Neutral Citation Number: [2020] EWHC 2675 (Ch)

Case No: CH-2019-000287

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
APPEALS (ChD)

On appeal from the County Court at Central London
Order of HHJ Saunders dated 27 September 2019
Lower Court case number: D10CL457

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

Date: 12 October 2020

Before :

LORD JUSTICE NUGEE

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Between :

RUKSANA AMIN	**Claimant and Appellant**
- and -	
(1) MOHAMMED RAIS AMIN (decd)	
(2) RAJA UMAIRE AMIN	**Defendants and Respondents**
(3) ZUBAIRE AMIN	

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Raj Arumugam (instructed by **Hodders Law**) for the **Appellant**
Paul Oakley (instructed by **S G Law Solicitors Ltd**) for the **Respondents**

Hearing dates: 2 and 3 July 2020

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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.

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Monday 12 October 2020.

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LORD JUSTICE NUGEE

Lord Justice Nugee:

Introduction

1. This is an appeal from a decision of HHJ Saunders sitting in the County Court at Central London given after a trial which took place over a number of days in November 2018 and February 2019 (followed by written closing submissions). His judgment (**"the Judgment"** or **"Jmt"**) was handed down on 26 July 2019, and given effect to in an Order dated 27 September 2019.

2. The proceedings concerned a freehold house at 104 Gladstone Park Gardens, London NW2 6JX (**"104 Gladstone Park Gardens"**), which is registered at HM Land Registry in the sole name of Ruksana Amin, the Appellant (**"Mrs Amin"**). The action started as a claim for possession by Mrs Amin, but she was met by a counterclaim for a declaration that she held 104 Gladstone Park Gardens on trust for the Respondents, who are (or were) her husband Mohammed Rais Amin (**"Mr Amin"**), now deceased, and her 2 sons, Raja Umaire Amin (**"Raja"**) and Zubaire Amin (**"Zubaire"**).

3. HHJ Saunders in the Judgment upheld the counterclaim and found that 104 Gladstone Park Gardens was held by Mrs Amin on trust for Mr Amin, Raja and Zubaire. By his Order he duly made a declaration to that effect, and ordered Mrs Amin to transfer 104 Gladstone Park Gardens to them. He also dismissed Mrs Amin's claim for possession and ordered her to pay the costs. He refused permission to appeal but granted a stay to enable the application for permission to be renewed to the High Court: by Order dated 28 October 2019 I granted permission to appeal and continued the stay until the determination of the appeal.

Respondents' application

4. Two matters were listed before me at the hearing. One was the substantive appeal; the other was an application by the Respondents by notice dated 28 May 2020. The application sought two things. The first was an order that Mrs Amin answer a Request for Further Information pursuant to CPR Part 18 dated 3 April 2020; the other was an order that Mrs Amin provide a transcript of the evidence at trial for the purposes of the appeal.

5. I heard argument on the application first and gave a short judgment on 2 July 2020 dismissing both parts of the application. Nothing more needs to be said about the Part 18 Request. So far as a transcript of the evidence is concerned, I accepted the submission of Mr Arumugam, who appeared for Mrs Amin, that it was up to her and her advisers as to how to present the appeal. I did however point out that in circumstances where I had not been provided with a transcript it inevitably followed that I could not be asked to conclude that the Judge had erred where his findings depended on, or might have been affected by, the oral evidence.

Facts

6. Mrs Amin and Mr Amin met in the 1970s. They were never legally married according to English law but on 28 January 1984 they held a Muslim religious ceremony (a Nikkah) and the Judge found that they regarded themselves as husband

and wife. They had four children together, namely a daughter Farzana (born in October 1984), followed by their two sons Raja (born in April 1986) and Zubaire (born in March 1988), and finally a further daughter Aisha (born in August 1991). Their relationship came to an end in 2007, as referred to below.

7. At the time of the trial Mr Amin was still alive but he died on 4 April 2020 between the Judgment and the hearing of the appeal. I have no information about his estate, and no steps have been taken to substitute anyone to represent his estate for the purposes of this appeal. The only thing that was done was to adjourn the hearing which was then due to be heard later in April.

8. The history of where Mr and Mrs Amin lived, and the properties that between them they acquired is quite a complex one, but it is helpful to try and disentangle it. Not all of this is covered in the Judgment, and some of what follows is taken from Mrs Amin's witness statement(s) (and reference below to her evidence is to her written evidence). This evidence needs to be treated with considerable caution: I am not generally in a position to know which parts of it were challenged in cross-examination, or qualified or departed from in her oral evidence, but it is clear that she did not make a good witness. The Judge found her oral evidence to be confused and imprecise, and referred to her complete inability at times to recall any precise detail contained in her witness statement – something that happened so frequently that he formed the view that it was almost as if the statement had been written for her by someone else (Jmt at [44]-[45]). With that caveat, the position seems to have been as follows (all the properties referred to below other than the Harrow property are in London NW2):

    (1) Initially in 1984 Mr and Mrs Amin lived in a property at 9 Ash Grove with one of Mr Amin's brothers, Mohammed Anis Amin. Mrs Amin's evidence was that this had previously been owned by Mr Amin but he had transferred it to his brother.

    (2) In 1988 they and their then 3 children moved into 163 Walm Lane which was let by the local Council to Mr Amin's father.

    (3) While still living there, in 1995 they acquired 104 Gladstone Park Gardens. It was registered in their joint names. There appears to have been no exploration before the Judge, and there was none before me, as to what, if anything, was said or agreed or intended as to the beneficial ownership of the property when it was acquired in 1995, and the Judge made no findings about the beneficial ownership on acquisition. Mrs Amin's evidence was that it cost about £90,000, of which some £60,000 was raised on mortgage, and some £20-£30,000 was given to Mr Amin by another of his brothers, Mohammed Shabir Amin. She thought that was in connection with some other property transaction or transactions between the brothers, but it is not necessary to go into the details. She also said that Mr Amin dealt with all financial matters as he did not allow her to have a bank account. The Judge said (Jmt at [27]) that he could not make any findings as to who provided the purchase price as the conveyancing file was not available; but he did find that it was clear that none of the monies had come from Mrs Amin.

    (4) Mr and Mrs Amin however did not move into 104 Gladstone Park Gardens. It

was in a poor condition and Mr Amin, who was a builder, spent some time renovating it (Jmt at [28]). According to Mrs Amin, they then rented it out, the intention being that the rent would pay the mortgage.

(5) In about March 1999, Mr Amin's father's tenancy of 163 Walm Lane came to an end and he was offered a tenancy of another property at 22 Blackstone Road. Mr and Mrs Amin, and their children, moved there with him.

(6) On 20 May 1999 Mr and Mrs Amin sold 104 Gladstone Park Gardens to Mrs Amin's cousin Shahenaz Banu Shaikh (**"Shahenaz"**) (Jmt at [28]). Mrs Amin's evidence was that they sold the property because they were having difficulties meeting the mortgage, the tenants having left, and that they sold it to her cousin for about £130,000; her sister, Rehana Shaikh Azhar (**"Rehana"**), had considerable experience buying and selling properties and had helped Shahenaz obtain a mortgage. Mrs Amin also said that the whole of the proceeds were paid into Mr Amin's bank account as she did not have one.

(7) The evidence of Shahenaz, whom the Judge found to be a credible witness, was that the sale to her was not a real sale, but a device to enable Mr and Mrs Amin to raise equity using her name, with Rehana helping her to get a mortgage, and that it never really belonged to her (Jmt at [71]-[73]). She and her family did live there for some time: there was a dispute about precisely when, which the Judge said he did not need to resolve (Jmt at [30]). Mr and Mrs Amin and their children moved into 104 Gladstone Park Gardens in September 2000 (Jmt at [30]).

(8) A further mortgage was raised on 104 Gladstone Park Gardens in March 2002 from the Bank of Scotland. There was a dispute, which the Judge did not resolve, as to who had the use of the monies raised.

(9) In January 2005 Mr Amin acquired a property in Harrow at 113 Leamington Crescent, London HA2 (**"113 Leamington Crescent"**). It was conveyed into his sole name. Mrs Amin's evidence was that it cost £240,000, that her mother contributed the £24,000 needed as a deposit, that Mr Amin took out a mortgage (again arranged by Rehana) for some £204,000, and that Rehana contributed the balance.

(10) In July 2005 Shahenaz sold 104 Gladstone Park Gardens back to Mrs Amin, and on 6 July 2005 it was transferred into her sole name. The purchase price was £249,000. I deal below (under Ground 4) with the evidence as to how this was funded.

(11) In the summer of 2007 Mrs Amin moved out of 104 Gladstone Park Gardens. Her evidence was that this was because of domestic abuse towards her and her daughters, but the Judge said he had doubts about that (Jmt at [46]), and that he had formed the view that although significant arguments had taken place they had been more in the manner of substantial family disagreements than domestic abuse; he also said that the circumstances of Mrs Amin's departure were not directly relevant to the proceedings (Jmt at [6]).

(12) Mrs Amin's evidence was that she went to live with her sister Rehana and

their elderly mother in a house owned by Rehana. It would appear that Farzana and Aisha also went to live there; the precise order of events is not as clear as it might be, but not of significance. It is clear from the witness statements as a whole that the family split into two sides with Mrs Amin and the daughters on one side, and Mr Amin and the sons on the other.

(13) Mrs Amin has not returned to 104 Gladstone Park Gardens since. Mr Amin remained living there and on 16 August 2007 registered a Notice of Home Rights under the Family Law Act 1996. Raja and Zubaire continued to live with him, later joined by Raja's wife in September 2007 and Zubaire's wife in 2012, and both Raja and Zubaire continue to live there with their wives and respective children.

(14) In July 2014 Mrs Amin consulted solicitors and asked the defendants to vacate 104 Gladstone Park Gardens as she wished to sell it. That was followed by a formal notice to quit in October 2016, by which time Mrs Amin said she wished to live there herself, and by proceedings claiming possession in February 2017. As already referred to that was met by a counterclaim that Mrs Amin held 104 Gladstone Park Gardens on trust for Mr Amin, Raja and Zubaire.

The Judgment

9. The central issue for the Judge, indeed the only issue that he needed to resolve, was the beneficial ownership of 104 Gladstone Park Gardens.

10. Having set out the background to the case (Jmt at [1]-[10]), the Judge dealt with the law (Jmt at [11]-[24]). I will have to consider some of this in more detail below, but the Judge summarised his conclusion on the law by saying (at [22]) that he should apply the test in *Jones v Kernott* [2011] UKSC 53, namely that financial contributions were relevant but that there were many other factors that might enable the Court to decide what shares (if any) were intended.

11. He then set out what could be determined from the documentary evidence, but commented that it was sadly far from complete (Jmt [25]-[43]). He then turned to the oral evidence, dealing with each witness in turn. I have already referred to his assessment of Mrs Amin herself as a witness who failed to come up to proof. The other witnesses who gave evidence for her were her daughter Farzana, her sister Rehana and her brother Altaf Shaikh. The Judge said that Farzana's evidence was limited to the allegations of domestic abuse, and did not assist on the core issue (Jmt at [52]); and that Altaf Shaikh's evidence was of limited relevance (Jmt at [60]). He dealt with Rehana at greater length but said that she was not helpful on the question whether there was an agreement between the parties with regard to the purchase of property (Jmt at [57]). He also referred to the fact that she had admittedly been convicted of 6 counts of false accounting and been given a suspended prison sentence, and had a confiscation order made against her in a sum of over £100,000: while he accepted that that was in relation to unrelated matters, he said that the conviction must affect her credibility to a certain extent (Jmt at [58]-[59]).

12. He then considered the evidence of the defendants and their witnesses. Apart from the defendants themselves (Mr Amin, Raja and Zubaire) these consisted of Shahenaz,

Mr Amin's brother Mohammed Anis Amin, and Raja's wife Sana Raja Umaire Amin. Of Mr Amin, the Judge said that his evidence, although not perfect, was on the whole credibly put (Jmt at [64]). He said that Raja was unable to assist the Court to any great extent, which was understandable in view of his age when the core issue arose, but that he did give some useful evidence (Jmt at [76]-[77]]); and that Zubaire's evidence was to similar effect (Jmt at [79]). Of the other witnesses, he found Shahenaz credible and extremely helpful (Jmt at [71]); he found Mr Mohammed Anis Amin of limited assistance but said that he gave clear evidence on one point which he found helpful (Jmt at [80]); and he found Sana Amin to be both credible and useful on one aspect (Jmt at [81]). Before continuing, I add the comment that it is apparent from this short survey that unlike some cases of this type where the trial judge only hears from the two parties concerned, this was a case where the oral evidence was extensive, and where the Judge found the evidence called for the defendants both more credible and more helpful than that called for Mrs Amin.

13. He then set out his analysis and conclusions in a passage headed "Reasoning" (Jmt at [83] to [99]). Again I will have to consider some of this in more detail in due course but he made four key factual findings. The first was that mortgage payments were made by Mr Amin (Jmt at [88]). The second was that Mrs Amin made no financial contribution (Jmt at [93]). The third concerned a case put forward by Mrs Amin that the purchase of 104 Gladstone Park Gardens in her name and the near-simultaneous purchase of 113 Leamington Crescent in Mr Amin's name were linked, and that there had been a family meeting at which it was agreed that they would have one property each. The Judge rejected this, finding that the purchase of 113 Leamington Crescent was unrelated to that of 104 Gladstone Park Gardens, and was intended to be simply an investment opportunity, and that there was little evidence of a family meeting and what there was was vague and imprecise (Jmt at [96]-[98]). The fourth was that the registration of 104 Gladstone Park Gardens in Mrs Amin's sole name was done without significant thought, the family having a history of transferring properties between members of the extended family (Jmt at [96]).

14. He then expressed his conclusion at [100]-[101] as follows:

> "100. In examining the course of conduct of the parties, I find that the above evidence is sufficient to displace the presumption that the property is held in accordance with the terms of ownership at H.M. Land Registry.
>
> 101. I find that the property is held on trust by the claimant for all three defendants and order that there be a transfer into the names of D1, D2 and D3."

Grounds of Appeal

15. Four Grounds of Appeal were argued on behalf on Mrs Amin. In summary they were as follows:

(1) Ground 1 is that the Judge wrongly failed to consider whether there was a common intention between the parties as to the beneficial interest in 104 Gladstone Park Gardens.

(2) Ground 2 is that the Judge's conclusion that Raja and Zubaire should share in the beneficial interest in the property was perverse and unsustainable.

(3) Ground 3 is that the Judge failed to give any consideration to whether there was sufficient detrimental reliance by any of the defendants.

(4) Ground 4 is that the Judge's finding that Mrs Amin made no financial contribution to the purchase of 104 Gladstone Park Gardens in 2005 was wrong and unsustainable.

16. There was also a Ground 5 put forward in Mrs Amin's Grounds of Appeal, which was that the Judge failed to give proper weight to the fact that 104 Gladstone Park Gardens was bought (in Mrs Amin's sole name) at the same time as 113 Leamington Crescent was bought (in Mr Amin's sole name), which it was said showed that they were not intended to have any beneficial interests in each other's properties. Mr Arumugam however did not pursue that ground at the hearing of the appeal. I think he was wise not to do so, in the light of the Judge's clear factual finding that the two transactions were unrelated. It is not necessary to say any more about it.

17. I propose to take Ground 4 first, which is a pure question of fact.

Ground 4 – did Mrs Amin make any financial contribution to the purchase?

18. Mr Arumugam pointed to what he said was the undisputed documentary evidence at the time of the purchase of 104 Gladstone Park Gardens which demonstrated beyond doubt that Mrs Amin did contribute to the purchase, and which meant that the Judge's conclusion that she made no financial contribution had to be wrong.

19. The evidence he relied on was as follows:

(1) A completion statement from DKLL Solicitors (**"DKLL"**), the solicitors acting in the sale for Mrs Amin. This showed that in addition to the purchase price of £249,000, there were costs and disbursements of £3,859.57, making the total cost of purchase £252,859.57. Of that £186,750 was to be provided by way of mortgage from Halifax plc, and £300 had been "received from you", leaving £65,809.57 required to complete.

(2) DKLL's client ledger. This showed receipt of the following sums:

(i) £300 on 17 September 2004. This was paid by cheque by Rehana.

(ii) £200 on 13 April 2005. Rehana's evidence, supported by an e-mail, was that this was also paid by her.

(iii) £25,000 on 28 April 2005. This was a transfer from Rehana's account.

(iv) 3 sums of £32,810, £5,000 and £3,000 on 30 June 2005. The £32,810 came from an Abbey National account in the name of Mrs Amin. Mrs Amin's evidence was that the other two sums came from Rehana.

(v) The mortgage advance of £186,750 on 6 July 2005.

20. Mr Arumugam said that this evidence established that, leaving aside the mortgage, the property was purchased entirely with her resources: she contributed in round terms £60,000 out of the cost of £250,000 or 24%, and the Judge was plainly wrong to say

that she had contributed nothing. I add that that way of analysing it assumes that money coming from Rehana was to be treated as a contribution by Mrs Amin, but even without that assumption there is *prima facie* evidence that she contributed the £32,810.

21. Mr Oakley, who appeared for Raja and Zubaire, accepted that on the face of the documents it did appear that money came from Mrs Amin. But he said that the oral evidence was to the effect that the money did not in fact come from her at all. He referred to various points which emerged from the evidence:

(1) Mrs Amin's own evidence was that at the outset of the relationship she had no money of her own and did not even have a bank account.

(2) Mr Amin's evidence was that he bought the property in 1995 with the aid of a £60,000 mortgage, paying the balance in cash. His oral evidence, as recorded by the Judge (Jmt at [27]), was that the cash came from his brother. That accords with Mrs Amin's written evidence, and justifies the Judge's finding that although he did not have the conveyancing file and could not find who provided the purchase price, it was clear that none of the monies in 1995 came from Mrs Amin.

(3) Mr Amin's evidence was that he paid the entirety of the mortgage from 1995 onwards, and continued doing so even after the property was transferred to Shahenaz in 1999. His evidence was that the transfer to Shahenaz was something done at the instance of Mrs Amin and her sister Rehana in order to raise money to put into a business venture. That accorded with Shahenaz's evidence which was that she was approached by Mrs Amin and Rehana who wanted to raise money to start up a business; she also said that the re-mortgage in 2002, which raised a further £54,000, was also designed to raise money to put into the business. The Judge, as already referred to, found her both credible and "extremely helpful", and recited her evidence both that the sale to her "wasn't a real sale, they just wanted to use my name" (Jmt at [72]) and that Rehana asked her to have the house in her name so that they could raise equity (Jmt at [73]). There was indeed evidence that a business was acquired, although not until January 2002, namely a company called Camden Automotive Ltd, with four shareholders: Rehana and her husband (or ex-husband) Azhar Iqbal, Mrs Amin and Mr Amin, with the first three being directors (Jmt at [31]). It went into liquidation in 2007 (Jmt at [41]).

(4) So far as the funding of the 2005 purchase was concerned, there was in evidence an undated note in Rehana's handwriting with various figures in relation to a number of properties. In relation to 104 Gladstone Park Gardens, this referred to "Misbah" as contributing £130,000 of which he had paid £35,000 (part of which was used to fund the £25,000 deposit) leaving £95,000 to pay. Mr Oakley said that this referred to monies borrowed by Mr Amin, and that although the Abbey National docket would appear to show on its face that the £32,810 came from Mrs Amin, the oral evidence was to the effect that she had not been the source of this money at all. Mrs Amin had been given clear notice that she would have to demonstrate that she had contributed out of her personal resources, but there was no paper trail produced at trial for the monies. This was one of the matters that he said was explored in oral

evidence, but in the absence of the transcript it was impossible for the appellate court to know what the oral evidence was. His recollection however was that the Judge had commented that the evidence did not establish that any of the £60,000 came from Mrs Amin.

(5) In addition the evidence more generally was to the effect that there were financial transactions between the wider family, including unrecorded loans. That is echoed in the Judgment where the Judge said (at [96]):

> "I note that, during the trial, there has been mention of transfers of properties without value between members of the extended family and evidence of payments in cash."

22. In those circumstances Mr Oakley's submission was that it would be unsafe and unfair for me to overturn the decision of the Judge that Mrs Amin in fact made no financial contribution. He referred me to a statement in the *White Book* (*Civil Procedure 2020* vol 1 at §51.2.5) where the editors comment that:

> "Where a judge's evaluation of facts is challenged, it is properly understood to be very difficult for an appellate court to place itself in the position of the trial judge who would have had to take account of both written and oral evidence."

This has been repeatedly emphasised in recent decisions of the Supreme Court and Court of Appeal. It is not necessary to refer to them at any length, but I will simply mention one, namely *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114] where Lewison LJ helpfully summarises the various reasons for this appellate reticence on questions of fact, including the following (at [114(iv)]:

> "In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping."

23. I accept Mr Oakley's submissions. This point is a good illustration of the limits of what an appellate court can do when there has been a trial on documentary and oral evidence but on appeal the court is only presented with the documents and not with a transcript. It is for the appellant to demonstrate on appeal that the trial judge has erred in a factual conclusion. In general that can only be done by showing either that there was literally no evidence in support of his conclusion, or that his decision was one that no reasonable trial judge could have come to (cf *Perry v Raleys Solicitors* [2019] UKSC 5 at [52]). It seems to me impossible to do that without having regard to the totality of the evidence before him; and that it follows that it is insufficient to point to documentary evidence, however plain it appears to be on its face, where it is said that oral evidence was heard which was relevant to the question. Unless it is accepted, which in this case it was not, that the oral evidence added nothing of relevance, I think that means that it is likely to be impossible to mount an appeal successfully on pure questions of fact without a transcript of the relevant parts of the evidence.

24. In the present case I accept, as Mr Oakley did, that on the face of the documents it would appear that Mrs Amin contributed the sum of over £30,000 from her own resources, and that a further £30,000 odd was contributed by her sister. But those are islands, and the picture might be different if one was immersed in the whole sea of evidence. It has long been recognised that it is difficult for an appellate court to recreate the atmosphere of a trial even if it does have a transcript of the oral evidence;

but it seems to me quite impossible to do so where it is known that the Judge had evidence before him, but the appellate court does not have the details of what that evidence was.

25. Mr Arumugam's submission in effect amounted to a suggestion that the Judge had simply overlooked or ignored what the documents said. But I do not think I can conclude that that is so. It no doubt would have been easier for all concerned if the Judge had acknowledged what the documentary evidence appeared to show, and then explained why he did not accept it; but that is to look at the matter with hindsight. There is ample authority that judgments can always be better expressed, but that trial judges should be assumed, unless the contrary is demonstrated, to know what they are doing; and in particular that an appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into consideration, even if not expressly mentioned: *Henderson v Foxworth Investments Ltd* [2014] UKSC 41 at [48]. The task of trial judges in producing, often under considerable pressure, judgments that adequately find the facts and apply the law in a legally sound and comprehensible way, is difficult enough without appellate courts requiring them to deal with every piece of evidence before them.

26. In those circumstances I do not think this this ground of appeal can succeed, and it must be dismissed.

Ground 1 – common intention

27. Ground 1 is that the Judge wrongly failed to give any or any proper consideration in his judgment to the question whether there was a common intention between the parties to share 104 Gladstone Park Gardens beneficially, and if so how and when it was formed.

28. Mr Arumugam advanced a carefully structured argument, based on the authorities, as follows:

    (1) The caselaw distinguishes between the case where a property is taken in joint names and the case where it is taken in a sole name: see *Culliford v Thorpe* [2018] EWHC 426 (Ch) at [50] per HHJ Paul Matthews sitting as a Judge of the High Court. As he there points out, what are now the leading cases on common intention constructive trusts, *Stack v Dowden* [2007] UKHL 17 and *Jones v Kernott* [2011] UKSC 53, were both joint names cases; the most recent case at House of Lords / Supreme Court level concerning a common intention constructive trust where the legal title was in one party only is *Lloyds Bank plc v Rosset* [1991] 1 AC 107.

    (2) There are three stages in establishing a common intention constructive trust. For this he referred to another decision of HHJ Paul Matthews sitting as a Judge of the High Court, *Dobson v Griffey* [2018] EWHC 1117 (Ch) at [20]-[23] where he identifies the three stages as follows. First is the question whether there was a common intention, either expressed or inferred. Second, if the common intention is established, whether there has been detrimental reliance on the common intention. Third is the quantification of the parties' shares.

(3) It is important not to confuse the first stage (establishing what the common intention was) with the third stage (the quantification of it): see *Lloyds Bank plc v Rosset* at 132E-133B per Lord Bridge. I am not sure that this passage really supports Mr Arumugam's submission. The point Lord Bridge was making, as Mr Oakley said, was that there were two quite different ways to establish a common intention: one was a case based on *discussions* – that is where there was evidence, necessarily based on express discussions between the parties, of an actual agreement, arrangement or understanding reached between them; and the other was a case based on *conduct* – that is where there was no evidence of discussions and the Court inferred such an intention from the parties' conduct, usually from contributions to the purchase price either initially or by payment of mortgage instalments. But Mr Arumugam can point to *Dobson v Griffey* where HHJ Paul Matthews clearly treats the establishment of a common intention as separate from quantification, although he makes the point that if the common intention itself establishes the parties' shares, nothing more needs to be done.

(4) In the absence of evidence of an express agreement or arrangement or understanding, the Court is not at liberty to *impute* a common intention to the parties, only to *infer* it: *Stack v Dowden* at [125] per Lord Neuberger. The difference between inference and imputation was explained by him as follows (at [126]):

> "An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend."

(5) The correct approach was also set out by Sales LJ in *Capehorn v Harris* [2015] EWCA Civ 955 at [16]-[18] as follows:

> "16. …In relation to assets acquired by unmarried co-habitees or partners, where an asset is owned in law by one person but another claims to share a beneficial interest in it a two-stage analysis is called for to determine whether a common intention constructive trust arises. First, the person claiming the beneficial interest must show that there was an agreement that he should have a beneficial interest in the property owned by his partner even if there was no agreement as to the precise extent of that interest. Secondly, if such an agreement can be shown to have been made, then absent agreement on the extent of the interest, the court may impute an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances: see *Oxley v Hiscock* [2005] Fam 211; *Stack v Dowden* [2007] AC 432; *Jones v Kernott* [2011] UKSC 53.
>
> 17. There is an important difference between the approach applicable at each stage. At the first stage, an actual agreement has to be found to have been made, which may be inferred from conduct in an appropriate case. At the second stage, the court is entitled to impute an intention

> that each person is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property. A court is not entitled to impute an intention to the parties at the first stage in the analysis.
>
> 18. Unfortunately in this case in the critical part of her judgment, at paragraphs 152 and 153, the judge erroneously elided these two stages."

Mr Arumugam's submission was that the Judge here had fallen into the same error.

(6) At the first stage when looking for a common intention, it is necessary that the parties' intentions be manifested and communicated to each other: *Lightfoot v Brown* [2005] EWCA Civ 201 per Arden LJ at [27], referring to *Oxley v Hiscock* [2005] Fam 211 and *Gissing v Gissing* [1971] AC 886. In the latter case Lord Diplock said (at 906):

> "As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words of conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party."

29. On the basis of this analysis, Mr Arumugam submitted that the Judge here never made any finding as to the first stage, namely whether there was a common intention. He contrasted the approach of the Judge with yet another case of HHJ Paul Matthews sitting as a Judge of the High Court, *Knight v Knight* [2019] EWHC 915 (Ch), where he conducted a careful analysis of the evidence to make findings as to what was actually agreed.

30. He suggested that the Judge did not correctly state the law. The Judge devoted some time to the law. It is not necessary to set it all out: he identified that it was necessary for the defendants' case to succeed that there be a constructive trust based on the parties' common intention (at [11]); that it is not enough for a party to have paid the mortgage and the law required that there be reliance on a shared understanding that the right will arise (at [12]); and that the burden fell on the defendant (at [13]). Having referred to, and cited from, various authority, he expressed his conclusions on the law as follows (at [21]-[22]):

> "21 That approach [the approach of Chadwick LJ in *Oxley v Hiscock* [2004] EWCA Civ 546 at [68]-[69]] is broadly like that in *Stack v Dowden.* Both *Stack* and the decision of the Supreme Court in *Jones v Kernott* [2012] 1 AC 776 are the leading authorities (nothing has changed in that respect) and I remind myself of the five-stage process at paragraphs 51-53 of that judgment.
>
> > "51 In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct:

> "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party": Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906.

Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden* [2007] 2 AC 432, para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, "the whole course of dealing . . . in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

52 This case is not concerned with a family home which is put into the name of one party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above.

53 The assumptions as to human motivation, which led the courts to impute particular intentions by way of the resulting trust, are not appropriate to the ascertainment of beneficial interests in a family home. Whether they remain appropriate in other contexts is not the issue in this case."

> 22 In my view the test in *Jones* is that which I should apply. Financial contributions are relevant but, as is said in *Jones*, there are "many other factors" which may enable the court to decide what shares (if any) were intended."

31. Mr Arumugam said that the Judge's conclusion in [22] was an error: the test in *Jones* which he referred to was in a part of the joint judgment of Lord Walker and Lady Hale which (a) was dealing with a joint names case and (b) was dealing with the quantification stage which only arose if the Court had already decided that there was a common intention.

32. I do not think that either limb of this criticism is justified. As to the first limb, it is true that *Jones v Kernott* was a joint names case and the analysis in [51] is expressly said to be applicable to such a case. But at [52] Lord Walker and Lady Hale dealt with sole name cases and, as set out above, said that the parties' common intention had once again to be deduced objectively from their conduct. That is a reference back to [51(3)]. In a joint names case the starting point is the presumption that equity follows the law and hence that the parties are beneficial joint tenants, and the common intention referred to in [51(3)] is the intention, either at the date of acquisition or subsequently, that the parties' beneficial interests should be something other than joint: see [51(2)]. In a sole name case the starting point, as the Judge expressly recognised (Jmt at [13]), is that the presumption is that the sole legal owner is also the sole beneficial owner, and the common intention referred to in [52] is a common intention that the beneficial interests should be something other than the legal owner being also the sole beneficial owner. But that apart, it seems to me that the exercise that Lord Walker and Lady Hale envisaged is similar in a sole name case to that in a joint names case. In each case what needs to be found to displace the presumption that equity follows the law is a common intention that the beneficial ownership should be something different from the legal ownership; and (save for the case where there is evidence of express discussions as referred to by Lord Bridge in *Lloyds Bank v Rosset*) that is to be deduced objectively from their conduct.

33. As to the second limb of Mr Arumugam's criticism, I do not think it is justified either. When the Judge referred to not only financial contributions but many other factors being relevant, he was picking up what Lord Walker and Lady Hale had said at [51(5)]. I accept that in strict theory one can distinguish between two different questions, namely (i) was there a common intention that the beneficial ownership should be something different from the legal ownership and (ii) if so, what is the appropriate quantification, and that in [51(5)] Lord Walker and Lady Hale are primarily referring to the quantification stage. But I do not think the two stages can always be neatly distinguished in the way that Mr Arumugam suggests. In [51(3)] Lord Walker and Lady Hale say that examples of the sort of evidence that might be relevant to the drawing of inferences on the first question can be found in *Stack v Dowden* at [69]. There Lady Hale said:

> "Many more factors than financial contributions may be relevant to divining the parties' true intentions"

That is almost identical language to that used in *Jones v Kernott* at [51(5)].

34. But quite apart from this minute textual analysis of the joint judgment of Lord Walker

and Lady Hale, if one stands back from the detail, the broad question is always: what did the parties intend? Once one allows the parties' intention to be inferred from their conduct, it seems to me to make no sense to try and make a sharp divide between evidence that enables an inference to be made as to their common intention that the beneficial interests should not follow the legal ownership, and evidence that enables an inference to be made as to what they intended those beneficial interests to be. Those questions are necessarily bound up together.

35. In my judgment the Judge was right to say that financial contributions and many other factors could enable the Court to decide not only what shares the parties intended, but also whether there was a common intention at all that the sole legal owner should not be the sole beneficial owner. That is why the Judge rightly said that such evidence may enable the Court to decide "what shares (if any) were intended".

36. Mr Arumugam then submitted that the Judge simply failed to deal with the question of common intention. I do not think that is a valid criticism either. At [94] he referred to the fact that the property was in the sole name of Mrs Amin, and at [95] that the burden then fell on the defendants to demonstrate what the common intention was, sufficient to displace the presumption. He had already concluded that Mrs Amin made no financial contribution at all (Jmt at [93]), and that it was more likely than not that mortgage payments were made by Mr Amin (at [89]).

37. Then at [96] he said that Mrs Amin had failed to persuade him that there was an intention that the property was hers outright and specifically linked to the purchase of 113 Leamington Crescent. Mr Arumugam submitted that that wrongly put the onus of proof on Mrs Amin. Given that he had just referred to the burden falling on the defendants to displace the presumption, I do not read this as based on an erroneous misconception that the onus lay on Mrs Amin to establish what the intention was, but as a rejection of her case that there was a positive agreement that it should be hers alone as a *quid pro quo* for 113 Leamington Crescent being in Mr Amin's sole name. He rejected that for a number of reasons. First, Mrs Amin made a very poor witness and did not come up to proof. Second, although Mrs Amin's case was that there was a family meeting at which this was expressly discussed and agreed, there was very little evidence in support of it (Jmt at [97]). And at [96] he made what to my mind is a key finding that there was no significance to the property being put into Mrs Amin's name – that "it was done this way without significant thought". This is no doubt a very unusual conclusion to reach, as normally the fact that a property has been put in one party's name would be evidence, and often quite powerful evidence, that that party was intended to have at least a share in the property, if not the entire beneficial interest.

38. Having referred to these matters, and some others, he then expressed his conclusion at [100]-[101] in the terms I have already set out (see paragraph 14 above). That of course has to be read in the light of what the Judge had said elsewhere in the Judgment. That includes [22] where he said that the test which he should apply was to decide in the light of the financial contributions and other factors, "what shares (if any) were intended"; and [95] where he said that it was for the defendants to demonstrate "what the common intention was, sufficient to displace the presumption." Read in that light, I see no reason why the Judge's conclusion at [100]-[101] should not be regarded as a finding that the common intention of the parties, based not only on the financial contributions but the entire course of conduct of the parties, was that

the property should belong beneficially to the defendants and not to Mrs Amin.

39. I therefore reject the criticism that the Judge did not go through the first stage of finding a common intention at all.

40. Mr Arumugam made some other criticisms of the Judge under this ground, which I can deal with briefly. He said that it was not surprising that Mr Amin, and later Raja and Zubaire, were carrying out improvements to the house and paying the mortgage as they were the ones living there. What was needed was a contribution that was referable back to an (inferred) agreement or common intention. But this overlooks the fact that Mr Amin's evidence was that he alone had paid the mortgage throughout – that is from 1995. Mr Arumugam said that the Judge did not identify when the common intention arose, or why it arose or how it arose. But this is somewhat artificial. Where a common intention is inferred, based on conduct, rather than found on the basis of actual discussions, it will normally be impossible to pinpoint a particular date or occasion on which the intention was formed. That does not, it seems to me, prevent the Court in an appropriate case from deciding that such a common intention should be inferred. Mr Arumugam submitted that it was an error to regard financial contributions as determinative. That I accept: see *Fowler v Barron* [2008] EWCA Civ 377 at [30] per Arden LJ. But they are usually highly significant, and in any event the Judge here made it plain that he did not base his finding on financial contributions alone.

41. I therefore dismiss this ground of appeal.

42. Before leaving it, I would add one footnote. In his reply, Mr Arumugam eloquently submitted that the Judge had inflicted a surprising injustice on Mrs Amin by finding that 104 Gladstone Park Gardens was 100% beneficially owned by the defendants, which had the practical effect of leaving her without anything from her long relationship with Mr Amin. He also pointed out that she was still liable on the mortgage.

43. I agree that at first blush it is surprising that Mrs Amin, who was after all the legal owner, was found to have no beneficial interest in the property at all. One can see that a case might have been made, not least in the light of Mr Amin's own evidence, that the original purchase of the house in joint names in 1995 gave rise to a presumption that they were intended to be joint beneficial owners, and that the subsequent dealings with the house – the transfer to Shahenaz to raise money on it, and retransfer to Mrs Amin in 2005 – were not intended to alter the beneficial ownership which remained one of joint ownership throughout.

44. But the Judge could only deal with the case as it was presented to him. As Mr Oakley pointed out, both sides ran an all or nothing case. Mrs Amin's case was that the property was 100% owned by her. The defendants' case was that it belonged 100% to them. Neither in the pleadings nor in anything else that I was shown is there any suggestion (on either side) of a fallback case that it was jointly owned, nor is there any trace of such an argument in the Judgment. (For the sake of completeness, there is a reference in the witness statements to certain discussions about dividing it up, but these came to nothing and it is not suggested that this was run as an alternative legal case). Mr Arumugam indeed accepted that joint ownership was neither his case nor the defendants' case. It is understandable in those circumstances, once the Judge had

found that he preferred the defendants' case to Mrs Amin's, as he so clearly did, that he reached the conclusion he did.

45. And as to her liability on the mortgage, I heard no argument on it but there would appear to be no reason why Mrs Amin should not have the normal rights of a bare trustee, including a right to indemnity from the defendants and a lien on the trust property. But these are not matters that arise on the appeal and are not matters for me.

Ground 2 – Raja and Zubaire's interests

46. Ground 2 is that the Judge's conclusion that Raja and Zubaire shared in the beneficial interest was perverse and unsustainable.

47. I can take this quite shortly. Mr Arumugam in effect made two points. The first was that the Judge accepted that at the time of the purchase in 2005 (let alone the original purchase in 1995) Raja and Zubaire were not old enough to have had any knowledge or involvement in the acquisition of the property. That I accept: Raja was 19 at the time of the re-transfer into Mrs Amin's name in 2005 and the Judge recorded that he was not involved with any discussions with his parents about any beneficial interest in the property and had no knowledge regarding any financial arrangements (Jmt at [75]); Zubaire was 2 years younger and the Judge said that the effect of his evidence was similar (Jmt at [79]). But I do not think this means that the Judge's conclusion was perverse. As I have pointed out the Judge was faced with two all-or-nothing cases. The essential question he had to decide was whether he accepted that the defendants' financial contributions and other factors were sufficient to displace the presumption that Mrs Amin was the sole beneficial as well as legal owner. Having decided that they were, I do not think he had to concern himself with precisely how or when the sons acquired their interests, or indeed quite what they were. There was no dispute between Mr Amin and his sons, who all made common cause and put in a single defence and counterclaim, and so there was nothing to resolve between them. There is nothing in the pleadings as to how the interests were divided as between Mr Amin and his sons, and I was told that it was not explored at trial. Nor of course does it make any difference to Mrs Amin how their interests were shared. Mr Arumugam said that the Judge failed to quantify their interests and that alone justified a re-trial, but unless he was asked to quantify their interests – and for the reasons I have given, there is nothing to suggest he was – I do not see that he was in error in failing to do so.

48. I have already said that the failure to do so has no effect on Mrs Amin. As far as I can see it is unlikely to have any effect on anyone else, except Mr Amin's daughters Farzana and Aisha. Unless Mr Amin made a will (and Mr Oakley said that there was no will drawn up as far as he and his clients knew), they no doubt have an interest under their father's intestacy, and they therefore have an interest in challenging how much, if any, of the beneficial interest in the property already belongs to their brothers and how much belongs to their father's estate and hence as to 25% to each of them. But the daughters, as both counsel recognised, were not parties to the action and so are not bound by the Judge's findings in any event. It does not therefore matter, so far as they are concerned, that he did not quantify the respective shares as between the defendants. It is also possible (although I have my doubts, given the gift with reservation rules) that this question might affect the quantum of Inheritance Tax payable on Mr Amin's estate, but HMRC are not bound by the Judge's findings

either.

49. Mr Oakley in fact said that his case was that Mr Amin started off as sole beneficial owner in 1995, and although he could not pinpoint a date when the sons came to share in the beneficial interest, Mr Amin was willing to recognise them as having done so, as shown by the form of his counterclaim and his witness statement (and his stance at trial – Mr Arumugam told me that he was adamant in oral evidence that it was the boys' house). On that analysis, it is not necessary for Mrs Amin to have agreed, or to have had a common intention, that her sons should share in the beneficial interest as she never had any beneficial interest herself at all, and it was a matter for Mr Amin when and if his sons acquired an interest. I suspect that this point may not have received the attention at trial that it did on appeal, as there is no trace in the Judgment of an analysis along these lines, but it does seem to me logically coherent and to explain how Raja and Zubaire could now be regarded as beneficial owners despite, as Mr Oakley accepted, not being mature enough in 2005 to be then intended to have an interest.

50. The second point that Mr Arumugam made was to criticise the Judge for finding support in something that Mrs Amin said. He recorded (Jmt at [47]) that she said in oral evidence more than once that the house belonged to her children, or that she had bought it for her children. The Judge commented (Jmt at [51]):

> "This does, of course, fly in the face of her pleaded case as D2 and D3 [Raja and Zubaire] are her children."

He reverted to it at [84] where he said:

> "Indeed, for the reasons set out above, some of her oral evidence – in terms of supporting the assertion that there was intention to benefit the children – was simply not helpful to her case; indeed, to the contrary."

And again at [99] where, after referring to all three defendants as having continued to live in the property, treating it as their own, carrying out renovation work and paying the mortgage, he said:

> "Ironically, this is consistent with the claimant's own evidence that it was always intended that the property would be for the benefit of her children."

51. I agree with Mr Arumugam that what Mrs Amin said in evidence did not really give any support to the defendants' case: she has four children, and made it clear that when she said that the property was for her children, she meant all four, and not just the sons. But I do not read the Judge as having placed any real weight on these statements of Mrs Amin's as helping to prove the defendants' case: rather, it seems that he regarded them as undermining her own case that the property was solely hers. I am not sure how inconsistent they really were, as she might well be taken to mean no more than that she was intending to pass the house on to them; but I do not think this point is sufficient to invalidate the Judge's conclusions.

52. For the reasons I have given I dismiss this ground of appeal.

Ground 3 – detrimental reliance

53. Ground 3 is that the Judge failed to find any detrimental reliance on the common intention, although this is an essential element before a common intention constructive trust can be established: see *Dobson v Griffey* at [20].

54. I can take this ground very shortly too. I accept that detrimental reliance is a requirement for a common intention constructive trust. But where a person spends money on a property by way of mortgage payments, it will be readily inferred that they do so because they are relying on an understanding that they have an interest in the property. Indeed the Judge when dealing with the law cited two passages to that effect. One was from the judgment of Nourse LJ in *Grant v Edwards* [1986] Ch 638 at 647 where he referred to expenditure referable to the acquisition of the house and said:

> "If it is found to have been incurred, such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted upon it."

The other was from the judgment of Chadwick LJ in *Oxley v Hiscock* at [68] where he said:

> "And, if the answer to the first question is that there was a common intention, communicated to each other, that each should have a beneficial share in the property, then the party who does not become the legal owner will be held to have acted to his or her detriment in making a financial contribution to the purchase in reliance on the common intention."

55. In the present case, the Judge said that the defendants regarded the property as their own and made payments of the mortgage while carrying out construction work (at [88]); that they continued to live in the property regarding it as their own (at [93]); and (again) that they treated the property as their own, carrying out renovation work and paying the mortgage (at [99]). That to my mind is sufficient to demonstrate that the Judge thought that they had acted to their detriment in the belief that the property belonged to them. I do not think any more was required.

56. I dismiss this ground of appeal as well.

Conclusion

57. None of the grounds of appeal succeeds, and the appeal must be dismissed.