Neutral Citation Number: [2021] EWCA Civ 1661

Case No: B6/2019/2286

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
MR JUSTICE MOOR
FD14F00348

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/11/2021

Before:
LORD JUSTICE MOYLAN
LORD JUSTICE NEWEY
and
SIR RICHARD McCOMBE

- -

Between:

RAVENDARK HOLDINGS LTD	**Appellant**
- and -	
(1) NATALIA ROTENBERG	
(2) ARKADY ROTENBERG	
(3) LUGASNEL SA	**Respondents**
(4) ROTEX GMBH	
(5) PALMOTO HOLDINGS LTD	

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Jonathan Seitler QC and Elizabeth Houghton (instructed by **Farrer & Co Solicitors**) for the **Appellant**
Fenner Moeran QC and Sassa-Ann Amaouche (instructed by **JMW Solicitors LLP**) for the **First Respondent**
Richard Todd QC and Simon Webster QC (instructed by **Grosvenor Law**) for the **Second Respondent**
The Third to Fifth Respondents did not appear and were not represented

Hearing dates: 19 and 20 May 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am 10th November 2021.

Lord Justice Moylan:

1. Ravendark Holdings Limited ("RHL") appeals from the decision of Moor J ("the Judge") of 30 July 2019, finalised in an order dated 13 January 2021. The other parties to the appeal are Natalia Rotenberg (who I will call "the wife") and Arkady Rotenberg (who I will call "the husband"). The order was made in proceedings brought by the wife for the enforcement of a final financial remedy order which had been made by the Judge on 20 July 2016 ("the July 2016 Order").

2. The relevant entities and people are: RHL, a company incorporated in the British Virgin Islands; Olpon Investments Limited, a company incorporated in Cyprus; the husband, the ultimate beneficial owner of Olpon; the wife; and Mr Kalantyrskiy ("DK"), the ultimate beneficial owner of RHL. RHL is the legal owner of a property known as Upper Ribsden, Windlesham, Surrey ("the Property"). The parties to the proceedings, in so far as relevant to this appeal, are RHL, the husband and the wife. Olpon is not a party.

3. The Judge determined that RHL holds the Property "on resulting trust for" the husband. By his order of 13 January 2021 ("the January 2021 Order"), the Judge declared that the husband is the sole beneficial owner of the Property and made consequential orders for the transfer of the Property to the Wife. The January 2021 Order also declared that, "upon the transfer of the … Property to (the wife), (RHL's) liability pursuant to the Loan Facility Agreement dated 20 March 2012 to Olpon Investments Limited shall be satisfied".

4. RHL appeals contending that the Judge was wrong to find a resulting trust because the monies used to purchase the Property were provided by Olpon to RHL by way of a loan. RHL is represented by Mr Seitler QC and Ms Houghton, who did not appear below.

5. The wife is represented on this appeal by Mr Moeran QC, who also did not appear below, and Ms Amaouche. Mr Moeran accepted, as set out in his skeleton argument, that "this is not a case where a resulting trust can arise, in the strict sense of that term". This is because, as submitted by RHL, the judge found that "there was a legitimate loan agreement". The wife has filed a Respondent's Notice seeking to uphold the Judge's determination that RHL holds the Property beneficially for the husband on the alternative basis of a constructive trust.

6. The husband, represented by Mr Todd QC, who did not appear below, and Mr Webster QC, supports RHL's appeal. He has also applied for permission to appeal, an application which I adjourned to be determined at this hearing.

7. For the reasons set out below, I would allow RHL's appeal and remit the matter to be reheard before a judge of the Family Division to be nominated by the President.

Background

8. This case has a long history and I propose only to set out some elements in this judgment.

9. The husband and the wife were married in 2005 and divorced in Russia in 2013. The wife then made an application for financial provision under Part III of the Matrimonial and Family Proceedings Act 1984, leave to do so having been granted by the Judge.

10. The parties reached a comprehensive financial agreement. The husband sought "to renege" on this but the Judge acceded to the wife's application that an order be made in the same terms as the agreement. The July 2016 Order has a number of provisions which dealt with the Property. These included that the husband and the wife "agreed that the contents of the … Property shall remain the absolute property of the" wife. The husband undertook and agreed "to procure or carry into effect the transfer" of the Property into the sole name of the wife as provided for in the order. An order was made that the husband "will procure the transfer of (the Property) into" the wife's sole name by 9 September 2016.

11. As set out in the judgment below, the husband "has simply not complied with virtually any of his obligations under" the July 2016 Order. In particular, the Property has not been transferred to the wife.

12. The manner in which the Property was acquired is as follows:

> "6. Upper Ribsden was purchased by Ravendark Holdings Limited (hereafter "Ravendark") for £27.5 million on 26 April 2012. Ravendark had been incorporated in the British Virgin Islands on 6 February 2012. The shares in Ravendark were held by professional trustees, Royalmed Management Ltd. The Wife had found Upper Ribsden and the Husband had instructed solicitors, Hogan Lovells, to act in the purchase. On 20 March 2012, Ravendark entered into a loan facility agreement with Olpon Investments Ltd (hereafter "Olpon") for the provision of a loan to finance the purchase of Upper Ribsden. The agreed chronology says that Olpon is owned/controlled by the Husband.
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> 7. On 3 April 2012, Olpon provided £5.5 million to Ravendark. Of this, £2.65 million was used for the deposit on the property together with a sum of £100,000 previously provided. On 17 April 2012, a further £29 million came from Olpon, making a total loan of £34.5 million. Of this, just under £28,989,010 was sent to Hogan Lovells for the balance of the purchase price, including to cover the stamp duty. The indicative completion statement shows stamp duty of £4.125 million. It also shows the cost of a panic room door and a safe being installed at a total cost of just over £19,500.
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> 8. One of the major issues in the case is who owns Upper Ribsden. On 21 March 2012, a declaration of trust was entered into which declares that Royalmed holds the shares in Ravendark as nominee and on trust for Mr Dmitry Kalantryskiy (hereafter "DK"). On 4 April 2012, Ravendark granted a two-year lease to enable the Wife and children to occupy the property at a rental of £20,000 per month. The Wife and children moved into Upper

> Ribsden on 13th May 2012 so that the children could attend school in this country."

13. The Loan Facility Agreement referred to in the judgment below was between Olpon and RHL ("the LFA"). This had been signed by the same person, Mr Panagiotis Kinanis, as a director of RHL and as a director of Olpon. The LFA included a clause, paragraph 4.3, which provided:

> "At any time during the existence of the Loan Facility, the Lender may request that the Company pledge its interest in Real Estate and/or arrange for the pledge of shares in the Company in a form and on terms satisfactory to the Lender."

Proceedings and judgment below

14. The wife sought to enforce the July 2016 Order. As part of that she sought a declaration that the husband was the beneficial owner of the Property. It would be fair to say that the legal basis of the wife's case was not always as clearly set out as it might have been. However, it seems from the transcript of the hearing that it was the Judge who first suggested that the Property might be held by RHL on resulting trust for the husband. This is then reflected in the judgment when he said, at [22], that the wife's Points of Claim "plead that the Husband owns the property, presumably by way of a resulting trust". He later set out his conclusion, at [83], that the Property "is held by [RHL] on resulting trust for the Husband".

15. The hearing before the Judge took place in July 2019. At that date the husband was subject to EU sanctions. He was given permission to give evidence remotely but did not do so. Judgment was given in August 2019. The order was initially also made in August 2019 but was not perfected until January 2021.

16. In the course of his judgment, the Judge referred to a number of features in the arrangements between RHL and Olpon and between RHL and the husband and the wife. These included that, at [63], DK had never been to the Property; at [73], that the purchase price "was negotiated" by the husband and the wife; and, at [65], that not all the monies said to have been lent by Olpon to RHL were spent on the purchase of, or otherwise on, the Property. The total provided was £34.5 million, of which £27.5 million was used to purchase the Property with stamp duty of £4 million. In addition, £4 million was spent on refurbishing the Property, works which the Judge found, at [22], that DK "had no involvement in"; at [76], that they "were entirely done at the instigation of the [Rotenberg] family"; and, at [76], which, "as DK has not shown otherwise, (were) paid for by them, probably in part through the excess from the £34.5 million provided from Olpon". The Judge also found, at [59], that the husband "approved every invoice for spending on the property". In addition, monies provided by Olpon were used to purchase furniture for the Property, to buy a Bentley for the use of the Rotenberg family in England and to pay contents insurance premiums (which included the wife's jewellery). The Judge clearly considered it significant that these monies had been used for purposes which did not benefit DK or RHL but were said to be part of the sum owed by RHL to Olpon.

17. Under the LFA, RHL was required to pay interest at LIBOR plus 2%. At the date of the judgment, the annual amount was approximately £1.6 million with repayments due

to be made from 2020. The Judge calculated, at [21], that the total due under the LFA was £44 million. In his evidence at the hearing before the Judge, DK said that the Property was worth less than the outstanding loan.

18. The husband produced a purported tenancy agreement between RHL and the wife. This was not signed by the wife. The rental was £240,000 per year, of which one year had been paid. If the unpaid rent was deducted from the sum due under the LFA, the net due would have been £42 million.

19. The Judge's other findings included, at [65], that RHL "was established to hold the invoice for spending on the property"; and, at [69], that DK "was used by the Husband to hide the true ownership of" the Property and that DK "was acting at the instigation and direction of the Husband throughout". Under the heading, "My specific findings as to Upper Ribsden", the Judge set out a number of further findings starting from [72]:

> "72. I make the following specific findings as to Upper Ribsden. The Wife found the property. She wanted it bought for the occupation of the family whilst in England for the education of the children. As the marriage had not broken down at that point, it was intended to be a matrimonial home. She asked the Husband to secure its acquisition and he agreed. He instructed Hogan Lovells and used AO to liaise with them as to the purchase of the property. AO, from whom I have not heard, was not acting for DK. It is accepted he thought he was acting for the Husband not DK and he was right in thinking that, as he was.
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> 73. I find that the purchase price was negotiated by the Husband and Wife. The money to buy the property came from Olpon. I recognise that Olpon is not a party to this litigation, but I am quite satisfied that this was the Husband's money being provided from a company he controlled to purchase what was intended to be a matrimonial home. I had understood that he was the 100% owner of the shares in Olpon although I was told during argument that he holds 99.5% of the shares. The holder of 0.5% of the shares was not identified and I draw the inference that it is another nominee. In any event, nobody is saying that Olpon owns this property.
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> 74. DK provided no money towards the purchase. The entire purchase price, stamp duty and money for the refurbishment works came from the Husband. I am quite satisfied that the involvement of DK was solely to hide the true beneficial ownership of the property. As AO said to the security staff on 2 May 2012 "*Mr Rotenberg is not to be shown as the owner of the property"*. This was confirmed by the Husband to the Wife in a text when she asserted it was her house. He wrote "*you have nothing and I bought this house for our children and to myself*".
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> 75. It was an entirely uncommercial arrangement so far as DK was concerned. He only received the rent for a year but did not complain. The rent of £240,000 was less than 1% of the value of

> the property at purchase. It has never been increased. It is exactly the same as the amount the Wife gets for her property in London that cost £8.73 million. The rent is to be compared with the interest on the alleged loan which was around £1,038,000 in the first year alone. DK therefore made a notional loss of almost exactly £800,000 after only a year. This was to go on for eight years."

20. The Judge referred, at [77], to the Bentley and the insurance premiums and to the fact that DK has never seen the Property. The Judge concluded that there was a "good reason" for that, namely "It is not [DK's] property".

21. The Judge next referred to the following matters:

> "78. If any reinforcement for this were needed, it is to be found in the way in which the Husband has offered part or all of this property to the Wife in negotiations from the very beginning. How was he able to offer to place it into the trust arrangement proposed at the Ritz Hotel as early as 14 March 2013 if it was not his to place in a trust? His open offer dated 9 July 2014 was to transfer 50% of the property to the Wife. In the agreement, he agreed to give her the entire property. He could not have done any of this unless it was his. In the order itself, he undertook to acquire the Surrey property and/or the shares in Ravendark. He did not say he had to use his best endeavours to do so. Paragraph 32 is in terms that he "will" procure the transfer of the Surrey property into the sole name of the Wife. He was clearly not worried about any potential difficulty."

At [79], the Judge found "that the Husband was in charge and DK did the Husband's bidding".

22. The Judge dealt with the LFA in the following paragraphs:

> "80. I am quite satisfied that the Husband could have insisted on the transfer. After all, he could have exercised clause 4.3 of the loan agreement to require Ravendark to pledge its interest in Upper Ribsden and/or arrange for the pledge of the shares in a form and on terms satisfactory to the Husband. In a commercial arrangement, the lender could then apply for possession but that would not be necessary here as the family already has possession.
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> 81. Both Mr Marshall on behalf of DK and Mr Webster on behalf of the Husband rely heavily on the fact that the Wife does not allege sham. I am quite clear that there is no need for her to do so. The arrangement was exactly the same as the one in *Prest v Petrodel*, namely Ravendark held Upper Ribsden for the Husband by way of a resulting trust, given that he had provided the purchase price and intended all along to retain the ownership. There is no question of sham. Ravendark was properly

> established. The declaration of trust of the shares in favour of DK is legitimate, albeit that Ravendark had no significant assets. Indeed, there was a perfectly legitimate vehicle by which the Husband could force a return of the property to him via clause 4.3. He could even get the shares if he wanted them.
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> 82. The loan agreement is therefore a complete red herring. Again, the document is not a sham. It is just the means by which the Husband can reassert control of the legal ownership if he needs to do so. All he had to do was exercise clause 4.3. In that way, the legal title to the property can be returned to its beneficial owner."

23. The Judge then set out his conclusion:

> "83. It follows that I find that Upper Ribsden is held by Ravendark on resulting trust for the Husband on the basis that he provided the entire purchase price via his company, Olpon. There is absolutely no injustice to DK in my findings. After all, he has paid not a penny for the property. He has never even seen it. He accepts it is worth less than the outstanding loan and the rent is, at present, some £1.4 million per annum less than loan interest. In any event, it is what he agreed with the Husband."

At the end of his judgment, at [88], the Judge said that he would also declare that RHL "owes no further money to Olpon".

Appeal

24. As referred to above, it was accepted on behalf of the wife that the Judge was wrong to have determined that a resulting trust was created in this case. The focus of each party's submissions at the hearing of this appeal was, therefore, on the wife's alternative case of common intention constructive trust. The wife sought to persuade us that it was open to this court to determine that such a trust was established on the facts as found by the Judge. RHL contended that a common intention constructive trust could not arise in the circumstances of this case because of its "commercial" context and that, alternatively, the matter should be remitted to be reheard. The Husband essentially supported RHL's case although it appeared that Mr Todd possibly saw greater force in the argument that the matter should be reheard having regard to a number of the Judge's findings.

25. As I have decided that the matter should be remitted for a rehearing, I propose only to summarise the parties' submissions. As I explain further below, I do not consider that we are properly and fairly in a position to determine whether, alternatively to a resulting trust, a constructive trust arose in this case.

26. Although the issue has been conceded, I propose, first, to summarise RHL's case on resulting trust. RHL's case is that the Judge's conclusion was legally flawed because the Judge found that Olpon had made a genuine loan of the purchase monies to RHL pursuant to a genuine loan agreement. A loan is inconsistent with the presumption supporting the existence of a resulting trust, namely the making of a voluntary or

gratuitous payment used for the purchase of a property in the name of another. Mr Seitler pointed to the Judge's findings, at [21], that the "current debt is therefore in the order of £42,136,500"; at [80], that clause 4.3 of the LFA was enforceable against RHL; and, at [82], that the LFA was "a complete red herring" and was "not a sham".

27. In his written submissions, after quoting from [83] of the judgment below (that RHL held the property "on resulting trust for the Husband on the basis that he provided the entire purchase price via his company, Olpon"), Mr Seitler summarised the effect of the judgment as follows:

> "4.3 The Learned Judge thus expressly found that a resulting trust had arisen on the basis of the provision of the purchase price by Olpon.
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> 4.4. Accordingly, despite engaging in a factual analysis in paragraphs [63] to [80] of the Judgment of the parties' dealings and intentions in relation to the Property, these were ultimately put aside in arriving at the finding of resulting trust which was based upon the advance of purchase monies.
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> 4.5. There was no finding of an express trust nor was there any suggestion that an express trust had arisen. Nor was there a finding of a constructive trust."

28. Based on this analysis, it was submitted, simply, that if the monies used to purchase the Property were provided by way of a loan from Olpon, a resulting trust could not, as a matter of law, arise. Mr Seitler relied on *Lewin on Trusts* 20th Ed, at [8-005] and [8-006] and on *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669, at p. 708 A/C.

29. The effect of the Judge's error was, Mr Seitler submitted, made clear by his declaration that, upon transfer of the Property to the Wife, RHL's "liability pursuant to (the LFA) … shall be satisfied". This demonstrated that the Judge considered it to be a loan which had to be "satisfied". Mr Seitler also questioned how the Judge could properly have made such a declaration without Olpon having been a party to the proceedings. He submitted that the Judge was forced into the position of having to take this step because, otherwise, RHL would no longer have a beneficial interest in the Property but would still be liable to Olpon for the sums due under the LFA. This was, Mr Seitler submitted, the very reason why a resulting trust was not established on the facts of this case.

30. Mr Seitler also submitted that the Judge's reliance on the Supreme Court's decision in *Prest v Petrodel Resources Ltd and others* [2013] 2 AC 415 and, in particular, what Lord Sumption said, at [52], was misplaced. The Judge was wrong when he said, at [81], that "the arrangement was exactly the same" in both cases. Lord Sumption was addressing the question of when "assets vested in a company are beneficially owned by its controller" in the context of a matrimonial home legally owned by a company which is "owned and controlled" by a spouse (*Prest* at [52]). That was, Mr Seitler submitted, an entirely different situation to the present case.

31. In respect of the wife's alternative argument, Mr Seitler acknowledged that, with the findings made by the Judge, this court might "want to dispose of the case in favour of

the wife". However, he submitted, among other points, that this would be unfair to RHL and DK because the case had not previously been advanced on the basis of a common intention constructive trust and the factual and legal issues which would need to be explored have not yet been properly explored. He submitted that the "key" elements necessary to establish such a trust have never been "put" because the question of a constructive trust was not an issue at the trial. These included the relevant parties' intentions which, he submitted, would include Olpon. The Judge had made no findings as to either Olpon's or RHL's intentions neither of which were explored during the hearing. The issue of detriment had also not been addressed and Mr Seitler contested the wife's proposition that the husband had acted to his detriment as a result of the loan made by Olpon. He also questioned how RHL could simultaneously be a genuine borrower and intend to hold the Property beneficially for the husband.

32. Mr Seitler submitted that it was not, therefore, fairly or properly open to this court to find a constructive trust existed in respect of the beneficial ownership of the Property. He accepted that if, in principle, there was scope for a common intention constructive trust in the circumstances of this case then the matter should be remitted for a rehearing. However, he submitted that there was no scope for such a trust in this case largely because of what he said was the context in which the Property was purchased. In simple terms, this was because a common intention constructive trust, as relied on by the wife, cannot arise in a "commercial" context. In support of this submission, Mr Seitler relied on *Laskar v Laskar* [2008] 1 W.L.R. 2695 and *Crossco No 4 Unlimited v Jolan Ltd* [2012] 2 All ER 754 and contended that "the relationship between Husband, Ravendark and Olpon is undoubtedly a commercial one and not a domestic one".

33. Mr Todd made submissions on behalf of the husband. He supported RHL's appeal and submitted that, as a result of the Judge's order, the husband had "lost" the value of Olpon's loan to RHL. I do not propose to summarise his submissions because they did not materially add to the case as advanced on behalf of RHL, save that he acknowledged that everything points overwhelmingly in the direction of a rehearing. This included because he accepted the force of the argument that many of the Judge's findings were not satisfactorily resolved by his conclusion as to a resulting trust. This effectively meant that the wife's case had not been properly determined.

34. In response to RHL's appeal, Mr Moeran accepted that the judgment below did not support the Judge's conclusion that there was a resulting trust. As referred to above, this was because the Judge had found that there was a legitimate loan agreement. However, Mr Moeran submitted that "this is a paradigm case of an 'oligarch' utilising companies and third parties beholden to him (in this case one of the employees of his bank) to deliberately hide his ownership of assets, despite the obvious reality of the situation". He submitted that, despite the incorrect application of a resulting trust to the facts of this case, the Judge's conclusion that the Property was held beneficially for the husband was, "essentially, the end of the matter". This was, he submitted, an unappealable finding.

35. Mr Moeran took us through the judgment pointing to the many findings made by the Judge which were adverse to RHL and the husband. These included, at [74], that "the involvement of DK was solely to hide the true beneficial ownership of the" Property; at [79], that "DK did the Husband's bidding"; and, at [81], that the husband "had provided the purchase price and intended all along to retain the ownership" of the Property.

36. Mr Moeran submitted that he was not asking this court to find any additional facts and that, as in *Preedy v Baker* [2016] EWCA Civ 805, at [44], this court is "fairly able to decide the issues now raised by the newly devised case". This was because, he submitted, all the elements necessary for a common intention constructive trust were sufficiently addressed at the hearing below and are to be found in the judgment. These included the intentions of the husband, DK and RHL which, he submitted, must have effectively comprised an express agreement as to the beneficial ownership of the Property and which was combined with sufficient detriment with the provision of funds by the husband through Olpon. He submitted that the Olpon loan was not incompatible with a constructive trust; it was an evidential factor relevant in determining the parties' respective intentions and was something which the Judge had clearly taken into account.

37. In response to Mr Seitler's submissions as to whether a common intention constructive trust can arise in a "commercial" context, Mr Moeran submitted that this case does not concern a commercial arrangement and that, even if it does, a constructive trust can arise in such a context.

38. As to the former, Mr Moeran submitted that this case is very far from a commercial arrangement, the "entire structure" having the objective, as found by the Judge at [74], of hiding "the true beneficial ownership of" the Property. He relied on a number of factors including that DK took no part in the purchase of the Property, which was being purchased by the husband as a marital home, and that part of the funds provided to RHL had been spent in ways which did not benefit DK or RHL, such as the purchase of the Bentley and furniture for the Property and the payment of contents insurance premiums (including jewellery). Mr Moeran also pointed to the fact that in the July 2016 Order, it was agreed that the wife would keep the contents of the Property as her absolute property, demonstrating that they did not belong to RHL despite the manner in which they were purchased. The husband had also agreed in that Order that he "will" procure the transfer of the Property to the wife, not, as the Judge had noted, that he would use his best endeavours. Mr Moeran further relied on the Judge's finding, at [75], that it "was an entirely uncommercial arrangement so far as DK was concerned".

39. As to the latter, namely the context in which a constructive trust can arise, Mr Moeran relied on *Lewin* at 10-064, where it is said:

> "An express agreement, relied on to the detriment of a party claiming a beneficial interest, may found an interest under a common intention constructive trust outside the scope of the domestic consumer context"

He also relied on the authorities referred to by *Lewin*, namely *Agarwala v Agarwala* [2013] EWCA Civ 1763 and *Kahrmann v Harrison-Morgan* [2019] EWCA Civ 2094. In the latter decision, Henderson LJ, at [99], said that, "There is no reason why constructive trusts of a traditional kind may not arise in a commercial context". That case concerned an express agreement/common intention between a Dr Kahrmann and a business associate of his and neighbour, a Mr Hawkins, in respect of the future ownership of the freehold of two properties and an inferred agreement/common intention in respect of enfranchisement rights in respect of the same properties. Henderson LJ found the elements necessary to establish an express common intention

constructive trust including, at [89], that Dr Kahrmann had acted to his detriment. He also noted, at [100], that that case was, "in some respects, of an intermediate character".

40. Mr Moeran also dealt with the other points advanced by Mr Seitler and submitted, for example, that Olpon did not need to be part of the common intention because the only relevant parties for the purposes of a constructive trust are the legal title holder and the person claiming a beneficial interest. Olpon is merely a creditor of RHL. As for RHL, Mr Moeran submitted that the evidence demonstrated that DK was the governing or controlling mind of RHL and his intentions were, therefore, the relevant intentions as they would represent RHL's intentions. These, he submitted, had been explored in the evidence when DK had been cross-examined. Further, the Judge's finding, at [79], that "DK did the Husband's bidding" meant that RHL's intentions corresponded with and reflected the husband's intentions in respect of the Property.

41. On the issue of detriment, Mr Moeran submitted that, although the Judge had not addressed and had made no finding about detrimental reliance, the loan made by Olpon was a detriment to the husband. As I understood his submissions, they were that the advancement of funds by Olpon was a detriment to the husband because he is the ultimate owner of the company so affected by the making of the loan. In any event, detriment is not, he submitted, a question of the value received or a financial assessment. What is required is a sufficient change of position such that it would be unconscionable for the legal owner of the property to deny the other party's beneficial interest in it. Mr Moeran also submitted that the loan was part of the bargain between the husband and DK/RHL and relied in particular on passages in, the then, Mustill LJ's judgment in *Grant v Edwards* [1986] Ch 638 at pp. 651/652. The loan formed part of and completed the bargain made between DK/RHL and the husband.

42. Mr Moeran finally submitted that the required elements of a constructive trust had been sufficiently raised and sufficiently explored below for it to be just for this court to determine the wife's case and to uphold the Judge's decision on that basis.

Determination

43. When I gave permission to appeal, it was not clear to me what the Judge had meant when he said that the LFA was "a complete red herring" and that it was "not a sham". It was also not clear what findings he had made as to the source of the funds used to purchase the Property as he had referred, at [74], to the purchase price as coming "from the Husband" and, at [81], to the husband having "provided the purchase price" while, at [73], he said that the monies "came from Olpon". However, it became clear by the time of the hearing that it was conceded that the Judge had found that the loan was a real loan and that, as a result, whatever other findings he might have made, his conclusion that the Property was held on resulting trust for the husband could not stand.

44. The issue at the hearing of this appeal became, therefore, whether we could arrive at the same ultimate outcome but by way of a common intention constructive trust.

45. There is much force in Mr Moeran's submissions, as acknowledged by Mr Seitler, that the Judge's findings are so adverse to the husband and DK that justice would be served by upholding the Judge's determination as to the beneficial ownership of the Property. However, after substantial reflection, I have come to the conclusion that this course is

not properly open to us and that the right course is to remit the case for a full rehearing before a judge to be nominated by the President of the Family Division.

46. As referred to above, Mr Moeran made the overarching submission that the Judge's conclusion that the Property was held beneficially for the husband was, "essentially, the end of the matter". The problem I see with that submission is that the Judge's conclusion that the Property was held beneficially for the husband was in turn founded on his conclusion that the facts of this case led to the creation of a resulting trust. Once it is accepted that the latter conclusion cannot stand, the former is also unsustainable.

47. As for the wife's alternative case in her Respondent's Notice, namely that a common intention constructive trust has been established, I do not consider that we are properly and fairly in a position to determine that question. This is largely because I agree with Mr Seitler's submission that not all of the constituent elements were sufficiently explored either evidentially or legally at the hearing below, in particular in respect of the issue of detriment. I consider he is entitled to submit that this court cannot be satisfied that RHL "would not have altered the way it conducted the case", to quote Arden LJ (as she then was), at [21], in *Crane v Sky In-Home Ltd* [2008] EWCA Civ 978, in turn quoting from Peter Gibson LJ in *Jones v MBNA* (Court of Appeal, 30 June 2000).

48. I consider, however, that contrary to Mr Seitler's submissions it is certainly arguable that the circumstances of the case are such that a constructive trust could be established. As referred to above, Mr Seitler argued that a common intention constructive trust cannot arise in a "commercial" context. Whether that is right as a matter of law, it seems clear that, if the Judge had addressed this issue, he might well have determined that the present case did not involve a commercial transaction. For example, the Judge found, at [75], that "It was an entirely uncommercial arrangement so far as DK was concerned". In addition, *Lewin* states, at 10-064: "An express agreement, relied on to the detriment of the party claiming a beneficial interest, may found an interest under a common intention constructive trust outside the scope of the domestic consumer context". The Property was being purchased as a family home. RHL's case was that it was an investment but the Judge clearly considered that it had a number of unusual features which were not compatible with it being a simple commercial transaction.

49. There was some debate at the hearing as to whether the wife was seeking to advance a new case or whether her case below had been advanced on a broad front. Looking at the pleadings, it can be seen that the wife's case did not expressly rely on a resulting trust. Her case was broad, namely that the husband was the "ultimate owner" of the Property and that the court should make a declaration that he is the beneficial owner. This was challenged in the pleadings on behalf of RHL but it was accepted in the written submissions provided for the hearing before the Judge that a property transfer order could be made against the husband "if a finding is made that the company [RHL] holds the [Property] on trust for H". There was also reference to the wife having the burden of proving that "RHL is beneficially owned or controlled by H".

50. As referred to above, it appears that the first reference to a resulting trust was when the Judge raised it during the course of the hearing. It then appears to have been adopted by RHL's then counsel as being the case he had to meet. The wife's submissions remained broadly advanced and included that there was no verifiable evidence as to the source of the monies although they could be seen to have been sent via Olpon.

51. Whatever the cause, it is clear to me that the wife's claim that the husband is the beneficial owner of the Property has not yet been properly determined and, equally, that RHL should have the opportunity of rearguing its case. Further, as Mr Seitler submitted, there does not appear to have been any legal basis on which the Judge was entitled to declare that the loan to Olpon was "satisfied". It would seem necessary for Olpon to be joined to the proceedings so that the true nature of the LFA and its legal effect can be fully determined at the rehearing.

52. Finally, in my view, the husband's application for permission to appeal raises no separate justiciable issue and I would, therefore, propose that it is dismissed. I also consider it relevant that it runs counter to his obligations under the July 2016 Order.

LORD JUSTICE NEWEY:

53. I agree.

SIR RICHARD McCOMBE:

54. I also agree.