Case No: C01BS923

IN THE COUNTY COURT AT BRISTOL
CHANCERY BUSINESS

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 21 January 2020

Before :

HHJ PAUL MATTHEWS

- -

Between :

LISA MARIE SOLOMON	**Claimant**
- and -	
PATRICK ANDREW MCCARTHY	**Defendant**

- -
- -

Jonathan Stanniland (instructed by **Watkins Solicitors**) for the **Claimant**
Christian Gape (instructed by **Direct Access**) for the **Defendant**

Hearing dates: 15-16 January 2020

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Judgment Approved

HHJ Paul Matthews :

Introduction

1. This is my judgment on the trial of a claim made under the Trusts of Land and Appointment of Trustees Act 1996 concerning two properties in Bristol. The claimant is the registered proprietor of both of them. The claim was commenced by claim form issued on 26 September 2016, for declarations as to the beneficial ownership of the properties and for orders for their sale. It was accompanied by particulars of claim. A response was filed to the claim by the defendant acting in person. There were then various procedural hearings, culminating in a case management hearing on 28 September 2018, at which the judge gave what was in substance summary judgment in favour of the claimant. However, an appeal against that judgment was allowed on 2 April 2019.

2. Directions to trial were given by District Judge Watson on 9 August 2019, and an amended defence (drafted by counsel) was filed on 22 August 2019. A reply was filed on 13 September 2019. The matter was argued before me on 15 and 16 January 2020,

when Jonathan Stanniland of counsel appeared for the claimant, and Christian Gape of counsel appeared for the defendant. I am grateful to both of them for their sensible and economical submissions, and the way in which they co-operated to overcome the various obstacles which littered the path to the conclusion of the trial.

3. The parties were formerly in a relationship which lasted a number of years and produced two children. As I have said, the claim concerns two properties, 275 Ridgeway Rd, Bristol BS16 3JZ ("Ridgeway"), and 22 Morden Walk, Bristol BS14 8BB ("Morden"). The claimant seeks declarations that she holds both Ridgeway and Morden on trust for herself and the defendant in equal shares, and that both be sold. The defendant does not resist the declaration that the claimant holds Ridgeway on trust for them equally, but seeks an equitable accounting in respect of the defendant's further financial contributions to the property. The defendant seeks a declaration that Morden is held by the claimant on trust for the defendant's three sons (two of whom with the claimant) but failing that on trust for the defendant. He also resists the claims for orders that the properties be sold.

4. At the outset of this claim, I observe that, although these questions come before the court following the breakup of a domestic relationship of some duration, this court is a civil court, and not a family court or a criminal court. It is not concerned as such with picking over the relationship between the parties or deciding whether, as alleged by the claimant, that relationship involved violence or abuse. It is concerned only with the issues that arise between the parties in relation to the beneficial ownership of the two properties. In some circumstances, there might be specific allegations of influence or even duress which might affect these questions. For example, a person might claim that a transfer of a property interest was made by means of undue influence or under duress. But there is none of that in this case. So I have to look at the principles of property law alone. The rights and wrongs of the personal relationship between the parties, whatever they are, do not affect that.

5. I need to mention separately the position of the sons. This arises only in relation to Morden. Because the defence of the defendant as settled by counsel puts forward an allegation that Morden was to be held on trust for the two sons of the parties and the other son of the defendant, in his order of 9 August 2019 District Judge Watson ordered that the claimant was to serve the three sons with notice of the proceedings. If they did not apply to be joined by 14 September 2019, they were to be bound by the result. There was an issue about whether the order of 9 August 2019 had been properly complied with, but it is now accepted that the three sons have been served, and that none of them has applied to be joined. Accordingly, they are all bound by the result of this litigation. I add only that one of the sons (Patrick Jr, who is the defendant's son but not the claimant's) had previously written a letter dated 4 August 2018 claiming a share in the property, but without giving any supporting evidence.

6. It was not submitted in the present case that it was not possible for the defendant properly to advance a claim that there was a trust for his sons, not being parties and not having applied to join the proceedings. I can well see that it could be difficult for the two sons of the parties to intervene in proceedings between their parents, and in any event, since they were minors at the time of the events which took place, it must be doubted how far they would have any relevant evidence to put forward to the court. In circumstances where one of the sons has intimated a claim, but none of them has applied to be joined, and the rules provide that they will be bound by the result, I do

not see why the defendant cannot advance a case for the benefit of his sons and only in default of that for himself.

7. I should also mention that the defendant was adjudicated bankrupt on his own petition in 2015, in circumstances I will come back to. I understand that he was discharged in the usual way, after one year. However, that leaves over the question of what happens to any beneficial interests in these properties that he might have had at that time. In April 2019, the official receiver was asked whether he wished to become a party to these proceedings. In May 2019, a reply on his behalf stated that he did not wish to be joined,

> "but would be grateful to be advised of the outcome as any interest determined to be owned by Mr McCarthy may well vest in his bankruptcy estate".

It was not submitted that by reason of the bankruptcy the defendant lost all standing to defend these proceedings.

Fact-finding and witnesses

8. In this case I must first find the facts on the basis of the evidence submitted, on which I can then decide the issues which have been put to me. For the benefit of the parties, I make the following comments about the fact-finding process. First, judges are not superhuman, and do not possess supernatural powers to determine the truth. What they do is to look at all the oral and written material presented, with the benefit of forensic argument and analysis from legal representatives. The court does not go looking for evidence, but relies on the parties themselves to put it forward.

9. A person who asserts a fact generally has the burden of proving it. For this purpose that person finds and adduces relevant evidence to the court to show that that is indeed the fact. If the fact is not proved, then, for the purposes of the litigation, it did not happen. The standard of proof in a civil case is not the same as in a criminal case. In a civil case, such as this one, if something is more likely to have happened than not (usually called "the balance of probabilities"), then, for the purposes of this litigation, it did indeed happen.

10. In commercial cases, the courts rely very heavily on the documents which are produced in the transactions that lead to such cases. In domestic cases of this kind, there are far fewer documents, and they are generally not produced by business people to a business standard, but by ordinary people in a domestic context. Moreover, it is clear from the evidence in this case that the parties have either filled in or acquiesced or agreed to the filling in of some official documents without much regard for whether the information they gave was complete and accurate. So, although I take the documents into account, I do not give them the same kind of weight that I would as in a commercial case.

11. The court must give reasons for its decisions. But it is not obliged to deal with every single point that is put forward or every piece of evidence that is presented. Even where the court does make findings, these are inevitably incomplete expressions of what the court thought of the primary evidence. Overall, what it comes to is this. The English legal system does not guarantee to reach the right answer in every case. What

it does promise is *a fair process*, designed to reach the right answer in as many cases as possible. The parties need to bear all of this in mind in considering what follows.

12. There were three witnesses called at this trial. The first was the claimant. She claimed to have reading and writing difficulties, although evidence was given that this was not true. In any event, she had not brought her glasses, and so all relevant passages from documents put to her were read out aloud to her. She also claimed to have been abused by the defendant during the relationship, although that too is denied by the defendant. Nevertheless I bear both of these claims in mind in considering her evidence. Her answers were often monosyllabic, and very frequently she was unable to remember facts or events about which she was asked. She also disclaimed knowledge about financial matters and mortgages in particular (though it seemed to me that she was well informed on some points). There were many gaps in her memory. She was very reluctant to say anything helpful to the defendant, even when it was obviously true. In my judgment she was mistaken on some significant points, as indeed she accepted when she was shown at the relevant documents. Overall, I do not feel able to place reliance on her evidence in the absence of other corroborative evidence.

13. The defendant, on the other hand, was very engaged in the process from the beginning, and gave lots of explanations. He accepted very properly that the documents he signed in the past might not always be completely true. As he put it, they were not sworn. On certain occasions in his evidence he became rather passionate. Overall, I considered he gave the impression of telling the truth in his evidence, even if sometimes he might be mistaken, and I am more confident about accepting his evidence than the claimant's where they differed.

14. The only other witness called was the defendant's aunt Velita Robertson. Although she has an address in Bristol, where she previously lived and worked full-time, she is currently living in The Gambia, although she returns to Bristol from time to time. A video link connection that had been attempted failed, and in the event the parties agreed that I should take her evidence by telephone. I bear in mind the limitations of telephone evidence, and also that Mrs Robertson is the defendant's aunt, and that she was involved in some of the transactions with which I am concerned. But she was also a businesswoman who held a professional qualification (she is now retired), which means she has a reputation to protect. More importantly, I have to say that I was impressed with the quality of her evidence, which she gave clearly and without hesitation. She may have been sometimes reluctant to deal with points put to her, but she did not shy away from difficult questions, and gave answers in some cases which did not favour the defendant. I accept that she was seeking to assist the court and tell the truth. I have no difficulty in accepting her evidence.

Facts found

15. On this basis I find the following facts. The parties were in a relationship from about 1986 (when the claimant was about 15 years old) to at least 2013, when the claimant left Ridgeway, the property in which she and the defendant were then living. The claimant says that the relationship ended then. The defendant says it continued, at least potentially. The parties had two sons together, Simeon born in 1991 and Devante born in 1997. They are both now adults.

16. The claimant was the tenant of Ridgeway, which belonged to Bristol City Council. The defendant and their children lived there with her. In 2001 she exercised the right to buy, with the aid of a mortgage. The property was taken in her sole name, as that was the only way in which the right to buy could be exercised. But there is a deed of trust dated 4 June 2001, located only very recently, which declares that she holds Ridgeway on trust for both parties. It is accepted that this is a genuine document. Despite the allegations of an abusive and controlling relationship, the claimant does not claim to set aside the deed of trust, for example for undue influence or duress. Ridgeway has been remortgaged at several times in the past. As at 31 December 2018, the outstanding balance was £130,483.

17. Despite living in Ridgeway, the defendant was also the council tenant of Morden. In 2002 he exercised the right to buy in respect of that property. With the discount available to a tenant, he paid only a little over £17,000, mostly cash and with no mortgage. He took the property in his sole name. Subsequently, in order to raise money, he mortgaged the property. He also let it, and used the rent to pay the mortgage interest.

18. In 2008, the defendant transferred Morden to the claimant. The then existing mortgage was paid off, and the new mortgage was taken in the claimant's sole name. The property was still let, and the rent applied to pay the mortgage interest. Although the property was now in the claimant's name, the defendant continued to control it, took the rent, and paid money over to the claimant so that she could pay the mortgage. That is still the position today. In her evidence to me in court, the claimant accepted that it was the defendant's property.

19. The defendant's case is that the property was transferred to the claimant because he was having some financial problems, but it was to be held by her on trust for his three (including her two) sons, and that a deed of trust was prepared to this effect, as had been the case with Ridgeway. The claimant denies this and claims a 50% share in the property, on the basis that that is what was agreed at the time. The outstanding mortgage on Morden as at 31 March 2019 is £78,534. The property is still tenanted at present.

20. As I have said, in 2013 the claimant left Ridgeway and went to live elsewhere. She came back from time to time to see her sons, and in 2015, when the defendant was away in Africa, she stayed for a time at Ridgeway with them. The defendant claims to have done significant work to Ridgeway, for which he paid, after the claimant moved out in 2013, and claims an equitable accounting in respect of this.

21. As I have also said, the defendant was made bankrupt in 2015 on his own petition. This appears to have arisen out of an earlier claim to tax (on a transaction dating back several years) which subsequently went out of control, and by reason of interest and penalties became a much larger sum. The defendant was advised by his accountant that, rather than challenge the claim through the courts, he should simply go bankrupt, and that is what he did. As I have said, the official receiver's position is that he wishes to be notified of the result of the litigation in case he wishes to argue that any beneficial interest to which the defendant may be entitled should have vested in the bankruptcy estate.

Ridgeway

22. I turn to consider Ridgeway in more detail. The claimant completed her acquisition of the property under the right to buy legislation on 4 June 2001, although it was not registered at the land registry until 24 August 2001. As I have already said, a deed of declaration of trust of 4 June 2001, executed by the claimant but not (in the version available to the court) by the defendant declares that the claimant holds Ridgeway on trust for the parties "absolutely". The parties agree that this means that, subject to any equitable accounting, the property belongs to them beneficially in equal shares.

23. The defendant claims that he has effected significant improvements to Ridgeway at his own expense and that these should be taken into account by way of an equitable accounting. He relies on the decision of Millett J in *Re Pavlou (a bankrupt)* [1993] 1 WLR 1046. That was a case in which a married couple had bought a house as beneficial joint tenants. They lived in it together until the husband left and then the wife continued in sole occupation, paying the mortgage instalments and for repairs and improvements. The wife obtained a divorce from the husband, and subsequently the husband was made bankrupt, thereby severing the joint tenancy. The trustee in bankruptcy sought a declaration as to the beneficial interests of the parties. It was agreed that there would be an order for sale and an equitable accounting. But there was a dispute as to the date from which the accounting should begin, as the trustee argued that there was no equitable accounting between joint tenants, only between tenants in common.

24. Millett J first held (at 1048G) that there was

> "no distinction for this purpose between a beneficial tenancy in common and a beneficial joint tenancy".

25. He went on (at 1048H-1049C):

> "The guiding principle of the Court of Equity is that the proportions in which the entirety should be divided between former co-owners must have regard to any increase in its value which has been brought about by means of expenditure by one of them.
>
> I must make it clear of course that, in deciding as I do that the wife is entitled as against the trustee in bankruptcy to credit for one half of any repairs or improvements, there has to be an enquiry as to the amount expended and the increase, if any, in the value of the property thereby realised. Much expenditure on property is not reflected in any increase in value, and most expenditure on property results in a much smaller increase in value than the amount expended. The wife will be entitled, as against the trustee in bankruptcy, to credit only for one half of the lesser of the actual expenditure and any increase in the value realised thereby.
>
> The same applies in my judgment to any capital element in the repayment mortgage instalments. The repayment of the capital element in each instalment increases the value of the equity of redemption which in euros to the benefit of both joint tenants. Accordingly, the wife is entitled to credit for one half of the increase in value of the equity of redemption which results from the capital element of the mortgage payments since the date on which the husband left the property in 1983, and not merely since the date of the bankruptcy order."

26. Millett J went on to deal with payments of mortgage interest and the question of an occupation rent. But I am not concerned with these in the present case, because in the course of the argument it was accepted between counsel that the size of the sums involved meant that it was not cost-effective to litigate them, and that they should simply be treated as cancelling each other out. What remains in issue therefore is the question of the works which the defendant claims to have carried out.

27. The defendant's case is that he carried out significant work to the property as follows:

(i) building a loft extension;

(ii) building a triple garage;

(iii) rendering the house and garage;

(iv) repairing the roof;

(v) installing a new kitchen;

(vi) flooring throughout;

(vii) decoration throughout;

(viii) bathroom improvements;

(ix) annual boiler checks;

(x) electrical rewiring.

28. There is considerable disagreement between the parties as to how far this work was carried out by the defendant by his own expenditure, and if so how much value it added to the property. According to the statement of Millett J, the equitable accounting gives credit to the improving party for one half of the *expenditure* on repairs or improvements and the *increase* in value of the property, whichever is the less. This means that any improvement which the defendant claims to have made by virtue of his own labour or without expenditure on his part cannot be taken into account. Moreover, as Millett J says, the amount actually spent is no guide to the increase in value.

29. The problem for the defendant is that he has been unable to place before me at trial any reliable evidence of how much he has spent or how much value has been added. Immediately before the trial, and therefore long after the deadline for the service of evidence to be relied upon, the defendant sought to introduce into evidence a number of new documents said to relate to these works. In a preliminary issue dealt with at the beginning of this trial, I refused permission for these documents to be relied upon. (In any event, some of those documents referred only to small amounts of money which were not in any event clearly related to Ridgeway.) In effect, the only evidence which the defendant is able now to put forward of expenditure – as his counsel accepted in closing submissions – is contained in his witness statement, confirmed in his oral evidence. This says that he has spent £45,350 on the property. The only evidence of valuation is that the defendant says that in 2013 the property was worth £170,000, but

by September 2018 it was worth £260,000. The claimant's view is that by 2018 it was worth perhaps slightly less than that, say £240,000-£250,000.

30. The expenditure figure of £45,350 has been the subject of considerable attack on behalf of the claimant. Apart from the lack of documentary evidence, the evidence of the claimant was that, during her stay at the property in 2015, she had an opportunity to look at the work done, and concluded that it was of poor quality, using substandard materials. Her evidence was that she inferred the materials were obtained cheaply, either through the defendant's contacts with builders or as a scrap metal merchant. In addition, the claimant points out that the defendant was under financial pressure in the years leading up to 2015, when he was adjudicated bankrupt on his own petition. She refers to the petition itself, in which he says that he was unemployed from about 2008 until about 2013, when he became a self-employed scrap metal merchant, earning (according to his accounts) an average of £45 per week. She asks how it is possible that the defendant could have afforded such considerable expenditure on the property in that time.

31. In my judgment, I do not need to resolve these questions. I am satisfied that the defendant did spend some money on Ridgeway, and did carry out some work himself. But I am unable to say how much he spent, or what value that work actually added to the property, and I need both of them (because he would be entitled only to the lesser sum). I say this because (as to the first) I have no proper invoices or receipts, and, with respect, I do not think I can rely on the defendant's memory to that degree of detail for such a significant amount of money, and (as to the second) because there are no proper valuations of the property taking into account the additions in value made by the particular works done, as opposed to the general increase in value of the property over time. In addition, some of the work appears to have been done before the claimant left in 2013, so a 2013 valuation does not help me in relation to that anyway. In these circumstances, I am unable to say that the defendant should have the benefit of expenditure or increase in value by way of equitable accounting, because I cannot say how much it is.

32. I should say that I have considered whether it would be appropriate for me to refer the matter to the district judge for an inquiry and an account. I have however concluded that that would not be fair, because the parties prepared for this trial on the basis that the matter would be dealt with there and then, and not on the basis that an order would be sought at trial for an enquiry an account to be taken at a later date. The defendant has had his opportunity, and it would be unfair on the claimant to give him a second bite at the cherry. Accordingly, the position as shown by the deed of trust of 4 June 2001 is maintained.

Order for sale?

33. I turn to consider the question whether a sale should be ordered of Ridgeway. The claimant is of course is no longer living there, the relationship having completely broken down. The defendant on the other hand is still living there. It is not clear whether any of his three sons is also living there. In considering whether to make an order under section 14 of the 1996 Act, I must consider the factors set out in section 15(1) and (3). These read as follows:

> "(1) The matters to which the court is to have regard in determining an application for an order under section 14 include—
>
> (a) the intentions of the person or persons (if any) who created the trust,
>
> (b) the purposes for which the property subject to the trust is held,
>
> (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
>
> (d) the interests of any secured creditor of any beneficiary.
>
> […]
>
> (3) In the case of any other application, other than one relating to the exercise of the power mentioned in section 6(2), the matters to which the court is to have regard also include the circumstances and wishes of any beneficiaries of full age and entitled to an interest in possession in property subject to the trust or (in case of dispute) of the majority (according to the value of their combined interests)."

34. I can ignore the third and fourth of the factors in sub-s (1) (welfare of any minor who occupies the land, and interests of any secured creditor of a beneficiary), as having no application on the facts of this case. The first factor however is the intentions of the persons who created the trust. The deed of trust was expressed to be made by both the claimant and the defendant, though on the version available to the court only the claimant has executed it. But it is plain that making this deed was not a unilateral decision of the claimant, and that the defendant was the driving force. So realistically I must consider the common intention of the parties, as shown by the deed itself and all the surrounding circumstances. In my judgment, objectively speaking, the intentions of the parties were to provide a home for themselves and for their young children. The second factor is the purposes for which the property subject to the trust is held. Once again, objectively speaking, the purposes for which the property is held were to provide a home for the parties and their children.

35. The present position however is now different. The children have grown up and are self-sufficient (the youngest son attained 18 in 2015). The claimant has left the property, and only the defendant is left. On the face of it, therefore, the purpose for which the property was acquired and the intentions of the parties in acquiring it have been fulfilled. But I must also consider the circumstances of the beneficiaries. The claimant wants a sale, but the defendant does not. However, their beneficial interests in the property are equal. No evidence was put before me of any special adaptation of the property to the defendant's own needs or as to any inability of his to secure other accommodation. Looking at the matter in the round, I can see no reason why the claimant should not now have the use of the value hitherto locked up in the property. In my judgment, the property should now be sold, the mortgage discharged, and the proceeds divided equally between the parties.

36. The defendant asks that, if an order for sale be made, he be allowed to buy the property. It is clear that the court has power to permit this in an appropriate case: *Bagum v Hafiz* [2016] Ch 241; *Chaston v Chaston* [2018] EWHC 1672 (Ch). In the present case the defendant is living in the property as his home, and the claimant is not. The defendant wishes to go on living there, and therefore wishes if possible to buy out the claimant. The claimant does not wish to live there and has expressed no interest in buying out the defendant. She would like the money. In these

circumstances, I can see no reason not to allow the defendant to seek to buy the property. But it must be at the open market price for vacant possession, and must be done within a short time, if at all. In default of agreement between the parties as to the open market price, this will have to be fixed by an independent expert.

Morden

37. I turn now to consider Morden. This is a flat which was acquired by the defendant on a long lease from Bristol City Council through the exercise of the right to buy (the defendant being its tenant), the grant of the lease being registered on 17 June 2002. According to a statement from Bristol City Council, given at the time of the exercise of the right to buy, the valuation of the property was £36,000, from which was deducted a discount to which the defendant was entitled of £18,720, leaving a price to be paid of £17,280. The defendant paid cash, but had the benefit of a small personal loan. Subsequently the property was mortgaged to raise money (it is not clear what for) and it was also let, the rent being used to pay the mortgage interest. It is not clear which came first.

38. In July 2008, the defendant transferred Morden to the claimant. Completion occurred on 25 July 2008, and the transfer was registered on 31 July 2008. The defendant's evidence was simply that he was having financial problems at the time because of attacks claim from the Inland Revenue. Velita Robertson's evidence was that he wanted to transfer the property to someone he could trust so that his creditors would not get it, and then later he could take it back. Whatever the reason, the solicitors involved appear to have treated the transaction in their completion statement as a sale at a price of £120,000 (which is also stated in the land register). However, as the defendant accepted in evidence, that price was not in fact paid. What was paid was a sum of about £78,000 from the claimant's new mortgagee, Bank of Ireland, to the claimant's solicitors. Presumably this figure was calculated by reference to what the mortgagee was prepared to lend on the property with reference to the claimant's income. The difference of about £43,000 was referred to in the completion statement as "gifted by seller". Most of the £78,000 advanced by the mortgagee was then remitted by the claimant's solicitor to the defendant's solicitor. The defendant's evidence was that he did not personally receive this. I do not think it makes much difference, but on the balance of probabilities I consider that he is right, and that this money, or most of it, went to pay off the existing mortgages or other charges that the defendant himself had placed on the property during the time that he was the owner.

39. Although the claimant undertook personal liability to the Bank of Ireland on the mortgage loan, the reality was that the property (at that stage, at least) was worth much more than the liability. And in practice it was the defendant who paid the mortgage instalments thereafter, directly into the claimant's bank account so that they could be paid to her mortgagee. The economic reality was therefore that the only person who had paid for this flat was the defendant (partly by way of his right to buy discount, partly in cash and an unsecured loan, and partly using the rent from the flat to pay the mortgage).

40. The claimant is the registered legal proprietor of Morden. However she does not claim to be the sole beneficial owner. She claims only 50% of the beneficial interest, and accepts that the defendant is entitled to the other 50%. She says this is what she understood as between her and the defendant at the time. The defendant, however,

claims that he transferred the property to the claimant to be held by her on trust for their two sons and his other son equally. The evidence for a trust at all extends beyond the defendant's own evidence to the fact (as I have found) that it was the defendant who paid for it and the claimant did not contribute in any significant way).

41. The evidence for the particular trust for the sons is the defendant's own evidence that that was what he intended, and the evidence of his aunt, Velita Robertson, that he wished to provide for his three sons at a time when he thought he was at financial risk. The defendant also said that he had a deed of trust prepared, just as for Ridgeway, but that this went missing when he was in hospital with a serious illness in recent times. The claimant points out there is no reference in the conveyancing file of 2008 to any deed of trust. However the claimant also accepted in evidence that Morden was the defendant's property. He had owned it previously, he had transferred it to her but controlled it afterwards, and he paid for the mortgage out of the tenants' rents. In my judgment the claimant's evidence in her witness statement that she "has always accepted" it was to be owned equally between them is not supported, and I do not accept it.

42. I take account of the fact that none of the three sons has appeared to be joined to these proceedings, or adduced any evidence in them, to support the claim to a trust for their benefit. But I doubt that this is probative of anything. From the sons' point of view they are bound whether they join in or not. If they join in, however, they may incur a costs liability. Their father, the defendant, is already making their claim. Why should they then join in? As to evidence, it is difficult to see what they can say about the events which happened when they were children. They would not have been directly involved or even consulted. Any evidence they could give would therefore be second-hand. Thirdly, two of the sons are also the sons of the claimant. They would naturally not be keen to intervene in a dispute between their parents. In any event, they could expect to benefit in due course either way, either from their father or their mother. So I am not impressed by the fact that they have chosen not to become involved.

43. Overall, I am satisfied that the claimant took the property on trust rather than by way of beneficial sale or gift. The question therefore is how far it can be established who were the beneficiaries of the trust. It is clear law that, where A conveys to B on trust for A, this can be proved without the need for signed writing complying with the Law of Property Act 1925, section 53(1)(b), because otherwise the statute would be used as an instrument of fraud: see *eg Re Duke of Marlborough* [1894] 2 Ch 133, *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA. So, *a fortiori*, the existence of a trust *itself* can be so established. The problem is whether, where A conveys to B on trust *for C*, the trust *for C* can be established without compliance with the statute. In my judgment it cannot. It is not necessary to enforce such a trust in order to defeat a fraud by A. It is only necessary that there be *a trust* rather than an absolute gift. And to allow the trust for C to be enforced would leave the statutory requirement without effective scope. It is no doubt for this reason that the defendant argues that, the true transfer to the claimant not being a sale or a gift, but being a transfer on trust which has failed for want of statutory formality, the claimant must hold Morden on a resulting trust for the transferor, the defendant.

44. The defendant refers to a passage in *Underhill & Hayton on Trusts & Trustees* 19th ed [12.12] (footnotes omitted):

> "Where land has been conveyed by A to B on oral trusts for C or for A, the interests of C or A are, in the absence of writing signed by B, fully protected against the by the maxim that equity will not allow the statute to be used as an instrument of fraud. However, in a competition between A and C the better view is that C cannot prove his claim due to the absence of writing satisfying [Law of Property Act 1925], s 53(1)(b), so that B holds on a resulting trust for A (assuming that C has not acted to his detriment in reliance upon having the equitable interest so as to obtain an equitable proprietary interest)…"

(I make clear that, although I am one of the editors of this work, this passage comes from a different part of the work from that for which I am responsible, and in any event the passage concerned appears to have been in the work for many years before I was involved.)

45. Whilst I am not aware of any direct authority, in England or elsewhere, in principle it seems to me right that, if the court is satisfied that B was not intended to take beneficially but that the intended beneficiary C is defeated because of failure to comply with formality requirements, so that the intended trust fails, that is just the kind of situation in which there should be a resulting trust for the transferor, *ie* A.

46. The claimant argues that this is the wrong approach. She invites me to apply the approach taken by Baroness Hale of Richmond in *Stack v Dowden* [2007] 2 AC 432 in cohabitation cases. The problem is that, on the face of it, the facts of this case are far removed from those of that case. *Stack v Dowden* was a case about

> "the effect of a conveyance into the joint names of the cohabiting couple, but without an explicit declaration of their respective beneficial interests, of a dwelling house that was to become their home" (see at [40]).

47. This however is a case about the transfer by one cohabitant into the sole name of the other, with (as I have found) the intention that it should be held for the benefit of the transferor's three sons, of a dwelling house that was not and would never become their home, and which, indeed, was held as an investment rather than as a home (*cf Laskar v Laskar* [2008] EWCA Civ 347, [17], per Lord Neuberger).

48. The claimant says that it was intended that Morden would ultimately be sold to repay the mortgage on Ridgeway, and therefore the principles in *Stack v Dowden* should apply. I accept that it was possible that Morden would be sold for this purpose, but not that it was inevitably going to happen. In any event I do not think that, even if it were true, this would turn the case into one where *Stack v Dowden* applied. I see no reason why ordinary resulting trust principles should not apply to resolve this situation.

49. In the present case, of course, there is the complication of the defendant's bankruptcy in 2015, but the impact of that (if any) can be resolved hereafter. For present purposes, I reach the conclusion that the claimant holds Morden on trust for the defendant. Since the defendant does not want the property sold, and the claimant has no beneficial interest in it to vindicate or protect, I can see no good reason for ordering a sale, and none of the statutory factors point in that direction.

Conclusions

50. My conclusions on the whole case are therefore as follows. In relation to Ridgeway, I will make a declaration that the claimant holds the property on trust for herself and the defendant in equal shares, dismiss the counterclaim to an equitable accounting, and make an order for sale, but giving the defendant the opportunity to purchase Ridgeway within a (short) specified time at open market value, which in default of agreement will be fixed by an independent expert.

51. In relation to Morden, I will make a declaration that the claimant holds the property on trust for the defendant absolutely and dismiss the claim for an order for sale. I will also direct the claimant's solicitors to notify the official receiver of the order made in this case, and to provide a copy of this judgment, in accordance with the official receiver's earlier request.