



Neutral Citation Number: [2019] EWHC 1627 (QB)

County Court Claim Nos: D00LU357, D0PP0115

Appeal Ref: QA-2019-000087

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT AT OXFORD
ORDER OF HHJ MORADIFAR DATED 28 MARCH 2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 June 2019

Before :

THE HONOURABLE MR JUSTICE MURRAY

Between :

MOHAMMED TAHIR

Appellant
/Defendant

- and -

FAIZ UL HASSAN FAIZI

Respondent/
Claimant

Mr Conor Kennedy (instructed by **Landmark Legal LLP**) for the **Appellant**
Mr Russell Wilcox (instructed by **Allied Law Chambers Solicitors Ltd**) for the **Respondent**

Hearing date: 18 June 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.

.....
THE HONOURABLE MR JUSTICE MURRAY

Mr Justice Murray :

1. This is an appeal by Mr Mohammed Tahir, the appellant, against the final order of His Honour Judge Moradifar, which was approved by the judge on 28 March 2019 (“the Order”), following the trial before him on 17, 18 and 19 December 2018 in the County Court at Oxford of:
 - i) a claim brought by Mr Faizi Ul Hassan Faizi, the respondent, against Mr Tahir (County Court claim no D00LU357) for a declaration under section 14(2)(b) of the Trusts of Land and Appointment of Trustees Act 1996 (“the 1996 Act”) that Mr Faizi holds a one hundred per cent beneficial interest in a residential property at 3 Sutton Gardens, Luton, LU3 3AF (“the Property”), the legal title to which is held by Mr Tahir and in which Mr Faizi has resided with his family since Mr Tahir purchased the Property in 2006; and
 - ii) a claim brought by Mr Tahir against Mr Faizi (County Court claim no DOPP0115) under which Mr Tahir sought possession of the Property for alleged non-payment of rent.
2. By order of Deputy District Judge Gill dated 27 November 2017, the two claims were linked, with Mr Faizi’s claim (D00LU357) to be heard as the lead claim. For the trial, Mr Faizi was listed as the first claimant, with Mr Tahir as the defendant. Oakwood Homeloans Limited (“Oakwood”) was listed as the second claimant. Oakwood is the mortgagee in respect of the loan secured on the Property (“the Mortgage”) that was entered into by Mr Tahir in November 2006 in order to purchase the property.
3. At the trial, Mr Faizi was represented by Mr Russell Wilcox, and Mr Tahir was represented by Mr Conor Kennedy, each of Mr Wilcox and Mr Kennedy also representing his client at this appeal. It appears that Oakwood took no active part in the trial, nor has it done so in relation to this appeal. Oakwood has separately brought proceedings to recover possession of the Property from Mr Tahir.
4. Following the conclusion of the trial, the judge invited further written submissions from each of Mr Wilcox and Mr Kennedy in relation to two questions that had arisen during the trial. He then took time for consideration, handing down his judgment on 14 March 2019.
5. In his initial order made on 19 March 2019 (and sealed by the County Court on 21 March 2019), HHJ Moradifar directed the parties to agree the terms of a final order to dispose of the proceedings, failing which they were to make brief written submissions, together with brief documentary evidence, on the question of the amount for which Mr Faizi must account to Mr Tahir in relation to mortgage payments in respect of the Property from 2015 onwards. Counsel for parties were also invited to provide a draft of the final order and to make any related other submissions on it. The parties were not able to agree the form of order and therefore made written submissions and provided alternative drafts of the proposed final order.
6. I was shown an email dated 28 March 2019 from the judge to counsel in which he gave brief reasons for approving the Order in the form proposed by Mr Wilcox, subject to a minor amendment in relation to the costs aspect of the Order. I note, in passing, that there was no copy of the Order as sealed by the County Court in the

appeal bundles, and neither counsel had yet seen a copy as at the date of the hearing before me. Mr Wilcox suggested that it was possible that the County Court had not yet sealed the Order, given the delays that are now common in the processing of orders by the County Court.

7. Based, therefore, on the judge's email dated 28 March 2019, I note that, in the Order, the judge:
 - i) declared that:
 - a) Mr Faiz Ul Hassan Faizi, the respondent, is entitled to a one hundred per cent beneficial interest in the residential property at 3 Sutton Gardens, Luton, LU3 3AF ("the Property");
 - b) the legal title to the Property, currently held by Mr Tahir, is held by him in trust for Mr Faizi; and
 - c) Mr Tahir is entitled to an account from Mr Faizi for monthly mortgage payments from 2015 onwards, which the judge found amounted to £16,257.15;
 - ii) dismissed Mr Tahir's related claim against Mr Faizi for possession of the Property (County Court claim number D0PP0115); and
 - iii) ordered that Mr Tahir pay two thirds of the costs of the action on claims D00LU357 and D0PP0115, to be subject to a detailed assessment if not agreed, with an appropriate adjustment to be made to the costs to reflect the increase in the length of the trial from two to three days and with the costs to be set off against the sum of £16,257.15 due from Mr Faizi to Mr Tahir, referred to at (i)(c) above.
8. Mr Tahir filed his Appellant's Notice seeking to appeal the Order on 3 April 2019.
9. By order made on 13 May 2019, Mr Justice Jay granted permission to appeal in respect of both of Mr Tahir's grounds of appeal. His observations on the grounds were:

"The first ground of appeal is weak: the judge found at [41] of his judgment that the Respondent's invoices did not provide sound corroborative evidence for the work undertaken. The judge found, more or less, that these invoices were not authentic.

This was a difficult case with unreliable evidence on both sides. The burden of proof was on the Respondent. I think it is arguable that the judge's essential conclusion at [45] required more supporting analysis of the evidence, particularly in the context of the law relating to constructive trusts."
10. Jay J also stayed "the Order of 19th March 2019" pending determination of the appeal or further order. The intention, no doubt, was to stay the Order, which was made no earlier than 28 March 2019, rather than the order made by the judge on 19 March

2019 in which he merely gave directions for submissions on the form of final order. I understand that the parties have interpreted Jay J's order as referring to the Order, rather than the earlier directions order.

Background

11. The following summary of the background facts, which are undisputed except where otherwise noted, is drawn from the Judgment:
 - i) In 2006 Mr Faizi and his family were resident in the United Kingdom.
 - ii) In 2006 Mr Tahir was a resident of the United Kingdom, living in council accommodation with a son from a previous marriage. His second wife and their children were living in Uganda, and they wished to come to the United Kingdom to live with Mr Tahir. In August or September 2006 ([31] of the Judgment says "2016", but it is clear from context that this is a typographical error and that "2006" is intended) Mr Tahir suffered an accident for which he received about £36,000 in compensation. Due to the accident, he was unable to work and relied on incapacity benefit.
 - iii) Mr Faizi and Mr Tahir met in 2006, although the precise timing and circumstances of their initial meeting were disputed.
 - iv) Mr Tahir purchased the Property on 24 November 2006 in his own name for a purchase price of £219,000, funded principally by the Mortgage in a principal amount of £208,265. Mr Tahir was registered as the legal owner of the Property on 27 December 2006 and has been the registered legal owner at all relevant times since then. The Mortgage requires repayment during the mortgage term only of interest, with principal to be repaid at the end of the term. In other words, it is an "interest-only mortgage".
 - v) Mr Faizi has resided at the Property with his family since shortly after completion of the purchase on 24 November 2006. In the Autumn of 2007 Mr Faizi applied for permission to renovate and extend the property. Planning permission was granted on 28 January 2008. Mr Tahir denied any knowledge of the grant of planning permission but accepted that Mr Faizi had converted the garage to an office. There was some dispute between the parties at the trial as to the extent of other improvements made by Mr Faizi. Mr Tahir did not claim to have made any improvements to the Property himself.
 - vi) Between 2007 and 2010 Mr Tahir spent extensive periods of time in Uganda. During the same period Mr Faizi made mortgage payments directly to Oakwood, although he did not always manage to do so in a timely manner and some payments were missed.
 - vii) At other times during the period from November 2006 to 2015, Mr Faizi made more or less regular payments to Mr Tahir in respect of the Property. Mr Faizi characterised these as payments to fund Mr Tahir's payment obligations under the Mortgage, in accordance with what he alleged to be their original agreement in 2006. Mr Tahir characterised these as payments of rent owed by Mr Faizi as a tenant of the Property.

- viii) On 15 September 2008 Oakwood obtained a possession order at Luton County Court requiring Mr Tahir to give possession of the Property to Oakwood. This was not enforced, and on 31 August 2016 Mr Tahir applied to set aside this order. (According to the Amended Particulars of Claim, Mr Faizi was not aware of the possession order made on 15 September 2008 until he received notice of Mr Tahir's application to set it aside. Mr Faizi applied to join the proceedings, and on 10 November 2016 the order made on 15 September 2008 was discharged. I note that [22] of the Judgment refers to the order of 15 September "2016" being discharged, but as there is no other reference to an order of that date in the judgment and given the reference in [21] of the Judgment to the order of 15 September 2008, it appears that this was a typographical error and that "2016" should have read "2008".)
- ix) By 2015 Mr Faizi had stopped paying any sums to Mr Tahir or to Oakwood. A dispute as to the ownership of the property had arisen between Mr Faizi and Mr Tahir, leading to the following steps being taken:
- a) On 3 November 2016 Mr Faizi filed a unilateral notice of his beneficial interest in the Property.
 - b) On 16 November 2016 Mr Tahir served on Mr Faizi a notice for possession pursuant to section 8 of the Housing Act 1988.
 - c) On 12 December 2016, Mr Tahir issued his claim (D00LU357) seeking an order from the court under section 14(2)(b) of the 1996 Act declaring that Mr Faizi was the beneficial owner of the Property and that Mr Tahir held the legal title to the Property in trust for him.
 - d) On 3 January 2017 Mr Tahir brought his possession claim (D0PP0115) against Mr Faizi.
12. On 17 August 2017 District Judge White gave Mr Faizi permission to file and serve amended Particulars of Claim by 21 August 2017, with Mr Tahir to file and serve an amended Defence by 4 September 2017. He also listed the matter for a case management conference ("CMC") on 27 November 2017. Following the CMC, Deputy District Judge Gill ordered, as I have already noted, that claim numbers D00LU357 and D0PP0115 be linked, with D00LU357 to be the lead case. He also gave other case management directions for the trial.
13. On 27 November 2017 Mr Faizi gave an undertaking to the court in which he promised:
- "... to pay on the first day of each month (starting on 1st December 2017) the sum of £760 to Mr Mohammed Tahir as occupation rent or in respect of the mortgage on the property which is the subject of the present dispute [a]nd to be bound by these promises until the conclusion of these proceedings or further order by the court."
14. On the same day, Mr Tahir gave an undertaking to the court in which he promised:

“... to pay such sums as are received from the claimant to the defendant pursuant to the claimant’s cross undertaking (of the 27 November 2017) for the payment of the mortgage on the property which is the subject of the present dispute [a]nd to be bound by these promises until the conclusion of these proceedings or further order of the court.”

Mr Faizi’s claim under the 1996 Act

15. Mr Faizi said that during the Autumn of 2006 Mr Tahir agreed to purchase the Property on Mr Faizi’s behalf and to enter into a loan secured by a mortgage on the Property in his own name. Mr Faizi was not able to purchase the Property in his own name or to obtain a mortgage loan due to his immigration status at the time. According to Mr Faizi, he agreed with Mr Tahir that Mr Faizi would pay the deposit for the purchase of the Property and expenses associated with the purchase, would meet the monthly mortgage instalment payments and would undertake and pay for any works needed to improve the Property. In return, Mr Tahir would hold the Property as trustee for Mr Faizi and would, at some future date, transfer the legal title to him.
16. Mr Tahir denied that he had agreed to purchase the Property and enter into the Mortgage on behalf of Mr Faizi. He asserted that in 2006 his wife was residing in Uganda, and he had purchased the Property in order to assist with his wife’s application for a visa to reside in the United Kingdom. He was able to pay the solicitors in relation to the conveyancing out of his accumulated savings of about £13,000, and he was relying, when making his mortgage application, on his compensation monies to fund the first two or three years of payments under the Mortgage. Mr Tahir maintained that Mr Faizi had always been his tenant and that any mortgage instalment payments made by him during the period 2007 to 2010 had been made in lieu of rent.

The Judgment

17. After a brief summary of the positions of the parties ([1-4] of the Judgment), a discussion of the law referring to relevant provisions of the 1996 Act and summarising a number of authorities relating to resulting and constructive trusts ([5-15] of the Judgment), and then summarising the background ([16-22] of the Judgment), the judge turned to his assessment of the evidence ([23-35] of the Judgment). The judge then set out his analysis ([36-44]) and his conclusion ([45-48]).
18. In addition to the documentary evidence, there were three witnesses, Mr Faizi, Mr Omer Ahtesham and Mr Tahir. Mr Ahtesham was called as a witness by Mr Faizi. In relation to the witness evidence, the judge directed himself at [39] of the Judgment as follows:

“When assessing the evidence, I must allow for cultural issues and the impact of the passage of time on memory of the witnesses and their ability to accurately recall important information. It is now over twelve years since the property was purchased.”

19. More generally, in assessing the evidence the judge noted at [38] of the Judgment that this was an unusual case where Mr Faizi and Mr Tahir had no family connections and had known each other only a short time by the time the Property was purchased. The Property was purchased neither as a commercial venture nor as a shared home. Also, the arrangement had been in place for many years, which “significantly contributed to relevant corroborative evidence being unavailable to the court”.
20. Mr Ahtesham ran a garage in the same building where Mr Faizi had his offices. He had known Mr Faizi since childhood, and he had known Mr Tahir since 2006. Mr Ahtesham gave evidence that he was aware of the discussions between Mr Faizi and Mr Tahir concerning the purchase of the Property, although he did not witness any payment made by Mr Faizi in relation to the purchase. He supported Mr Faizi’s account that he could not obtain a mortgage loan due to his immigration status. It was clear to Mr Ahtesham that there was an agreement between Mr Faizi and Mr Tahir that the beneficial interest in the Property would be owned by Mr Faizi.
21. The judge found Mr Ahtesham to be a truthful witness “who tried his utmost to be helpful” ([42] of the Judgment). He found his direct knowledge of specific events, however, to be “very limited and wanting”. The judge was not able to place much weight on Mr Ahtesham’s evidence. He found it “no more than broadly corroborative of [Mr Faizi’s] version of events”.
22. The judge found both Mr Faizi and Mr Tahir to be unsatisfactory witnesses. In relation to Mr Faizi, the judge found that:
 - i) The documentary evidence he produced was disorganised and confused, limiting its corroborative value. A number of receipts he provided were illegible and of little evidential value.
 - ii) To establish his contributions to the Property, Mr Faizi submitted invoices for the purchase of white goods and other small inconsequential items that did not, in fact, constitute improvements to the Property. The judge considered this misguided.
 - iii) Mr Faizi had provided a schedule of payments he had made in relation to the Property. Initially in his evidence, he asserted confidently that the schedule was accurate, but he was then forced during cross-examination to acknowledge that there were many missed payments and there were cheques returned as not cleared. In some instances, he could not justify that a payment, which he claimed was related to the Property, did, in fact, relate to the Property.
 - iv) Mr Faizi’s documentary evidence regarding his having obtained planning permission appeared reliable, and it was undisputed that Mr Faizi had converted the garage into an office. But Mr Faizi’s evidence regarding the actual works undertaken pursuant to that planning permission was not otherwise reliable.
 - v) Most seriously, invoices for the building work that he submitted as part of his evidence, which purported to have been issued by a company named Aaron Hall Associates Limited, predated the incorporation in 2012 of a company with the same name, registered address and company number as appeared on

the invoices. That company was dissolved in 2014. Mr Faizi had provided invoices purporting to be from a company with that name with dates ranging from 2010 to 2016. Mr Faizi was unable to explain this. He was also not unable to show that he had paid any of the sums due under the invoices, stating that they had been paid in cash, relying on sums transferred to him from Pakistan.

23. In relation to the evidence of Mr Tahir, the judge found him to be “evasive and unreliable”. His evidence “varied in quality and reliability”. When challenged in cross-examination, the judge found many of his explanations to be wanting. The judge found it difficult to accept that, although on Mr Tahir’s case the arrangement with Mr Faizi was a tenancy, Mr Tahir was “unable to recall a single correct sum for the rent that he says fell due every month”. The judge also noted that Mr Tahir took no steps to enforce the alleged tenancy agreement and no steps to ensure that the instalment payments due under the Mortgage were paid on time. The judge was also unimpressed by Mr Tahir’s having wrongly described the Mortgage as a “buy-to-let” mortgage and that his mortgage application had inaccurately stated that Mr Tahir was the “primary resident” at the Property. The judge noted that Mr Tahir was unaware until 2015 that Oakwood had obtained a possession order on 15 September 2008. He noted that Mr Tahir accepted that Mr Faizi had converted the garage at the Property into an office and that the alterations at the Property would have been a “considerable expense” for Mr Faizi.

24. The judge summed up his view of the credibility of Mr Tahir’s evidence as follows at [44] of the Judgment:

“On the pertinent issues in [the] case, I found the defendant’s evidence to be evasive and unreliable. This was amply illustrated by his replies to the questions about the nature and type of mortgage. Notwithstanding his asserted ability to meet the monthly mortgage instalments from his personal injury compensation, he took no steps to meet the shortfalls in the mortgage in the early years. The defendant’s lack of curiosity for the property was highlighted by his lack of knowledge of the planning application and his lack of visits to the property to inspect his investment in the future home for his wife and children.”

25. I will deal with the judge’s approach to the relevant law in connection with the second ground of the appeal, but by way of introduction I note that the judge identified at [7] of the judgment that cases involving a dispute concerning the extent of a party’s beneficial interest in property have tended to fall into one of two categories, namely:

“... [(i)] cases where the property in dispute is purchased as a home in a matrimonial or quasi matrimonial scenario and [(ii)] those properties that are bought with a commercial aim where the parties have acted at arm’s length.” (numbering added)

26. In relation to the first category, the judge at [8] to [11] of the Judgment referred to and quoted passages from *Midland Bank plc v Cooke* [1995] 4 All ER 562, 575 (Waite LJ) and *Jones v Kernott* [2011] UKSC 53, [25], [31], [51]-[53] (Walker SCJ and Hale

SCJ), the latter affording the Supreme Court the opportunity to clarify its earlier decision in *Stack v Dowden* [2007] UKHL 17, which also dealt with this category of cases.

27. In relation to the second category, the judge at [12] to [14] referred to and quoted passages from *Generator Development Limited v Lidl UK GmbH* [2018] EWCA Civ 396, [78]-[85] (Lewison LJ) and *Baynes Clarke v Corless* [2009] EWHC 1636, [21]-[24] (Proudman J).

28. The judge then said the following at [15] of the Judgment:

“There are many cases, such as the present case, that fall somewhere between the two categories. In the general context of the [1996 Act] and the authorities, cases are fact sensitive and the facts whether agreed or found by the court will provide the essential guide to where the starting point must be. To consider a case from the incorrect starting point can be fatal to the conclusions that are subsequently reached. As Baroness Hale of Richmond stated in *Stack v Dowden* (at 69) ‘*In law, “context is everything” and the domestic context is very different from the commercial world. Each case will turn on its own facts.*’”

29. The judge’s substantive factual and legal conclusions, which I will need to consider carefully, particularly in relation to the second ground, were set out at [45] to [47] of the Judgment:

“45. In this unusual case, I have considered each piece of relevant evidence in the context of the totality of the evidence before me. Whilst I have concerns about the quality of the evidence the claimant has adduced before the court, I have no hesitation in finding that the claimant and the defendant reached an agreement in 2006 that the defendant would purchase the property and hold its legal title for the benefit of the claimant. They further agreed that, when possible, the legal title would be passed to the claimant. In reliance on that agreement, the claimant has acted to his detriment by meeting most of the monthly mortgage payments, applying for planning permission and converting the garage at the property to an office.

46. The evidence about further works on the property is not reliable enough to support any further findings. I note that borrowing on the property has increased due to default payments. In my judgement, this does not lead to a conclusion that the claimant has not acted to his detriment given that I have found the parties agreed that this would be a property belonging to the claimant in all but the legal title.

47. The defendant has been paying some of the mortgage instalments since 2015. When the parties reached an agreement in 2006 the parties anticipated that at some point in the future the legal title would be passed to the claimant. I find that the defendant was fully aware of the liability that he was taking on and the requirement that he would have to meet the monthly mortgage payments. However, given the agreement between him and the claimant as I have found, the defendant has a reasonable expectation to be reimbursed for the monthly mortgage outgoings. ”
30. The judge concluded the judgment by setting out in [48] of the Judgment in outline the principal provisions of the order that he would be making in light of his conclusions. As I have already noted at [5] above, on 19 March 2019 he made an order giving directions for written submissions on the form of order, and on 28 March 2019 he indicated that he would be making his final order in the terms set out at [7]. Although, as already noted, I have not seen a sealed copy of the final order, I assume that that has been done and that the Order was made on the terms I have set out.

Grounds of Appeal

31. Mr Tahir put forward two grounds of appeal, which are that:
- i) the learned judge was wrong to place any reliance on the witness evidence of Mr Faizi in light of his finding that Mr Faizi had submitted invoices for building work from a company that did not exist as at the purported date of the invoice, leading to the inevitable conclusion that those invoices were fabricated; and
 - ii) the learned judge was wrong as a matter of law to find that an informally and vaguely expressed oral agreement could give rise to a real property transfer of beneficial interest.

The first ground of appeal

32. In his oral submissions on the first ground of appeal, Mr Kennedy focused on the relative weakness of Mr Faizi’s evidence to support his case that there had been an express agreement between Mr Faizi and Mr Tahir along the lines concluded by the judge at [45] of the Judgment. In his skeleton argument, he expanded on this. He submitted, in essence, that the invoices allegedly issued by Aaron Hall Associates Ltd must have been fabricated. The judge did not sufficiently engage with that necessary inference in his analysis. Having drawn attention in the Judgment at [41] to Mr Faizi’s inability to explain the serious discrepancy between the alleged provenance of the invoices and the dates of incorporation and deregistration of the company, the judge did not go on to draw the conclusion, as he should have, that the invoices were fabricated by Mr Faizi. Had he reached that conclusion, then he would have been compelled to reject the whole of Mr Faizi’s evidence.
33. Mr Kennedy also submitted that the judge’s criticisms of Mr Tahir’s evidence were “excessive”. He reviewed the various areas of Mr Tahir’s evidence that had been

criticised by the judge and submitted that they could all be attributed to inattention by Mr Tahir to his financial arrangements and could not reasonably be set on equal terms with (much less outweigh, in terms of credibility) the inevitable conclusion that Mr Faizi had fabricated evidence.

34. I can deal briefly with these points. In my view, the judge showed a clear awareness of the deficiencies of Mr Faizi's evidence. Nonetheless, he found that there was evidence that he was able to accept that provided support for Mr Faizi's case, including Mr Tahir's acceptance that Mr Faizi had made some improvements to the Property, for example, the conversion of the garage into an office. There was also the evidence of Mr Ahtesham, which the judge assessed as weak, but broadly corroborative of Mr Faizi's case. There was also the comparison with Mr Tahir's evidence. The judge made his assessment and set out his reasons for preferring the evidence of Mr Faizi.
35. Mr Kennedy's criticisms of the assessment of Mr Tahir's evidence fall far short, in my view, of establishing that the judge made findings of fact unsupported by the evidence or had reached a decision on the basis of the evidence that no reasonable judge could have reached: *London Borough of Haringey v Ahmed* [2017] EWCA Civ 1861 at [29]-[31]. I am therefore not able to conclude that the judge erred in fact, such that he was wrong for purposes of CPR 52.21(3)(a) so that I must allow the appeal. As noted in the commentary on this provision in the current edition of the White Book, Lloyd LJ (with whom Sullivan and Laws LJ agreed) in *Cook v Thomas* [2010] EWCA Civ 227, summarising a proposition reflected in many earlier authorities, said at [48] that:

“... an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue.”
36. This is a case in which the judge's decision turned heavily on his assessment of the relative credibility of each of Mr Faizi and Mr Tahir, which he had to evaluate in the context of all of the evidence. I do not find any basis on which I can disturb his primary findings of fact.
37. In my view, the judge was not compelled to conclude that the invoices were fabricated by Mr Faizi. Other explanations were possible, including that the company had fabricated them, for reasons of its own. The judge appears to have concluded that he did not need to reach a firm conclusion on the origin of the apparently false invoices, in light of the other evidence in the case.
38. Accordingly, this ground of appeal fails.

The second ground of appeal

39. I have already noted the basis on which Jay J gave permission in relation to the second ground. He considered that it is arguable that there should have been more supporting analysis of the evidence by reference to the law of constructive trusts. He might have added the words “resulting and” between the words “law of” and the words “constructive trusts”. With that qualification, I would respectfully agree with Jay J as to the arguability of the second ground. I note that the cases reviewed and

quoted from by the judge at [8] to [14] of the Judgment all concern constructive trusts in various contexts. The only reference to resulting trusts in the Judgment is a passing reference at [10] of the Judgment to “the classic resulting trust presumption” in the quotation from *Jones v Kernott* at [31], where Walker SCJ and Hale SCJ noted that the presumption did arise on the facts of that case.

40. I noted at [4] above that at the conclusion of the trial, the judge invited further written submissions on certain questions, to be provided by 7 January 2019. I do not have a copy of the judge’s formulation of the questions. I have, however, reviewed the written submissions made by counsel in response, where Mr Wilcox set out the questions reasonably fully and Mr Kennedy summarised them. I will set out both versions, although they are broadly consistent.
41. Mr Wilcox set out the judge’s post-trial questions as follows:
- “i. Does the beneficial interest in the Property as claimed by the Claimant arise by way of a resulting trust or by way of constructive trust? What are the implications of the answer to this question?
 - ii. What is the status of the Claimant’s contributions to the interest only mortgage on the Property taken out in the Defendant’s name? Does the issue of equitable accounting arise as between the parties?”
42. Mr Kennedy summarised the judge’s post-trial questions as follows:
- “These written submissions address the court’s questions as to whether (in the event that the court accepts the Claimant’s evidence that he paid the deposit and made subsequent mortgage payments) i.) the payment of the deposit gives rise to a resulting or a constructive trust; and ii) the effect of any subsequent payments made by the Claimant to the mortgage lender.”
43. Despite the differences in the way each counsel has formulated the questions, it is clear that the judge had firmly before him the issue as to whether, on the facts of this case, a resulting trust arose. In fact, each of Mr Kennedy and Mr Wilcox agreed that, on the facts of this case, only a resulting trust was possible. They differed, however, as to their interpretation of the judge’s findings of fact and therefore the extent of the resulting trust. I will return to this crucial point in a moment.
44. Mr Kennedy submitted that, although the judge had not said so in terms, he had wrongly concluded that a constructive trust had arisen under what is called the equity in *Pallant v Morgan* ([1953] Ch 43). This was, he submitted, an error of law made by the judge.
45. As noted in *Snell’s Equity* (33rd edn 2015) at para 24-039, the equity in *Pallant v Morgan* arises when two parties agree that one party will take steps to acquire a property and, when the acquiring party does so, the other party will obtain some interest in it. In light of the fact that Mr Wilcox agreed, in my view correctly, that a

constructive trust under the equity in *Pallant v Morgan* did not arise in this case, I do not need to rehearse in detail the submissions made by each party as to why that is so.

46. I will simply note briefly that cases involving a *Pallant v Morgan* constructive trust are concerned with alleged “unconscionable conduct of A in claiming the property as entirely his own by breaching the prior agreement that he would acquire the property for himself and B” (*Snell’s Equity* at para 24-040). That was not how Mr Faizi put his case. As Mr Wilcox noted during his submissions, that neither party has ever claimed that the Property was purchased other than for his own individual personal benefit. Mr Faizi’s pleaded case was that the Property was held on a resulting trust.
47. The parties also agreed that a common intention constructive trust does not arise on the facts of this case, given the context. This is not a case concerning the purchase of a shared home, as considered, for example, in *Stack v Dowden* and *Jones v Kernott*. I agree that a common intention constructive trust does not arise on the facts of this case.
48. Both parties agreed, therefore, that the findings of the judge justified only a resulting trust, although they differed as to the extent of the resulting trust.
49. Resulting trusts are briefly described in *Snell’s Equity* at para 25-001. A resulting trust may arise where a person has transferred property to another person gratuitously in circumstances where it is unclear whom the transferor intends to have the beneficial interest in the property. This can give rise to a presumption that the transferor intended the transferee to take a legal interest only with the beneficial interest retained by the transferor. As emphasised by Baroness Hale in *Stack v Dowden* at [60], this is a presumption and not a rule of law. As noted by Lord Pearson in *Gissing v Gissing* [1971] AC 886, at 902, the presumption is rebuttable by evidence of some other intention.
50. There are, in fact, two main situations where resulting trusts may arise, namely, (i) where there is a gratuitous transfer of property and (ii) where an express trust of property fails to dispose of the beneficial interest in the property. The parties agreed, as do I, that we are not concerned with the latter category in this case.
51. Mr Kennedy submitted that, on the judge’s findings of fact, Mr Faizi’s beneficial interest in the Property extended only to his contribution at the time the Property was purchased to fund the deposit and conveyancing costs. As that amounted to only about 6 per cent of the purchase cost, his beneficial interest in the Property is limited to that proportion. Mr Kennedy did not suggest that Mr Faizi had some other intention in paying those costs and so appeared to accept that a resulting trust in Mr Faizi’s favour arose to that extent.
52. As to the remainder of the beneficial interest in the Property, Mr Kennedy submitted that Mr Tahir had entered into the Mortgage with Oakwood and funded the remainder of the purchase price in that way. This was an arrangement under which Mr Tahir accepted substantial and ongoing liability to fund the interest payments as well as the liability to repay the outstanding principal due at the end of the mortgage term. Accordingly, Mr Kennedy submitted, Mr Tahir’s beneficial interest in the Property runs to the full extent of the purchase price funded by the Mortgage.

53. Mr Kennedy submitted that the judge was wrong to consider that the payments made by Mr Faizi to fund the periodic payments under the interest-only Mortgage gave rise to any beneficial interest in favour of Mr Faizi. In particular, Mr Kennedy placed reliance on Mr Faizi's denial, when giving evidence at the trial, that he had any liability for the Mortgage.
54. I did not have the benefit of a transcript of the trial, but I note that the judge did not refer directly to this evidence in the Judgment. Mr Wilcox did not object, however, to Mr Kennedy's reading out to me his note of Mr Faizi's response to his question about whether he considered himself liable under the Mortgage. Mr Kennedy considered that this admission by Mr Faizi was fatal to his claim for more than a 6 per cent beneficial interest in the Property. In my view, when giving this response during his evidence, Mr Faizi was simply acknowledging the correct legal position, which is that he has no direct liability to Oakwood. I do not take him as having denied that he was obliged to fund Mr Tahir's obligations under the Mortgage.
55. In his written submissions in answer to the judge's post-trial questions, Mr Kennedy relied on *Leake v Bruzzi* [1974] 1 WLR 1528 (CA), at 1533B and *Suttill v Graham* [1977] 1 WLR 819 (CA), at 822B to support his proposition that the interest-only payments made by Mr Faizi should only be regarded as Mr Faizi's payment for his use and occupation of the Property.
56. Mr Kennedy denied that the Judgment supported the conclusion that Mr Faizi had agreed to indemnify Mr Tahir in relation to the mortgage payments and asserted that the first time the proposition that such an indemnity was part of the agreement reached in 2006 was in Mr Wilcox's skeleton argument for the appeal. It was not, he said, part of Mr Faizi's pleaded case.
57. Mr Wilcox submitted that it was Mr Faizi's pleaded case that in 2006 an agreement was entered into by the parties for Mr Tahir to secure a mortgage so that he could purchase the Property on behalf of Mr Faizi and that Mr Faizi undertook to cover Mr Tahir for the repayments under the mortgage.
58. The Amended Particulars of Claim include the following at para 3:
- “The Claimant used to have a social relationship with the Defendant and, in the absence of British nationality, orally agreed with the Defendant around at [sic] the end of October and start of November 2006 that the latter would purchase the Property through funds provided by the Claimant and that the Claimant and his family would reside at the Property *and be responsible for the mortgage* and all maintenance and upkeep. At all material times, it was the intention of the Claimant and the Defendant that the Property would, by an implied *resulting trust*, be held by the Defendant for the Claimant.”
59. Although the words “indemnify” and “indemnity” are not used in the Amended Particulars of Claim, this is a sufficiently clear statement in my view to rebut Mr Kennedy's pleading point. I also note that the case is put squarely on the basis that there is a resulting trust, which would, of course, give rise to a right of indemnity against the trust property in favour of Mr Tahir as trustee.

60. I note, in passing, that there is no express reference in the Amended Particulars of Claim to constructive trusts, although this possibility was canvassed during the trial and in the post-trial submissions. I also note that para 6A of the Amended Particulars of Claim raises proprietary estoppel as an alternative basis for the claim, but that was not pursued by Mr Faizi.
61. To support his proposition that Mr Faizi's agreement to fund the payment liabilities under the Mortgage was sufficient to confer the entire beneficial interest on him, Mr Wilcox relied on a passage in the case of *Barrett v Barrett* [2008] EWHC 1061 (Ch), [2008] 2 P&CR 17, an appeal from an order striking out a claim for a declaration that a property was held on trust, made in the Central London County Court. In that case, David Richards J said the following at [24]:
- “Contributions to mortgage instalments do not stand in the same position as direct contributions to the purchase price. They may be intended to confer a beneficial interest on the payer, they may be intended as an advance to the mortgagor, entitling the payer to be subrogated *pro tanto* to the mortgagee's rights, or they may, as John contends in this case, be intended as payments in lieu of rent. To establish that they are intended to confer a beneficial interest, they must be referable to an agreement or arrangement made at the time of purchase that the payer should be responsible for the mortgage instalments either on terms that he should have a commensurate beneficial interest or in circumstances from which such an intention can be inferred – see *Carlton v Goodman* [[2002] EWCA Civ 545, 2 FLR 259]. It is for this reason that Mr Maynard relies on contributions to mortgage instalments made ‘in accordance with a pre-purchase agreement’.”
62. In *Barrett v Barrett*, David Richards J found that the claim failed on the basis that the agreement made at the time of the purchase of the relevant property was unenforceable for illegality on other grounds and that the judge below was, therefore, correct to strike out the claim.
63. In *Barrett v Barrett*, David Richards J set out alternative possible characterisations of contributions to mortgage instalments, which will depend, of course, on the factual circumstances. But, importantly, he states that where there is an agreement at the time of purchase of a property a party will be responsible for mortgage instalments on terms that he shall have a commensurate beneficial interest or in circumstances from which such an intention can be inferred, then such payments will confer a beneficial interest on the payer. This proposition is also supported by the decision of Patten J in *Re Share (Lorraine)* [2002] 2 FLR 88 (Ch) at [11] and by the decision of Mummery J in *Carlton v Goodman* at [22].
64. Mr Wilcox submits that the judge found such an agreement in this case at [45-46]. I agree. In my view, the key sentences are:
- “... I have no hesitation in finding that the claimant and the defendant reached an agreement in 2006 that the defendant

would purchase the property and hold its legal title for the benefit of the claimant.

... I have found that the parties agreed that this would be a property belong to the claimant *in all but the legal title.*” (emphasis added)

65. It is clear from these passages that the judge found that there was to be no sharing of beneficial interest. The agreement was that the entire beneficial interest was to be Mr Faizi’s. In my view, the judge could not have reached this conclusion unless he was satisfied that under the terms of the agreement, Mr Faizi was obliged to indemnify Mr Tahir in respect of his liabilities under the Mortgage.
66. Unfortunately, the judge made no explicit statement to that effect in his conclusions. At [47] he said:

“... I find that the defendant was fully aware of the liability that he was taking on and the requirement that he would have to meet the monthly mortgage payments. However, given the agreement between him and the claimant as I have found, the defendant has a *reasonable expectation* to be reimbursed for the monthly mortgage outgoings.” (emphasis added)
67. I consider this, however, to be no more than an infelicity in the drafting of the Judgment. The only conclusion compatible with his clear finding of an agreement that Mr Faizi was to have the entire beneficial interest in the Property is that Mr Faizi had undertaken to pay the mortgage instalments. In other words, Mr Tahir has more than a reasonable expectation to be reimbursed. He has a right enforceable against Mr Faizi personally and enforceable against the Property to be reimbursed for the monthly mortgage outgoings. Mr Faizi’s case was put clearly on this basis, as can be seen from the Amended Particulars of Claim and Mr Wilcox’s post-trial submissions, and the judge will have had this firmly in mind in reaching his conclusions.
68. The judge found that there was a trust. Although he did not use the term “resulting trust”, this does not in my view matter, provided that his findings were consistent with a recognised form of trust. In my view his conclusions, as counsel for each party has also agreed, are compatible with a resulting trust arising (although, as I have noted, Mr Kennedy denied that it extended beyond Mr Faizi’s payment of the original deposit and conveyancing costs). There having arisen a resulting trust, Mr Tahir, as trustee, is entitled to be indemnified out of the trust property (namely, the Property) for any expenses, such as mortgage repayments, incurred by him in respect of the trust property.
69. The judge’s references at [45] and [46] of the Judgment to the claimant’s having acted to his detriment do not undermine this conclusion, although they are not strictly relevant to the resulting trust analysis.
70. The decisions of the Patten J in *Re Share (Lorraine)* and of Mummery LJ in *Carlton v Goodman* also clearly support the proposition that Mr Tahir’s agreement to incur the liability of the Mortgage is not sufficient, in and of itself, to confer on him any

beneficial interest in the Property. In that sense, he is in the same position as Mrs Carlton, who was the sole mortgagee of the property at issue in *Carlton v Goodman*.

71. These conclusions dispose of Mr Kennedy's argument, in reliance on *Leake v Bruzzi* and *Suttill v Graham*, that Mr Faizi's payments, corresponding to interest-only liabilities under the Mortgage, should only be regarded as Mr Faizi's payment for his use and occupation of the Property. As the owner of the entire beneficial interest in the Property, any such payments would be owed to Mr Tahir as trustee for Mr Faizi's own benefit. In any event, the facts of those cases, involving in each case a dispute concerning the ownership of a matrimonial home are quite different from this case.
72. In light of the foregoing, the second ground of the appeal also fails.
73. *Conclusion*
74. Accordingly, the appeal is dismissed.
75. In light of my conclusions, the parties would be well advised to arrange in due course for the legal title to the Property to be transferred from Mr Tahir to Mr Faizi, and for the Mortgage to be novated from Mr Tahir to Mr Faizi. Oakwood would, of course, have to consent to the novation. I have not seen the documentation for the Mortgage, but it is also likely that Oakwood's consent would be needed for the transfer of the legal title. These are matters, however, for the parties to resolve, ideally without further recourse to the court.