Neutral Citation Number: [2023] EWCA Civ 1276

Case No: CA-2022-002478

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, BUSINESS LIST (ChD)
David Halpern KC sitting as a Deputy High Court Judge
[2022] EWHC 2872 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 November 2023

Before :

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LORD JUSTICE ARNOLD

- -

Between :

BALWANT SINGH GILL	**Claimant/ Appellant**
- and -	
(1) JASHPAL SINGH THIND **(2) BALJIT GILL THIND** **(3) JASHPAL SINGH THIND, BALJIT GILL THIND, AVNEESH SINGH THIND AND JEEVAN SINGH THIND (AS TRUSTEES OF THE THIND SSAS PENSION FUND)**	**Defendants/ Respondents**

And between :

BALWANT SINGH GILL	**Petitioner/ Appellant**
- and -	
(1) JASHPAL SINGH THIND **(2) BALJIT GILL THIND** **(3) JEEVES ESTATES LIMITED**	**Respondents**

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- -

Donald Lilly and William Stewart-Parker (instructed by **CANDEY**) for the **Appellant**
John Randall KC and Robert Mundy (instructed by **George Green LLP**) for the **Respondents other than the Third Respondent to the Petition**
The **Third Respondent to the Petition** did not appear and was not represented

Hearing date : 24 October 2023

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Approved Judgment

Lord Justice Arnold:

Introduction

1. This is an appeal by the Claimant and Petitioner, Balwant Singh Gill ("Mr Gill"), against paragraphs 3-9 and 11-12 of an order made by David Halpern KC sitting as a Deputy High Court Judge on 7 December 2022 for the reasons given in his judgment dated 14 November 2022 [2022] EWHC 2872 (Ch). By those paragraphs of his order the judge declared that Mr Gill holds 100 shares in the Third Respondent to Mr Gill's petition, Jeeves Estates Ltd ("JEL"), on trust for the first six of his grandchildren and made various consequential orders.

2. The order was made by the judge following an 11 day trial of a Part 7 claim and a petition under section 994 of the Companies Act 2006. The proceedings arose out of an unfortunate family dispute between Mr Gill on the one hand and his daughter, the Second Defendant and Respondent, Baljit Gill Thind ("Mrs Thind"), and her husband, the First Defendant and Respondent, Jashpal Singh Thind ("Mr Thind"), on the other hand. The dispute concerned the beneficial ownership of shares in three family companies: JEL, Jeeves Investments Ltd ("JIL") and Simicare Ltd ("Simicare"). Mr Gill claimed that he was legally and beneficially entitled to the sole issued share in each of JIL and Simicare and to one third of the issued shares in JEL. Mr and Mrs Thind's case was that Mr Gill received the JIL and Simicare shares on trust for their children (Avneesh Singh Thind, Jeevan Singh Thind and Simran Kaur Thind, who I will refer to by their first names) and that he received 100 of the 300 shares in JEL on trust for all his grandchildren.

3. The judge found that Mr Gill had received the JIL and Simicare shares on trust for the Thinds' children and that Mr Gill had received 100 of the 300 shares in JEL on trust for all his grandchildren (although the judge went on to hold, for the reasons he gave in a consequential judgment dated 7 December 2022 [2022] EWHC 3651 (Ch), that, by virtue of the class-closing rule in *Andrews v Partington* (1791) 3 Bro CC 401, 29 ER 610, only the first six of Mr Gill's grandchildren were beneficiaries of that trust).

4. Mr Gill does not challenge the judge's decision so far as it concerns JIL and Simicare, but he appeals with permission granted by Snowden LJ against the decision with respect to JEL. Although JEL is formally a respondent to the appeal, the principal respondents are Mr and Mrs Thind.

Background

The family

5. Mr Gill is in his eighties. He has four children: Kamaljit Kaur Khela, Mrs Thind, Ranjjett Benning and Kuldeep Gill ("Kuldeep"). Mr Gill currently has eight grandchildren born between 1983 and 2021. It is common ground that the family was a very close one until about the beginning of 2018, but since then a split has emerged with Mr Gill, Mrs Khela, her husband Kundan Singh Khela and Kuldeep in one camp and Mr and Mrs Thind and Mrs Benning and her husband Dave Benning in the other camp.

The companies

6. Mr and Mrs Thind run various businesses in the South-East of England, mostly through companies named after their children.

7. In 1999 Mr and Mrs Thind bought a pharmacy business in Brighton through Aveycare Ltd, named after Avneesh. In 2004 they bought an investment flat in East London through JIL, named after Jeevan.

8. In 2006 Mr and Mrs Thind bought nursing home premises ("the Laurels") in Hastings through JEL, also named after Jeevan, and the business run from those premises through Laurels Nursing Home (Hastings) Ltd ("LNH"). LNH later became a subsidiary of JEL.

9. To fund the purchase, Mr Gill provided £133,000 and Mr and Mrs Thind provided £267,000. The judge found that (as was Mr and Mrs Thind's case, but contrary to Mr Gill's case) these were interest-free loans, and that finding is not challenged by Mr Gill. Abbey National Building Society provided a mortgage loan of a little under £1m, secured by personal guarantees given by Mr and Mrs Thind, but not Mr Gill. Mr Gill was later repaid £108,000.

10. In 2011 Mr and Mrs Thind bought nursing home premises ("St Margaret's") in Hythe and the associated business through Simicare, a company named after Simran.

11. In 2012 Mr and Mrs Thind bought nursing home premises ("Sherwood House") through their SSAS Pension Fund and the associated business through Watts Healthcare Ltd ("WHL"). WHL then became a subsidiary of JEL. Mr Gill provided £280,000 to WHL between 2012 and 2014. The judge found that this too was a loan (as again was Mr and Mrs Thind's case, but contrary to Mr Gill's case), and again that finding is not challenged by Mr Gill. Mr Gill was repaid £250,000 between 2015 and 2016.

Ownership issues

12. *Aveycare*. Although Mr Gill lent money to Mr and Mrs Thind to help them buy the Brighton pharmacy, there was no dispute that they were the legal and beneficial owners of Aveycare.

13. *JIL*. JIL had one issued share. JIL's first annual return gave the name of its shareholder as "Mr and Mrs B S Gill (Trustees)".

14. Mr and Mrs Thind's case was that Mr Gill agreed in 2004 to hold the share in JIL on trust for their children and that he much later signed a written declaration of trust in favour of Avneesh and Jeevan.

15. Mr Gill's original case was that the shares in JIL were held by trustees for himself and his wife Baljinder Kaur Gill or by trustees for their pension fund. After being forced to admit that there was no such pension fund, he abandoned both these contentions. By the trial, his case was that the company's single share belonged to him in law and equity. He said that the written declaration of trust was a forgery. The judge found that Mr Gill was right that the declaration was a forgery, and there is no challenge to that finding by Mr and Mrs Thind.

16. *JEL*. According to JEL's 2008 annual return, as at November 2007, Mr Gill was registered as holding 100 shares in JEL and Mrs Thind 200 shares.

17. The dispute concerned the terms on which Mr Gill held the shares in JEL. The judge described the parties' cases at [18] in this way:

> "(1) Mr Gill's evidence is that he agreed to enter into a joint venture with Mr and Mrs Thind in relation to The Laurels and he therefore owns his shares absolutely. He says in his trial witness statement that Mr Patel advised him to take £108,000 out of the business; it is not clear whether he is saying that he was advised to take it as a dividend. He accepts that he has not paid tax on this money, but he blames Mr Povey who prepared his tax returns.
>
> (2) Mr Thind's evidence is that, during a family gathering in December 2005, he told Mr Gill about the Thinds' plan to buy The Laurels and to borrow part of the purchase price from the Bank. He says that Mr Gill replied: '*I will lend you the money but give it to the grandchildren, one third of it*'. The cash contribution for the purchase was £400,000, and Mr Gill lent £133,000."

18. Mr Gill relied in support of his case on an option agreement concerning the shares in JEL signed by Mr Gill and Mrs Thind on 8 September 2011 ("the 2011 Option"). The significance of the 2011 Option is that (i) it expressly refers to Mr Gill owning 100 shares and Mrs Thind owning 200 shares, (ii) it makes no reference to any trust and (iii) it provides for each party to have the option to buy the other's shares in the event of the latter's death.

19. *Simicare*. Simicare had only one issued share, held by Mr Gill from 2012.

20. Mr and Mrs Thind's case was that, at dinner at Nando's in Bluewater in April 2010, Mr Thind told Mr Gill that Mr and Mrs Thind were thinking of buying St Margaret's for the benefit of their children and Mr Gill agreed to act as trustee. Their case was that Mr Gill later signed a written declaration of trust.

21. Mr Gill's case at trial was that he was unaware that the share had been put in his name, but nevertheless it belonged to him in law and equity. Mr Gill again said the written declaration of trust was a forgery. Again the judge found that he was right about the declaration, and there is again no challenge to that finding by Mr and Mrs Thind.

22. Simicare paid dividends into a Nationwide Building Society account in Mr Gill's name. That account was only used to pay Avneesh, Jeevan and Simran's school fees. Mr and Mrs Thind argued that this supported their case that Mr Gill had agreed to act as a trustee of the Simicare share. Mr Gill said he knew nothing about the Nationwide account. His counsel floated the idea of some unspecified tax fraud, but the judge rejected that suggestion.

Management issues

23. In addition to the issues as to the ownership of the shares in JIL, JEL and Simicare, Mr Gill complained about how those companies (and their subsidiaries) were managed.

The witnesses

Mr Gill

24. Mr Gill gave evidence for one day, but did not return to court to finish being cross-examined the next day. He said that he was unfit to continue giving evidence, but the judge considered that the medical evidence he relied upon was far from satisfactory. The judge found that Mr Gill was a very unsatisfactory witness who came to court with an agenda and that there were occasions when he knowingly gave false evidence. The judge concluded that he could not rely on any of Mr Gill's evidence unless it was consistent with contemporaneous documents or was inherently probable.

Mr and Mrs Khela

25. Mr Gill had two supporting witnesses, Mr and Mrs Khela. Mr Khela did not give oral evidence on the ground of ill-health, and his witness statement was admitted as hearsay, but the judge considered that the medical evidence he relied on was far from satisfactory. The judge rejected Mr and Mrs Khela's evidence in its entirety.

Mr Thind

26. Having found that Mr Thind had forged the two trust deeds relied upon by Mr and Mrs Thind, the judge concluded that he could not rely on any of Mr Thind's evidence unless it was consistent with contemporaneous documents or was inherently probable.

Mrs Thind

27. The judge found that Mrs Thind was an honest witness. She was sufficiently far removed from the forgery not to be tainted by it. Parts of her evidence needed to be considered with caution, but subject to that he accepted her evidence as broadly reliable.

Avneesh and Jeevan

28. The judge found that Avneesh was an honest witness, but that his evidence concerning conversations he had had with Mr Gill did not materially assist.

29. The judge found that Jeevan was an honest witness. The judge attached some limited weight to his evidence about two conversations he had had with Mr Gill.

Satnam Singh

30. Satnam Singh is Mr Thind's father. The judge found that he was clearly an honest witness, but attached no weight to evidence he gave about what he had been told by Mr Thind.

Other witnesses

31. A number of other witnesses gave evidence, but the only one it is necessary to mention is Aurijit Basu, an accountant engaged by Mr Thind from the summer of 2017 onwards. The judge concluded that he should approach Mr Basu's evidence with considerable caution, although he did not reject it outright.

The judge's judgment

32. As the judge explained at [3]:

> "The alleged trusts of the shares are said to have been created by virtue of conversations between the parties. Despite the considerable number of trial bundles, there is a distinct absence of documents recording the parties' intentions at the date of the alleged creation of each of the trusts. The issues in the case therefore turn to a significant extent on oral evidence. The documents in the case mostly post-date the alleged creation of the trusts and are relevant primarily insofar as they do, or do not, corroborate the oral evidence."

33. The judge therefore considered that this was a case of the kind described by the Court of Appeal in *Natwest Markets plc v Bilta (UK) Ltd* [2021] EWCA Civ 680 at [51]:

> "Faced with documentary lacunae of this nature, the judge has little choice but to fall back on considerations such as the overall plausibility of the evidence, the consistency or inconsistency of the behaviour of the witness and other individuals with the witness's version of events; supporting or adverse inferences to be drawn from other documents; and the judge's assessment of the witness's credibility, including his or her impression of how they performed in the witness-box, especially when their version of events was challenged in cross-examination."

34. The judge analysed the evidence with meticulous care. After a short introduction, he set out the facts in outline at [5]-[36]. In that context he considered the 2011 Option and the evidence concerning the genesis of that document at [25]-[27], noting that it said nothing about any trust of Mr Gill's shares in JEL. He considered the purported trust deeds at [37]-[46], and found that Mr Thind had forged them. After a brief description of the proceedings, the judge set out his assessment of the evidence of Mr Gill's witnesses at [51]-[66].

35. The judge set out his assessment of the evidence of Mr and Mrs Thind's witnesses at [67]-[113]. In that context he considered a number of items of evidence which are significant for the purposes of the appeal.

36. First, he gave further consideration to the 2011 Option. He found that the document was drafted by Mr Thind's financial advisor on Mr Thind's instructions. He did not find it credible that Mr Thind signed the document without reading or understanding

it (although, as the judge correctly recorded at [25], the document was in fact signed by Mrs Thind, not Mr Thind). He said at [74]:

> "The 2011 Option makes very little sense if Mr Thind thought that Mr Gill held the shares in JEL on trust. If, however, he believed that Mr Gill held his shares beneficially, then the document makes more sense. Mr Thind presumably assumed that Mrs Thind would survive Mr Gill, and he wanted to ensure that Mrs Thind would be able to buy out Mr Gill's estate."

37. Secondly, he summarised part of Mrs Thind's evidence at [80]:

> "She said that she overheard a conversation between Mr Thind and Mr Gill in the Thinds' home in December 2005. She understood from this conversation that Mr Gill would lend some money for the purchase of The Laurels and that he would be given a one-third shareholding, which he would hold on trust for all of his grandchildren. She did not overhear the whole conversation, because she was also engaged in helping her mother to prepare food and in supervising the children. She did join in the conversation at one point, saying that the lounge area in The Laurels was too small and would need to be changed. Further, at one point Mr Gill addressed her as well as her husband, when he said that nothing should be said to Kundan Khela, because he would also ask Mr Gill for a loan. During 2006 she had various conversations with Mr Gill, when he used the word '*loan*' but she cannot be more specific. Once again, I treat this evidence with a degree of caution."

38. Thirdly, the judge also considered an email from Mr Basu to Mr Thind dated 4 July 2017, an email from Mr Basu to Mr Thind dated 3 January 2018 and an email from Mr Basu to Royal Bank of Scotland ("RBS") dated 3 August 2018. The 4 July 2017 email followed an introductory meeting between Mr Basu and Mr Thind. In relation to JEL Mr Basu wrote: "If I remember correctly, 33% of the shares are owned by Mr Gill and these shares are not held on trust. Is that correct?" Mr Thind did not reply. The judge therefore drew very little from this. In the 3 January 2018 email Mr Basu discussed dividends paid by JEL in a manner that, as the judge put it at [98], "appears to suggest that Mr Basu viewed Mr Gill as being beneficially entitled to his shares in JEL". A similar issue arose in relation to the 3 August 2018 email. The judge did not accept Mr Basu's explanations of these emails.

39. Fourthly, the judge said at [102]:

> "Mr Basu also gives evidence that he went with Mr and Mrs Thind to a difficult meeting at Mr Gill's house in mid-2018. He says that he told Mr Gill that Mr Gill held the shares in JEL on trust for all his grandchildren, to which Mr Gill replied '*for the moment*'. [Counsel for Mr Gill] did not put it to Mr Basu that these (or similar) words were not said; I accept that Mr Gill used these words. It is not entirely clear what Mr Gill meant by these words, but they tend to suggest that he regarded

himself as currently holding the JEL shares for the benefit of his grandchildren."

40. In fact Mr Basu's evidence (and Mr Thind's evidence) was that it was Mrs Thind who said that Mr Gill held the shares in JEL on trust for all his grandchildren, whereas it was Mrs Thind's evidence that Mr Basu said this. This detail does not matter, because Mr Gill does not dispute that the statement was made or that he replied in the manner set out above.

41. At [114] the judge noted that he had been referred to a considerable amount of additional evidence, but said that in his judgment none of it was sufficiently clear and unequivocal to assist. He considered three particular parts of the evidence falling into this category at [115]-[122].

42. The judge commenced his analysis at [123] with the legal ownership of the shares. In the case of JEL it was common ground that 100 of the 300 shared had been transferred to Mr Gill. In the case of JIL and Simicare there was no evidence that Mr Gill had ever received any instrument of transfer of the shares, but the registers were prima facie evidence that Mr and Mrs Gill were the holders of the share in JIL and that Mr Gill was the holder of the share in Simicare. The judge went on:

> "124. I must now decide whether Mr Gill is entitled to those shares beneficially or holds them on express or resulting trust. The law is uncontroversial:
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> (1) In the case of an express trust, the burden is on the Defendants to prove that Mr Gill's words and actions, when viewed in the context of the surrounding facts and matters, showed a clear intention to make a disposal of the shares in question so that the alleged beneficiaries would acquire a beneficial interest. No particular formality is required. The leading case is *Paul v Constance* [1977] 1 WLR 527, where the Court of Appeal upheld the judge's conclusion that the words '*the money is as much yours as mine*' were sufficient to create a trust on the facts of that case.
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> (2) In the case of a resulting trust, if Mr Gill acquired the shares without giving consideration for them, there is a presumption, easily rebutted, that he holds them on a resulting trust for whoever caused the shares to be put in his name: *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 at 312D-13E *per* Lord Upjohn.
>
> 125. I have rejected the evidence of Mr Gill, the Khelas and Mr Thind and I have identified which documents I find to be of no assistance in resolving these issues. Leaving aside all the evidence which I have discarded, I must now decide whether the remaining evidence is sufficient to give rise to express or resulting trusts, taking into account the overall plausibility of

> the evidence and the other factors stated in *Natwest Markets Plc v Bilta (UK) Ltd*."

43. The judge considered JIL and Simicare at [126]-[136]. His core finding was at [132]:

> "In my judgment, the overall implausibility of the Thinds making a gift of the shares in JIL and Simicare, coupled with the limited reliance which I place on the evidence of Mrs Thind and Jeevan, satisfies me on the balance of probabilities that Mr Gill agreed (i) in 2004 that he and his wife would accept the share in JIL, and (ii) in 2012 that he would accept the share in Simicare, in each case as trustees for Avneesh, Jeevan and Simran equally."

44. Having regard to the arguments on the appeal, it is necessary to set out the judge's reasoning in relation to JEL in full:

> "137. I have found it more difficult to determine the position in relation to Mr Gill's 100 shares in JEL. In contrast to the JIL and Simicare shares, where Mr Gill did not know that he was a shareholder and clearly gave no consideration for the shares, it is common ground that he did receive the shares in JEL and did advance substantial sums in relation to The Laurels and Sherwood, albeit that it is disputed whether these were loans or investments.
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> 138. The Thinds' case depends upon the court accepting two propositions:
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> (1) That Mr Gill agreed to hold the shares on trust; and
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> (2) That the trust was for all his grandchildren, not merely the Thind children.
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> 139. Mr Gill's statement to Mr Basu that he held his shares for the benefit of his grandchildren '*for the moment*' (see paragraph 102 above) tends to suggest that he regarded himself as a trustee. Further, if he thought that the moneys received in respect of JEL were dividends and not repayments of loans, he should have declared them to HMRC. I reject his attempt to blame Mr Povey for not including this on his tax return and I find that he received the sums as repayment of loans. It follows that he received the shares without making any capital investment.
>
> 140. I take into account Mrs Thind's evidence, on which I place limited reliance, that Mr Gill agreed to become a trustee in 2007 in relation to The Laurels. Her evidence is bolstered by what I consider to be inherently implausible. In my judgment it is implausible that the Thinds would have agreed to give Mr

Gill a one-third share in the business unless he agreed to take on one third of the liabilities and responsibilities, in particular:

(1) One third of the capital contributions, not just for the purchase of The Laurels and Sherwood, but also for the extension to The Laurels;

(2) A personal guarantee for the bank loans, alongside the guarantees given by the Thinds; and

(3) A substantial role in running the businesses, and not merely offering childcare.

141. As against this, I bear in mind that the 2011 Option Agreement tends to suggest that Mr Thind regarded Mr Gill as beneficial owner of his shares in JEL (see paragraphs 73 and 74 above), as does Mr Basu's email of 3 January 2018 (see paragraph 97 above). However, on balance I conclude that these are not sufficient to outweigh the factors set out above.

142. I have considered whether it is inherently plausible that the Thinds created a trust for all the grandchildren of Mr Gill:

(1) I bear in mind the agreed evidence that Sikh families (or at least this family) regarded all cousins as being siblings and that the Thinds were very close to Mrs Thind's existing nephews and nieces in 2007.

(2) I also bear in mind that Mr Thind said that he was not close to his own brother's children in 2007.

(3) I do regard it as slightly surprising that the Thinds intended to confer a benefit on their nephews and nieces, as well as their own children, which was not for a fixed sum but extended to one third of the entire value of The Laurels and any other businesses which subsequently became part of JEL (viz. Sherwood).

(4) However, although it seems more plausible that the trust would be limited to the Thind children, no such case is advanced by either of the parties. The only choice, on the evidence, is between a trust for all the grandchildren and full beneficial ownership for Mr Gill.

143. I therefore conclude, by a narrow margin, that Mr Gill received 100 shares in JEL as express trustee for all his grandchildren.

144. This leaves the difficulty of ascertaining the terms of the trust, which are far from clear. I accept that the parties intended the shares to be divided between all grandchildren, but that leaves the question of the cut-off date. The parties contemplated in

> 2007 that Mrs Benning might have further children in the future and I find that they intended to include these children. At the date of the trust, the Thinds had not yet fallen out with Kuldeep and there is nothing to suggest that they intended to exclude Kuldeep's unborn children. However, I have not heard counsel's submissions on when the class was intended to close …. I will need to hear further submissions before declaring the terms of the trust.
>
> 145. If I am wrong in finding that there was an express trust, I would have concluded that Mr Gill's shares in JEL are held on a resulting trust for Mr and Mrs Thind, on the basis that they alone provided the capital for these companies and that Mr Gill's only contribution was by way of loans which have been largely repaid."

45. There is no dispute that there is either a typographical error or some other slip in the first sentence of [140] and the third sentence of [144]. As can be seen from the judge's summary at [80], Mrs Thind's evidence was that the relevant conversation took place in December 2005. Although the judge did not accept Mr Thind's evidence, he gave the same date, as can be seen from the judge's summary in [18(2)]. The trust does not appear to have been constituted until November 2007, but that is a different matter.

The appeal

46. Mr Gill appeals on four grounds. Grounds 1, 2 and 3 are directed to the judge's primary finding of an express trust. Ground 4 is directed to the judge's alternative finding of a resulting trust, and therefore only arises if Mr Gill succeeds on one or more of grounds 1 to 3.

Ground 1

47. Ground 1 is that the judge was wrong in law to hold that, upon the facts he found, Mr and Mrs Thind had discharged the burden of proof upon them to establish an express trust of the shares in favour of Mr Gill's grandchildren.

48. It is well established that an express trust will only arise where the "three certainties" essential for the creation of a trust are satisfied. First, there must be certainty of intention to create a trust. Secondly, there must be certainty as to the subject-matter of the trust. Thirdly, there must be certainty as to the beneficiaries of the trust. Ground 1 concerns the first requirement.

49. Although the judge described the law on this point as uncontroversial and cited the leading authority of *Paul v Constance* [1977] 1 WLR 527, counsel for Mr Gill submitted that the judge had misapplied the principle established by that decision. In that case Mr Constance was a fitter. He was married to the defendant, but they were separated. Seven years before his death Mr Constance met the plaintiff, and they lived together until he died. The dispute concerned the money in a bank account which he and the plaintiff had opened together. When Mr Constance told the manager that they were not married, the manager suggested that the account be put in Mr Constance's

name and Mr Constance agreed. The money mainly consisted of a sum Mr Constance had been paid by his employer in compensation for an injury, but there was also some money won by Mr Constance and the plaintiff at bingo. The judge accepted the plaintiff's evidence that from time to time Mr Constance said to her: "The money is as much yours as mine".

50. Scarman LJ, with whom Bridge and Cairns LJJ agreed, noted at 530C-D that "[n]o particular form of expression is necessary for the creation of a trust, if on the whole it can be gathered that a trust was intended". At 531G he accepted the following statement of principle propounded by counsel for the defendant:

> "… there must be a clear declaration of trust and that means there must be clear evidence from what is said or done of an intention to create a trust — or, as [counsel] put it, 'an intention to dispose of a property or a fund so that somebody else to the exclusion of the disponent acquires the beneficial interest in it.'"

51. It is instructive to see how Scarman LJ considered that principle applied to the facts of the case. He went on at 531H-532F:

> "The judge, rightly treating the basic problem in the case as a question of fact, reached this conclusion. He said:
>
> '… I am quite satisfied that it was the intention of Mrs. Paul and Mr. Constance to create a trust in which both of them were interested.'
>
> In this court the issue becomes: was there sufficient evidence to justify the judge in reaching that conclusion of fact? In submitting that there was, [counsel for the claimant] draws attention first and foremost to the words used. When one bears in mind the unsophisticated character of the deceased and his relationship with the plaintiff during the last few years or his life, [counsel for the claimant] submits that the words that he did use on more than one occasion, 'This money is as much yours as mine,' convey clearly a present declaration that the existing fund was as much the plaintiff's as his own. The judge accepted that conclusion. I think that he was well justified in doing so and, indeed, I think that he was right to do so. There are, as [counsel for the claimant] reminded us, other features in the history of the relationship between the plaintiff and the deceased which support the interpretation of those words as an express declaration of trust. I have already described the interview with the bank manager when the account was opened. I have mentioned also the putting of the 'bingo' winnings into the account and the one withdrawal for the benefit of both of them.
>
> It might, however, be thought that this was a borderline case, since it is not easy to pin-point a specific moment of

> declaration, and one must exclude from one's mind any case built upon the existence of an implied or constructive trust, for this case was put forward at the trial and is now argued by the plaintiff as one of express declaration of trust. … The question, therefore, is whether, in all the circumstances, the use of those words on numerous occasions as between the deceased and the plaintiff constituted an express declaration of trust. The judge found that they did. For myself, I think that he was right so to find."

52. It can be seen from this reasoning that Scarman LJ regarded the issue as one of fact. It can also be seen that, in concluding that the judge was correct to decide as he did, Scarman LJ took into account not only the words used by Mr Constance, but also the character of Mr Constance, his relationship with the plaintiff during the relevant period and his conduct when opening the bank account and with respect to the bingo winnings.

53. Counsel for Mr Gill argued that: (i) *Paul v Constance* established that, as a matter of law, there must be clear evidence of an intention to create a trust; (ii) the facts relied upon by the judge in finding that there was an express declaration of trust did not individually or collectively represent clear evidence of an intention to create a trust; (iii) furthermore, other facts found by the judge provided evidence to the contrary; and (iv) the judge had also failed to take into account the difficulty of ascertaining the terms of the trust.

54. As counsel for Mr and Mrs Thind submitted, this argument conflates two different questions: what must be proved, and the standard of proof required to prove it.

55. What must be proved is an intention to create a trust. If A asserts that a declaration of trust has been made by B in a document, the claim might be analysed in two stages. First, A would have to prove, on the balance of probabilities, that B had signed the document. Secondly, A would have to persuade the court that the document, properly interpreted, constituted a declaration of trust. In principle, a similar two-stage analysis applies if A asserts an oral declaration of trust by B. First, A has to prove, on the balance of probabilities, what B said. Secondly, A has to persuade the court that this demonstrated an intention to declare a trust.

56. The principal difference between these scenarios is that, in the case of a documentary declaration, the first stage of the analysis involves a question of fact whereas the second stage is a question of law, and evidence as to B's subjective intentions and subsequent conduct is not admissible at that stage; whereas, in the case of an oral declaration, the questions of what was said and what was intended by it are both questions of fact, and evidence as to B's subjective intentions and subsequent conduct are admissible: compare the position concerning oral agreements (and agreements made partly in writing, partly orally and partly by conduct) as explained by Lord Hoffmann in *Carmichael v National Power plc* [1999] 1 WLR 2042 at 2049A-D and 2050H–2051C.

57. A secondary difference is that, in the case of an oral declaration, it may well not be possible for the court to make a finding as to the exact words used by B, and so the court may only be able to make a finding as to their gist. In those circumstances, there

would be nothing wrong in the court running the two questions together and asking whether, on the balance of probabilities, B said words that were such as to demonstrate an intention to declare a trust.

58. Turning to the standard of proof, it will be noted that I have referred to the balance of probabilities and have not used expressions such as "clear evidence". Quasi-criminal (e.g. committal) proceedings aside, the standard of proof in civil cases is always the balance of probabilities: *Re B (Children) (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2009] 1 AC 11. No different standard of proof applies to proving an oral declaration of trust. I do not think that Scarman LJ meant to say anything different when, during the course of an extempore judgment, he accepted counsel's submission that there must be clear evidence of an intention to create a trust. Rather, I consider that what he meant was that the words and conduct relied upon must demonstrate a sufficiently clear intention to create a trust.

59. In the present case the judge applied the correct burden of proof, namely that the burden lay upon Mr and Mrs Thind, and the correct standard of proof, namely the balance of probabilities. Taking into account all the sufficiently reliable evidence as to what Mr Gill had said in December 2005, and as to what Mr Gill had said and done subsequently, the judge found on the balance of probabilities that Mr Gill had agreed in December 2005 to hold the shares in trust for all his grandchildren. Although the judge did not explicitly say so, it is clear that he concluded that the words and conduct relied upon did demonstrate a sufficiently clear intention to create a trust. The judge recognised that the declaration of trust that he found had been made by Mr Gill gave rise to a legal question as to when the class of beneficiaries closed, but correctly did not regard that as relevant to the factual question.

60. Thus the judge made no error of law. His conclusion was a finding of fact, and it can only be disturbed if that finding was not open to him.

Ground 2

61. Ground 2 is that the judge was wrong to find as a fact that Mr Gill had received the shares in JEL without making any capital investment. Counsel for Mr Gill accepted that this was a finding of primary fact, and therefore could only be overturned if it was rationally insupportable: see *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2] (Lewison LJ, with whom Males and Snowden LJJ agreed). He argued that the judge was wrong for two distinct reasons. First, Mr Gill had made a capital investment by way of an interest-free loan of £133,000 to JEL (and subsequently had made a further interest-free loan of £280,000 to WHL), part of which remains to be repaid. Secondly, it was to be presumed that Mr Gill had paid the par value for his shares; and even if Mr Gill had not, Mr Gill remained liable to pay the value of the shares in the event of a winding up of JEL.

62. I shall deal with this ground shortly, because counsel for Mr Gill's submissions came nowhere near demonstrating that the judge's finding was rationally insupportable.

63. So far as the first point is concerned, as counsel for Mr and Mrs Thind pointed out, Mr Gill's case and evidence was that the £133,000 was an investment and not a loan. The judge found that it was a loan and not an investment. Thus the distinction the judge drew was the same distinction which Mr Gill himself drew. Furthermore, the

judge was perfectly entitled to take the view that, in this context, a person making an interest-free loan out of familial affection is not making an investment. Finally, it is important not to lose sight of the significance of the judge's finding that the £133,000 was a loan, which is that it supported Mr and Mrs Thind's case as to what Mr Gill had said in December 2005. It did so in two ways. First, it directly supported their account of the conversation. Secondly, it indirectly supported their case as to what Mr Gill had intended, because it made it implausible that Mr and Mrs Thind would have agreed to give Mr Gill a one-third share of JEL beneficially.

64. As to the second point, there is no presumption that Mr Gill paid £100 for the shares and no evidence that he did. The fact he would be liable to pay £100 in the event of a winding-up has no bearing on the factual question of what he said and intended in December 2005.

Ground 3

65. Ground 3 is that the judge was wrong to find that Mr Gill had made an express declaration of trust in favour of his grandchildren. Counsel for Mr Gill submitted that this was an evaluative decision which could be disturbed in accordance with the principles discussed in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at [72]-[78] (McCombe, Leggatt and Rose LJJ). I disagree: the finding was a finding of fact rather than an evaluative decision. It makes no difference which standard of appellate review should be applied, however, since counsel for Mr Gill's submissions again came nowhere near demonstrating that the judge's finding was wrong.

66. The principal point relied upon by counsel for Mr Gill in support of this ground was that the judge had been wrong at [139] to treat Mr Gill's statement to Mr Basu in 2018 that he held the shares in JEL on trust for his grandchildren "for the moment" as supportive of Mr and Mrs Thind's case. Counsel argued that this was both inconsistent with the judge's statement at [102] that it was not entirely clear what Mr Gill had meant and inconsistent with an intention irrevocably to part with the beneficial interest in the shares. I disagree. The significance of the statement is that Mr Gill did not deny that he held the shares on trust. The judge was right to say it is not entirely clear what Mr Gill meant by "for the moment", but it may have been a threat to act inconsistently with the trust. Even if it was, a threat to act inconsistently with a trust is not a denial of the existence of the trust.

67. Counsel for Mr Gill also argued that the judge had failed to take into account five pieces of evidence that were contrary to the existence of an express trust: (a) the 2011 Option; (b) Mr Basu's email dated 4 July 2017; (c) Mr Basu's email dated 3 January 2018; (d) Mr Basu's email dated 3 August 2018; and (e) the transfers of the shares in WHL to JEL.

68. The short answer to this argument is that the judge expressly took at least four of these matters into account: (a) at [25]-[27] and [73]-[74] (paragraphs 34 and 36 above); (b) at [94]-[95] (paragraph 38 above); (c) and (d) at [98] (paragraph 38 above). The weight to be given to them was a matter for him. As to (e), the relevance of this is obscure and so the judge cannot be faulted for not giving it any weight.

Ground 4

69. It follows that ground 4 does not arise for consideration.

Respondents' notice

70. Mr and Mrs Thind contend that, if the judge erred at all, it was in not giving some weight to three pieces of evidence which supported his finding of an express trust. First, Avneesh's evidence (which the judge summarised at [87]) that Mr Gill had told him more than once that the Laurels was held on a trust arrangement for all the grandchildren. Secondly, a WhatsApp message sent by Mrs Benning to Mrs Thind in January 2019 saying:

> "Dad did say trust for grand kids even to me and now he has changed his story. I [don't] want dads money always comes with strings attached but this is the extreme he would go so he doesn't keep his word and would rather give his money away to the lawyers than the grandchildren."

This was adduced as hearsay evidence and Mr Gill did not apply to cross-examine Mrs Benning on it. Thirdly, Satnam Singh gave evidence (which the judge mentioned at [111]) that Mr Thind had told him in 2006 that Mr Gill had lent some money towards the purchase of the Laurels and that the amount Mr Gill had lent was going towards a trust for the Gills' grandchildren.

71. Having regard to my conclusions above, the respondents' notice is not needed. Nevertheless I agree that these items of evidence provide additional support for the judge's finding. The same goes for the point made by counsel for Mr and Mrs Thind, albeit without the benefit of inclusion in the respondents' notice, that it is not now disputed that, as the judge found at [132(i)], Mr Gill had previously agreed in 2004 that he and his wife would accept the share in JIL as trustees for Avneesh, Jeevan and Simran. The fact that he had previously assumed the role of trustee increases the probability that he did so again in the case of JEL in December 2005.

Conclusion

72. For the reasons given above I would dismiss this appeal.

Lady Justice Asplin:

73. I agree.

Lord Justice Peter Jackson:

74. I also agree.