Neutral Citation Number: [2019] EWHC 1534 (Ch)

Case No: PT-2018-000778

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21/6/2019

Before:

MASTER CLARK

- -

Between:

(1) MR NIGEL STORMANT PANTON
(2) MR IAIN MACLAREN
(3) MR PETER MICHAEL ROBINSON **Claimants**

- and -

(1) MR NIGEL BROPHY
(2) MR PAUL ARNOLD **Defendants**

- -
- -

Andy Creer (instructed by **Wright Hassall**) for the **Claimants**
Gabriel Fadipe (instructed by **Bevan Brittan LLP**) for **The London Borough of Hounslow**

Hearing dates: 14, 27 March 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This is my judgment on:
   (1) the application dated 20 March 2019 by LB Hounslow ("the Council") to be joined to this claim;
   (2) if the Council is joined, then, by agreement of the parties, whether the relief sought in the claim should be granted.

Factual background

2. The factual background is largely undisputed.

3. The claimants are members of an unincorporated association called "The Thames Tradesmen's Rowing Club" ("the Club"). The Club was established in 1897, and its objects are to promote rowing, sculling and related activities. It is affiliated with British Rowing, which is the national governing body for the sport of rowing. It has 50 active members (excluding associate members and guest users).

4. The Club has until recently occupied a property known as Chiswick Boathouse, Dukes Meadow, Chiswick, London, W4 2SH ("the Boathouse") from where it carried out its activities.

5. The Council is and has at material times been the freehold owner of the Boathouse.

6. The Club's occupation of the Boathouse began in 1987, when it entered into a document in the form of a lease dated 17 November 1987 ("the Lease") with the Council. The Lease provided for a term of 30 years from 9 August 1985, at an initial rent of £3,300 per annum. The Club paid the rent to the Council on a quarterly basis as provided for by the terms of the Lease.

7. In the early 1990s, the Council agreed to help Hounslow Hockey Club Limited ("the Company") fund the installation of a flood-lit all weather hockey pitch adjoining the Boathouse. The Club was encouraged to enter into a joint venture agreement with the Company, as this would provide access for the Company to the social facilities and showers at the Boathouse. It was also agreed that the Lease would be assigned to the Company and the Club as joint tenants. The joint venture was called the Chiswick Boathouse Sports Centre ("the Joint Venture"), and the arrangement was formalised in a signed agreement dated "1992" ("the Joint Venture Agreement").

8. This recited that the parties were joint lessees of the Boathouse (although at this stage the Club remained the sole tenant named in the Lease). It provided that the costs and revenue of the Boathouse were to be shared equally; those costs including the rent.

9. Following the Joint Venture Agreement, the Club and the Company occupied the Boathouse together, and used it as a clubhouse for use by the members of the two clubs. The Joint Venture was named "The Chiswick Boathouse Sports Centre" and the evidence includes draft rules for it in which its objectives are said to include:

> "the joint management of [the Boathouse] under the joint leasehold held by [the Club] and [the Company]."

10. The evidence shows that the management committee of the Joint Venture held monthly meetings, operated a bank account, produced financial accounts and that the two clubs jointly held a liquor licence.

11. In about 1993, the Council granted a licence ("the Licence") permitting assignment of the Lease to the Club and the Company, referred to as "the Assignee". It included the following terms:

> "4. ASSIGNEE'S FURTHER COVENANT
> The Assignee further covenants with [the Council] that, as from the date of completion of the Assignment, during the residue of the term created by the Lease and any statutory continuation of the Lease, the Assignee will comply with the tenant's obligations in the Lease, whether arising before or after the date of the Assignment.
> …
> 5.3 All covenants by any party to this Licence will be deemed to be joint and several covenants where that party comprises than one person."

12. The Assignment itself is not in evidence, but on 15 May 1996, the Company gave notice to the Council of an assignment dated 7 May 1996.

13. Immediately following the Assignment, on 8 May 1996, the Club, the Company and the Council entered into a deed of variation dated 8 May 1996 ("the Deed of Variation") of the Lease. This recited:

> "WHEREAS:
> 1. This Deed is supplemental to a Lease made between [the Council] and [the Club] and dated 17 November 1987 (hereinafter called "the Lease")…
>
> 2. The Leasehold interest in the Lease is now vested in [the Club and the Company]
>
> 3. [The Council] and [the Club and the Company] wish to vary the terms of the Lease in manner hereinafter appearing"

14. The substantive terms of the Deed of Variation varied the Lease to extend its term so that it expired in 2033, increased the annual rent payable to £6,750 with effect from 26 February 1993, and made other small changes, including increasing changing room facilities. At clause 12 it provided:

> "The Lease shall continue in full force and effect in all respects save as hereby modified by this Deed."

15. On 5 May 2009, the Company was dissolved. The Club continued to occupy and use the Boathouse, and to pay rent to the Council.

16. On 19 June 2018, the Council's solicitors wrote to the Bona Vacantia Department setting out the factual background. Paragraph 4 of the letter stated:

"Although the grant of the lease in 1987 was void, the effect of the assignment and variation in 1996 (and indeed subsequent demand for and payment of rent by our client) was a valid grant of the amended Lease to [the Company]. That leasehold interest is the subject of this letter, and in relation to which our client applies under section 1013(4) of the Companies Act 2006."

The letter required the Crown representative to decide whether he would or would not disclaim the Company's leasehold interest.

17. By a Notice of Disclaimer dated 29 June 2018 under s.1013 of the Companies Act 2006, the Treasury Solicitor disclaimed "the Crown's title (if any)" the leasehold interest in the Boathouse.

18. On 18 July 2018, the Council's solicitors wrote to the Club, asserting that it had no proprietary or contractual interest in the Boathouse, and giving it notice that the Council intended to take possession of it on 19 August 2018. It in fact took possession on 20 August 2018; and since that time the Club has been in temporary accommodation.

The claim

19. The claimants seek orders that:
    (1) they be appointed as trustees of the Lease in place of the Company, which is alleged to be the former trustee of it;
    (2) the remainder of the term of the Lease, as varied by the Deed of Variation, be vested in them.

20. The claim is made under sections 41 and 44 of the Trustee Act 1925 ("the Act"). These provide, so far as relevant:

"**41.— Power of court to appoint new trustees**

(1) The court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient difficult or impracticable so to do without the assistance of the court, make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustees or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order appointing a new trustee in substitution for a trustee who lacks capacity to exercise his functions as a trustee, or is a bankrupt, or *is a corporation which is in liquidation or has been dissolved*.

44. Vesting orders of land.

In any of the following cases, namely:—

(i) Where the court appoints or has appointed a trustee, or where a trustee has been appointed out of court under any statutory or express power;

(ii) Where a trustee entitled to or possessed of any land or interest therein, whether by way of mortgage or otherwise, or entitled to a contingent right therein, either solely or jointly with any other person—

…

(c) cannot be found, or, being a corporation, has been dissolved;

the court may make an order (in this Act called a vesting order) vesting the land or interest therein in any such person in any such manner and for any such estate or interest as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct:

Provided that—

(a) Where the order is consequential on the appointment of a trustee the land or interest therein shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees;"

21. The claimants accept that as an unincorporated association, the Club could not hold a legal estate in land; and, therefore, that the Lease did not vest any legal interest in it: see *Camden LBC v Shortlife Community Housing* (1993) 25 HLR 330.

22. Their claim is based on the Assignment which, they say, took effect as a surrender of whatever interest was created by the Lease, and a re-grant of the Lease to the Company on terms as varied by the Deed of Variation. Their case is that the Lease was then held by the Company on trust for itself and the members of the Club.

23. On dissolution of the Company, the claimants' case is that only the Company's legal interest and its own beneficial share would have passed to the Crown as *bona vacantia*; but that the Club's beneficial interest would have been unaffected by the dissolution: referring to s.1012 of the Companies Act 2006.

24. The effect of the disclaimer was that the Company was, the claimants' say, discharged of its obligations under the Lease, but that this did not affect the Club's rights as a person with a derivative interest in the Lease.

25. The claimants rely upon s.44(ii)(c) of the Act, although it would appear that s.44(i) would also apply if their application to be appointed trustees succeeds.

26. The claimants are officers of the Club, and are put forward as appropriate persons to be appointed trustees. The defendants are also officers of the Club. The Council was not joined as a defendant to the claim.

Procedural background

27. The claim was issued on 12 October 2018, and was listed for directions or disposal. The defendants did not acknowledge service; so that the general rule that a non-party is entitled to a copy of a statement of case did not apply: CPR 5.4C. Regrettably, the claimants refused the Council's request to be provided with a copy of the claim form (or the evidence in support of the claim). Shortly before the hearing, the Council wrote to the Court seeking a copy of "the pleadings".

28. At the first hearing on 14 March 2019, I raised the issue of whether the Council ought to be a party to the claim. Having heard submissions, I was not satisfied that the Council had no real prospect of showing it was entitled to be joined to the claim. I therefore adjourned the hearing for 2 weeks, and made an order requiring the

claimants to provide a copy of the claim form and evidence in support of the claim to the Council. The order also provided:

> "2. Unless by 4pm on 21 March 2019, the LB Hounslow issues an application notice seeking to be joined to the claim, and serves the application notice and any supporting evidence on the parties to the claim, the claim shall be determined at a ½ day hearing on 27 March 2019 at 10:30am.
>
> 3. If the LB Hounslow issues an application to be joined to the claim, then unless the Court otherwise orders, that application shall be determined at the hearing on 27 March 2019 and the Court shall thereafter, as appropriate, make further directions, or determine the claim."

29. On 20 March 2019, the Council issued an application seeking to be joined to the claim under CPR 19.2(2)(a), which provides:

> "19.2
> …
> (2) The court may order a person to be added as a new party if –
>
> (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings;"

30. The Council did not file any evidence but accompanied its application with 2½ page "Grounds for Application" which was the only written document setting out its position before me at the hearing (its counsel did not file or serve a skeleton argument). Its position was, in summary, that:
    (1) No legal estate was created by the Lease;
    (2) Any occupation of the Boathouse was at most under a tenancy at will;
    (3) The Assignment was void and of no effect because there was no leasehold interest to assign;
    (4) The Council resiled from its earlier position (in its solicitors' letter dated 18 July 2018) that the effect of the Assignment and Deed of Variation was a valid grant of the amended lease to the Company.

31. The Council's counsel's submissions at the adjourned hearing extended beyond those in its "Grounds", and at the end of the hearing, I invited him to reduce them to writing in bullet point form. This resulted in a 7½ page document which was effectively a re-presentation of the Council's application, including a detailed analysis of the decision in *Neville Estates v Madden* [1962] Ch 832, which did not form part of his oral submissions. The claimants (who are private individuals) have not responded to this, stating that to do so would be a disproportionate and costly exercise. Their counsel invited me to "*treat the written submissions with caution and, if necessary, to disregard them*". I consider that the options were binary: to take them into account or not. In the interest of reaching the correct conclusion, I have taken them into account, notwithstanding the absence of a substantive response from the claimants. This has significantly increased the work in preparing this judgment.

Joinder

Council's submissions

32. The Council's counsel submitted that its application fell squarely within CPR 19.2. He referred to and relied upon *In re Pablo Star, Price v Registrar of Companies* [2017] EWCA Civ 1768, [2018] 1 W.L.R. 738 in support of the submission that CPR 19.2 should be given a wide interpretation and that the words "in dispute" should be read as " in issue".

33. *Pablo Star* was concerned with the circumstances in which it was permissible and appropriate to join a third party to proceedings for restoration of a dissolved company to the register. The purpose of the restoration in that case was to enable it to assign copyright owned by it to another company ("the assignee"); and for proceedings for breach of copyright then to be brought by the assignee against, amongst others, the Welsh Ministers. Following the making of the restoration order, the Welsh Ministers applied to be joined to the proceedings to argue that the order should be revoked, or the restoration declared invalid. This would have deprived both the company and its assignee of any cause of action for infringement of copyright against the Welsh Ministers.

34. At paras 61 and 62, the Master of the Rolls said:

> "61. … it is well established that the court will not allow the intervention in proceedings for restoration by a third party who merely wishes to argue that the proceedings which the revived company proposes to bring against the third party have no prospect of success: *Stanhope* [1994] BCC 84, 90.
>
> 62. By contrast, the court will allow intervention by a third party whose interests will be directly affected by the restoration and who would otherwise have no opportunity to be heard on the issue of whether, in the light of that direct effect, restoration is just: *Blenheim* [2000] BCC 554, 574."

35. The Council's counsel submitted therefore that since a vesting order binds the whole world or at least anyone interested in the ownership of the property, the Council will be "directly affected" by the outcome of the claim. The effect of the vesting order would be, he submitted, to establish that the leasehold interest exists. The Council's position, as set out above, is that the leasehold interest has never existed, and that therefore, the Court cannot make the order sought.

Claimants' submissions

36. The claimants' counsel made the following submissions.

37. First, she submitted that, while there is a dispute between the Council and the Club as to whether the Council was entitled to dispossess the Club from the Property on 20 August 2018, the existence of the leasehold is not in issue in the proceedings. It would only be put in issue by the joinder of the Council. The only issue in these proceedings was, she submitted, whether the claimants were suitable trustees.

38. Secondly, she submitted that the Council does not have an interest in the Lease. It holds the reversion immediately expectant on the determination of the Lease. She submitted that by analogy with *Pablo Star*, the objective of the Council in opposing the claim is to avoid a claim by the claimants, as trustees.

39. Finally, she submitted that the Council could not be joined as a defendant in light of the claimants' opposition, applying *The Council of the Borough of Milton Keynes v Viridor (Community Recycling MK) Ltd* [2016] EWHC 2764 (TCC), where Coulson J (at §9) held: -

> "I do not consider that the court has the power to join a party as a defendant, in circumstances where the claimant opposes that joinder. No authority in support of such a novel proposition was cited to me."

40. The claimants' counsel accepted in the course of her oral submissions that the Court could join the Council in a capacity other than defendant, such as third party intervenor; and submitted that joinder in that capacity would be more appropriate than joining it as defendant, and would not expose the claimants to risk of an adverse costs order.

Discussion

41. The starting point is the effect of the vesting order. The relief sought in the claim form is, in my judgment, predicated on the existence of the Lease. The claim does not, for instance, seek the vesting of such rights or causes of action as the Club was beneficially entitled to. In these circumstances, the order sought would, in my judgment, establish the existence of the leasehold interest. Indeed, if the vesting order is granted, the claimants intend to apply in the County Court for an order entitling the Club to re-enter the Boathouse.

42. The claimants' counsel accepted that, in such an application, the Council could apply to set aside the vesting order, on the basis that there was no valid lease; and that unless and until the Council did so, the court dealing with the re-entry application would be bound to proceed on the basis that the claimants had a leasehold interest in the Boathouse. This, in my judgment, is an acknowledgement that the issue of the existence of the Lease arises in this claim, and that the Council has an interest in that issue.

43. Her submission that the Council only has an interest in the freehold but not in the Lease has an air of unreality about it. Plainly, a lease is an interest affecting the freehold title in which the freeholder has an interest, not least because it will have privity of title with the tenant, and be subject to the rights and obligations under the lease.

44. As for the *Milton Keynes* case, that was a case where a defendant sought to join another defendant to the claim contrary to the claimant's wishes. It was held that the proposed joinder did not fall within CPR 19.2, because there was no matter in dispute between the claimant and the proposed defendant, nor any pleaded issue between the existing defendant and the proposed defendant. It is no assistance in determining this application.

45. As to the claimants' counsel's acceptance that the Council could be joined to the claim as a third party intervenor; and that joinder in that capacity would protect the claimants from exposure to liability for the Council's costs, I reject both submissions. As its counsel submitted, the Council's status in its application may well be that of an intervenor, but if the application succeeds, it would have to be joined as a defendant; in any event, costs are discretionary and there is no rule that an intervenor is not entitled to its costs if successful.

46. For these reasons, I consider that the Council has an unanswerable case to be joined to this claim as a defendant.

Vesting order

47. The parties' submissions focussed on two main issues:
    (1) Whether the effect of the 1996 documents was that the Company had a leasehold interest as at the date of its dissolution; and
    (2) If so, whether it held that interest on trust for the Club.

Claimants' submissions

Company's leasehold interest

48. As to the first issue, as noted above, the claimants' counsel submitted that the Assignment took effect as a surrender of whatever interest was granted by the Lease, and re-grant of the Lease to the Company, which was then varied to extend the term of the Lease to 30 July 2033.

49. She submitted that the common intention of the parties to the Assignment was to grant a lease to the Company and the Club; and that since the Club was unable to take the leasehold interest, the grant took effect as a grant to the Company alone. She relied upon the decision in *Rabiu v Marlbray Ltd* [2016] 1 WLR 5147. *Rabiu* concerned a contract to buy a 999 year lease of a room in a London hotel. The buyers on the face of the contract were a husband and wife. The husband signed the contract purportedly on behalf of himself and the wife. She had not authorised him signing or entering into the contract on her behalf. The Court of Appeal held that the contract was valid, so that the husband was obliged himself to complete the purchase, and to take the lease.

50. The basis of the decision is set out at [65] of the judgment of Gloster LJ:

> "Whether or not a valid contract has come into force as between A and B, both of whom have signed the contract, notwithstanding that contemplated party C has not signed the contract, will depend on the common intention of the parties as may be objectively ascertained from the circumstances surrounding the transaction. Put another way, the issue is whether, objectively, B's agreement to execute and his execution of the contract was, expressly or impliedly, conditional upon C likewise signing the agreement."

51. In this case, the claimants' counsel submitted, the Council intended to grant a lease to the Company; the Company intended to accept the grant; and, accordingly, the Assignment took effect as a grant to the Company.

52. In the alternative, she submitted that the Deed of Variation was to be construed as a lease to the legal entity capable of taking it. It was, she said, an agreement that the Company would be the tenant for the remainder of the term of the Lease as varied, creating a continuing right for the Company to occupy the Boathouse until 2033.

53. In both cases there was, she said, no basis for concluding that Council's grant to the Company was expressly or impliedly conditional upon the Club also taking the grant.

Beneficial entitlement of the Club to the leasehold interest

54. As to the second issue, the claimants' counsel submitted that objectively the Company and the Club intended that they would be joint tenants at law, and they would have been but for a "legal technicality". She relied upon the presumption that, where there is joint legal ownership, there will be joint beneficial ownership, recognised in *Stack v Dowden* (where it was characterised as a presumption of resulting trust). The corollary of this, she said, was that the Club and the Council intended to be joint tenants in equity, and the fact that they could not be joint tenants in law did not vitiate their intention because they were unaware of "the technicality".

55. She also relied upon the Joint Venture Agreement and the acts done pursuant to it; and the draft rules of the TCBSC, particularly the objective set out at para 8 above. These, she submitted, showed an intention that both the Company and the Club would use and occupy the Boathouse, and that the Joint Venture would continue after the Assignment.

Council's submissions

Company's leasehold interest

56. As to the first issue, the Council's counsel submitted that the Company had never had a leasehold interest in the Boathouse.

57. The effect of the Assignment, he submitted, was that the Club assigned whatever leasehold estate (if any) it had in the Boathouse, immediately before the Assignment, jointly to itself and the Company.

58. The effect of the Deed of Variation was that the Council, the Club and the Company varied the terms of whatever leasehold estate (if any) the Club and the Company had in the Boathouse immediately before the variation.

59. Since the Club did not have a leasehold estate, the Assignment was therefore, he submitted, of no effect, and similarly the Deed of Variation was of no effect.

60. He also submitted that on an objective construction there was no document that granted or purported to grant a leasehold estate to the Club and the Company; and no document that granted or purported to grant such an estate to the Company alone.

61. Thus, he submitted, at all material times there was no person against whom the Council could have enforced the tenant's covenants in the Lease, even though

neither side were aware of this; and it could not have obliged the Company to remain at the Boathouse until 2033.

Beneficial entitlement of the Club to the leasehold interest

62. As to the second issue, he submitted that even if the documents of May 1996 could be somehow construed as a grant, they could not have taken effect as a grant to the Company as sole lessee but holding on trust for itself and the Club, because:
    (1) objectively viewed, that is not what any party was contracting for, and;
    (2) not only:
        (i) was the relationship between the Club and the Company not a trust relationship, but also;
        (ii) a beneficial interest in land could not vest in the Club (i.e. the Club could not be a beneficial owner) for much the same reasons that a legal estate could not so vest.

Objective intention of the parties

63. The Council's counsel submitted that the "*common intention of the parties, as objectively ascertained by the circumstances surrounding the transaction*" (*Rabiu*, [65]) was for the Club and the Company jointly to have such rights against and such liabilities to the Council as the Club had (or at least was believed to have had) under the Lease, as varied. He said that this was clear not only from the executed documents (in particular the recitals to, and cl.12 of, the Deed of Variation – set out above), but also from a memorandum dated 22 November 1993 from the Club to the Company, which refers to "a longer lease".

64. This case, he submitted, was distinguishable from *Rabiu* on the following basis.

65. In *Rabiu* there was nothing - on an objective analysis of the circumstances of the transaction - to suggest that the husband or the seller signed on the understanding that the transaction was conditional on the wife being contractually bound, and it was clear (from the provision for joint and several liability) that the husband and wife were not to be regarded as a 'composite purchaser': [68]

66. In the present case, he submitted that, by contrast, the circumstances show a common intention that the Club and the Company were to take jointly. He relied on the fact that there is no provision in the Deed of Variation nor in the Lease for joint and several liability.

67. In support of this he made the following submissions:

    (1) Objectively viewed, the Council intended the Company (who had been using the Boathouse together with the Club from well before 1996) to be responsible for the lessee covenants 'equally with' the Club, not 'instead of' the Club. The Council could not have intended (and cannot be seen as having been prepared) to grant a leasehold estate vested in the Company alone:
        (i) That would simply have been the reverse of what was believed to be the 1992-1996 position (the Club as tenant with the Company an informal occupier);
        (ii) It would have left the Council with no-one against whom to enforce the tenant covenants in the event of the Company being unable to perform

them - for example, (and as has indeed occurred) in the event of the Company being dissolved;

(iii) If it had so intended, it would have given permission to the Club to assign to the Company alone.

(2) Objectively viewed, the Company intended the Club to be equally responsible for the tenant covenants - and equally entitled to the benefit of the landlord covenants (in particular the covenant allowing use of the Boathouse).

(3) Objectively viewed, the Club intended to be equally entitled to the benefits of the lessor covenants (in particular the covenant allowing use of the Boathouse) - and equally responsible for the tenant covenants.

(4) The rules of the Joint Venture refer to the Boathouse as being "*under the joint leasehold held by* [the Club] *and* [the Company] ..."

68. He submitted, therefore, that since the Club did not become liable to the Council by reason of the May 1996 documents, the Company did not thereby become the Council's sole tenant.

Absence of trust relationship

69. The Council's counsel accepted that a leasehold interest could be held on trust. The claimants do not contend for an express trust. The Council's counsel submitted that no resulting or constructive trust could arise in this case.

Factual absence of trust relationship

70. First, he submitted that there was nothing in the Joint Venture Agreement or the Rules suggesting that either the Club or the Company held or was to hold the Boathouse (or indeed anything) on trust for the other - notably, militating against any trust relationship, cl.8 of the Rules provided for the parties each to be responsible for their own taxation. The relationship between them was, he said, purely contractual.

71. In the period from about 1992 to May 1996, when the Club was believed to be the sole leaseholder, the Joint Venture paid the rent and was reimbursed by each of the Company. There was, he submitted, no trust at that stage.

72. There was, therefore, he said, no reason why a trust should have arisen if the Company became the sole leaseholder in May 1996: as between themselves, the Club would have occupied as the Company's licensee under the auspices of the Joint Venture. Such licence could be viewed as coupled with an estoppel, if necessary (i.e. to prevent a breach of the Joint Venture), such that the Company could not lawfully have excluded the Club from the Boathouse.

73. Indeed, he submitted, even in the absence of the Joint Venture, an arrangement under which Person X shares occupation of premises with Tenant Y and contributes half (or other proportion) of the rent payable under the lease does not mean that Y holds on trust for him/herself and X.

Legal impossibility of trust relationship

74. The Council's counsel submitted that the Club was incapable of holding a beneficial interest in a leasehold under a trust. I reject this submission for reasons given below.

Discussion

75. In my judgment, the issues of the effect of the 1996 documents and whether the Company held a leasehold interest as trustee for the Club are inextricably linked, for reasons which I explain below.

76. I accept that the Assignment of itself was not capable of effecting a grant to the Company, for two reasons: first, since the Lease did not confer a leasehold interest on the Club, there was nothing that could be assigned by it; secondly, the Council was not a party to the Assignment so it could not grant anything by it.

77. However, the Council was a party to the Licence and the Deed of Variation. By the Licence the Council agreed that the Club and the Company would become its tenants on the terms of the Lease; and the Company agreed to comply with all the terms of the Lease.

78. The effect of the Assignment and the Licence, together with clause 12 (set out above) of the Deed of Variation was, in my judgment, that all 3 parties agreed to the terms of the Lease, as varied by the Deed. The Council thereby granted a lease on those terms, subject to the question of the effect (if any) of the Club being unable to take a legal interest in the leasehold thereby granted (considered below).

79. I also consider that that grant was capable of taking and in fact took effect as a grant to the Company. The common intention of the parties was that the grant should be to the Club and the Company. It was also the parties' intention that the two tenants' liabilities should be joint and several: see clauses 4 and 5.3 of the Licence to Assign (set out above). I therefore reject the Council's counsel's submission that the common intention was that the Club and the Company should only be liable jointly, and not jointly and severally.

80. The parties' intentions must be considered in the following framework. First, any joint tenancy is held on trust of land: *Crawley BC v Ure* [1996] QB 13 at 26D; Law of Property Act 1925 s.36(2), as amended by the Trusts of Land and Appointment of Trustees Act 1996 s.5 and Sch. 2, para. 4. Secondly, although an unincorporated association cannot hold a legal interest in leasehold land, it can have a beneficial interest in it, in the sense that the legal title is held on trust for the members of the association from time to time, subject to their contractual rights and liabilities to each other as members of the association: see, for instance, *Wise v Perpetual Trustee* [1903] AC 139 (PC), decided on the basis of this trust analysis.

81. This analysis is helpfully explained in *Hanbury & Martin*, Modern Equity, 21st edn, at para 16-019:

> "**D. - Ownership by Members on Contractual Basis**
> The contractual analysis provides a method by which unincorporated associations can validly hold property without the necessity of discovering an intention to create a trust, and by which gifts to the association, in order to

escape invalidity as purpose trusts, need not be regarded as taking effect as immediate distributive shares in favour of the members, which is unlikely to have been the donor's intention. Members of an association can:

> "[b]and themselves together as an association or society, pay subscriptions and validly devote their funds in pursuit of some lawful non-charitable purpose. An obvious example is a members' social club" [referring to *Re Rechers Will Trusts* [1972] Ch 526 at 538]

where it would in most cases be difficult to find an intention to create a trust. Their assets, whether donations or members' subscriptions, are held by the trustees or by the committee or officers of the club on the terms of the constitution or rules of the club, which are themselves a contract by the members with each other. A trust is interposed simply because it is normally inconvenient (and impossible in the case of land [referring to Law of Property Act 1925, s.34(2)]) for the assets to be vested in all the members. This is a bare trust and does not detract from the contractual analysis.

This solution avoids some of the difficulties which arise from an analysis which regards the members as beneficiaries under a private trust. The members' rights are contractual, and of course they depend upon the rules of the association. A member will not usually be able to claim his share at any time; but the members as a whole control the committee's activities in accordance with the rules ..."

82. Thus, the Council's intention that the Club should be its tenant could only be realised by a grant to a trustee to hold the leasehold estate on trust for the Club's members; and a grant to the Company alone fulfilled that intention.

83. As in *Rabiu*, therefore, on an objective basis of the circumstances of the transaction, there was, in my judgment, nothing to justify the inference that the grant was conditional upon the Club also taking legal title to the leasehold estate, which was, of course, impossible.

84. I therefore reject the Council's counsel's submission that the relationship between the Club and the Company was not a trust relationship. The trust relationship arose out of the fact that they intended to be beneficial joint tenants of the Boathouse. This intention is shown by the recitals in the Joint Venture Agreement and the draft rules of the CBSC.

85. The trust relationship between the holder(s) of the legal estate and the members of the Club is not inconsistent with a contractual relationship between the beneficiaries: see e.g. *Wise*. In this case, the members of the Club had their own contractual relationship; and the Club and the Company had (or intended to have) a contractual relationship as to their use of and responsibility for the Boathouse.

86. This analysis is not inconsistent with the Club, by its members, enjoying occupation of the Boathouse, or being responsible under the Joint Venture Agreement for the tenant's obligations under the terms of the Lease as varied. Indeed, it is consistent with their joint beneficial entitlement.

87. I turn to the Council's counsel's additional submissions (not advanced at the hearing) on *Neville Estates*, the relevant passage being:

> "Such a gift [to an unincorporated association] may take effect in one or other of three quite different ways. In the first place, it may, on its true construction, be a gift to the members of the association at the relevant date as joint tenants, so that any member can sever his share and claim it whether or not he continues to be a member of the association. Secondly, it may be a gift to the existing members not as joint tenants, but subject to their respective contractual rights and liabilities towards one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. If this is the effect of the gift, it will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which precludes the members at any given time from dividing the subject of the gift between them on the footing that they are solely entitled to it in equity.
>
> Thirdly, the terms or circumstances of the gift or the rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held in trust for or applied for the purposes of the association as a quasi-corporate entity. In this case the gift will fail unless the association is a charitable body.

88. First, I accept that the Company cannot sensibly be regarded as holding the Boathouse jointly for the members of the Club as at the date of the grant. I also accept that the claimants could not succeed on the basis of the third category of analysis in *Neville Estates*.

89. I do not however accept that rule 19.4 of Club Rules, which provides:

> "The income and property of the Club ... shall be applied solely towards promotion of the objects of the Club. No portion of them shall be transferred directly or indirectly to members."

precludes the second analysis in *Neville Estates*. This is clear from *Re Recher's Will Trusts* [1972] Ch 526 at 538F-G:

> "A trust for non-charitable purposes, as distinct from a trust for individuals, is clearly void because there is no beneficiary. It does not, however, follow that persons cannot band themselves together as an association or society, pay subscriptions and validly devote their funds in pursuit of some lawful non-charitable purpose. An obvious example is a members' social club. *But it is not essential that the members should only intend to secure direct personal advantages to themselves. The association may be one in which personal advantages to the members are combined with the pursuit of some outside purpose. Or the association may be one which offers no personal benefit at all to the members, the funds of the association being applied exclusively to*

the pursuit of some outside purpose. Such an association of persons is bound, I would think, to have some sort of constitution; that is to say, the rights and liabilities of the members of the association will inevitably depend on some form of contract inter se, usually evidenced by a set of rules."
(emphasis added)

90. It follows that:
    (1) Whilst an unincorporated association cannot take a grant of a leasehold estate, it can by its trustees hold a beneficial interest in such an estate. I reject the submission that there is no distinction to be drawn between the two: see *Re Recher's Will Trusts* [1972] Ch 526.
    (2) If a vesting order were made, the trustees would hold the leasehold interest in accordance with the Club Rules, in which provision is made for the way in which the Club's assets are to be dealt with if it is unable to continue. I reject the Council's counsel's submission that the effect of a vesting order would be that the trustees were entitled absolutely to the leasehold interest.
    (3) I also reject his submission that it is a "*manifest absurdity*" that the Council would only be able to look to claimants for performance of the tenant obligations in the Lease. The claimants would have recourse to the funds of the Club to meet their obligations under the Lease; and the potential commercial unattractiveness of that outcome was inherent in the Council's initial decision to enter into leases with the Club in 1987 and again in 1996.

91. Finally, if I am wrong that the effect of the 1996 documents was a grant of a leasehold interest, then, in my judgment, the claimants are nonetheless entitled to an order vesting a leasehold interest in them on the following bases.

92. First, they are so entitled on the basis that if the effect of the 1996 documents and in particular, clause 12 of the Deed, was not as a grant of a leasehold interest, then it was as an agreement to grant a lease, pursuant to which the Company and the Club entered into occupation (with exclusive possession) of the Boathouse on the terms of the Lease, as varied by the Deed, and paid the rent due under it; continuing to do so until the Company's dissolution on 5 May 2009 (following which the Club continued to pay and the Council to accept the rent until August 2018, when it removed the Club from the Boathouse).

93. The effect of the above, in my judgment, was that the Company entered into as a tenancy from year to year, but otherwise on the terms of the Lease (as varied by the Deed) except so far as inconsistent with such a tenancy: see Halsbury's Laws, Vol 62, paras 72, 204.

94. Furthermore, if the 1996 documents cannot properly be construed as an agreement to grant a lease, nonetheless, the occupation and payment of rent gave rise in my judgment to an agreement by conduct in the terms of the Lease as varied by the Deed, with the same consequences; or, at the very least, a quarterly periodic tenancy (rent being paid quarterly).

95. In both cases, since it was the common intention of the Club and the Company that they would be joint tenants of the Boathouse, and the Club paid one half of the expenses (including the rent) of the Boathouse, the Company would have held that

leasehold interest on trust for itself and the Club beneficially. Furthermore, such an interest for the purposes of the two clubs, and, later, the Club's activities would be a business tenancy falling within the Landlord and Tenant Act 1954, Part II, giving rise to a statutory right to renewal: *Addiscombe Garden Estates v Crabbe* [1958] 1 QB 513 (CA).

Conclusion

96. For the reasons set out above, therefore, I will make a vesting order in the terms sought in the claim form.