of the trust (§198 above). I do not consider such an approach to be consistent with its mandatory terms. A trustee that wishes to confirm a trust over land can readily produce evidence that complies with the legislation, but in my view cannot be treated as having done so if the evidence has not in fact been produced.

278. Although the commentaries and authorities from the United States relied on by Mr Thanki and referred to by Zacaroli LJ at §192 also concern legislation derived from the Statute of Frauds, the legislation is nonetheless different, and more importantly they do not relate to any equivalent to s.423 of the Insolvency Act. CGC's challenge to the Transfer is under s.423. That challenge is not inconsistent with the approach in the United States that a trustee under an unenforceable trust may choose to perform it without flouting legislation based on the Statute of Frauds. It is also worth noting that *Scott and Ascher on Trusts*, 6th ed., to which we were also referred, makes the point at 6.14 that, if the statute has not been complied with, a person who succeeds to the

trustee's interest, including a purchaser with notice of the trust or a creditor or trustee in bankruptcy of the trustee, is entitled to take advantage of its unenforceability. In my opinion that rather illustrates the point that a trustee who perfects the trust does in fact confer value.

279. A further point that was the subject of discussion in post-hearing submissions was the judge's decision that the appropriate order under s.423(2) was the transfer of the Property to CGC, rather than seeking to restore the Property to NIOC on terms that it remained subject to a previously declared trust.

280. The short answer to this point is that this is an appeal by NIOC (and, on Ground 1, the Fund), not by CGC. The challenge on appeal is whether the Transfer fell within s.423 as a result of the application of s.53(1)(b) LPA, not the judge's exercise of discretion to order the relief that he did once he had concluded that s.423 applied. As I have sought to explain, the judge was also not wrong, in the absence of evidence complying with s.53(1)(b), to treat NIOC and not the Fund as the beneficial owner of the Property prior to the Transfer.

281. In summary on Ground 3:

i) The critical issue is whether the Transfer was at an undervalue within s.423(1). That question directs attention to the position as between NIOC and the Fund.

ii) In my view the Transfer was at an undervalue. Factually, the "moral obligation" relied on by NIOC must have been worth very considerably less than the value of NIOC House.

iii) More fundamentally, in the absence of evidence complying with s.53(1)(b) the court was obliged to treat NIOC as the beneficial owner of NIOC House at the date of the Transfer. Section 53(1)(b) imposes a mandatory requirement, and is not limited to cases where the trustee denies the trust.

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282. Like Falk LJ, I agree with the clear and cogent analysis of Zacaroli LJ in his judgment in relation to Grounds 1 and 2 of the appeal and Respondent's Notice Grounds 2 (a) and (b). I also agree with the additional points which Falk LJ makes in relation to Grounds 1 and 2 in her judgment. However, like her, I disagree with Zacaroli LJ in relation to Ground 3. It follows that, since a majority of the Court considers that Ground 3 must be dismissed, the appeal overall must be dismissed.

283. I consider that Falk LJ has set out in her judgment a compelling analysis as to why Ground 3 should be dismissed and I will only add a few points of my own to explain why I have reached this conclusion.

284. As Falk LJ points out, the critical question which Ground 3 raises is whether the Transfer in August 2022 was at an undervalue, which in turn focuses on whether, as between NIOC and the Fund, NIOC received something of significantly less value than it provided. The answer to that question must be in the affirmative if the trust is unenforceable because of the absence of evidence satisfying s.53(1)(b). I agree with Falk LJ that, in the absence of such evidence, the court has to proceed on the basis that

the trust did not exist and accordingly NIOC remained the beneficial owner of NIOC House as at the date of the Transfer. The fact that if such evidence were produced the trust would be enforceable is nothing to the point.

285. Mr Thanki's argument was that, even though the trust was unenforceable, NIOC was under a prior moral obligation binding on its conscience, to effect the Transfer. However, as he correctly accepted, in a self-declaration case such as the present, the beneficiary, the Fund, cannot compel the trustee, NIOC, to enforce the trust by transferring the property. I agree with Zacaroli LJ that the principle in *Rochefoucauld v Boustead* is limited to "3-party" cases for the reasons he gives at §153 above. Even if NIOC was under some moral obligation, by reason of a declaration of trust, to transfer NIOC House to the Fund, that obligation could not be enforced by the Fund whether through proceedings or otherwise. On the basis that the consideration which NIOC received on the Transfer was its release from that moral obligation, the value of the moral obligation was, as Falk LJ says, considerably less than the open market value of NIOC House, from which it must follow that the Transfer was a transaction at an undervalue for the purposes of s.423.

286. Although Mr Thanki sought to place considerable reliance on *Gardner v Rowe*, I agree with Falk LJ that that case does not, on analysis, assist NIOC's case. It was a case where there was evidence complying with s.7 of the Statute of Frauds (and thus with s.53(1)(b)), albeit not produced until some time after the declaration of trust, which meant that the trust could be proved to have existed prior to Wilkinson's bankruptcy. The case has nothing to say about what the position would have been if, as in the present case, there was no such evidence complying with s.53(1)(b). Also, as Falk LJ points out, nothing in that case has any bearing on the application of s.423 of the Insolvency Act 1986. There is nothing in the judgments at first instance or on appeal which determines whether the action taken by Wilkinson after his bankruptcy might now be regarded as contrary to that section.

287. Zacaroli LJ considers that, although the absence of evidence complying with s.53(1)(b) means that the trust is unenforceable, that does not affect its validity. I am unable to agree with that analysis. The subsection provides: "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;" (my emphasis). It is thus in mandatory terms and if there is no evidence which complies with the subsection, then I agree with Falk LJ that the court cannot recognise the existence of the trust. There is equally no basis in the language of the subsection for limiting its application to cases where the trustee denies the existence of the trust.

288. It follows that I would dismiss Ground 3 and that I consider the appeal must be dismissed.