Neutral Citation Number: [2022] EWHC 1237 (Ch)

Case No: CH-2021-BRS-000009

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
CHANCERY APPEALS (ChD)
On appeal from the order of HHJ Berkley dated 11 November 2021 and 9 December 2021
County Court case number: D78YM746

Bristol Civil Justice Centre
2 Redcliff St, Redcliffe, Bristol BS1 6GR

Date: 26/05/2022

Before :

MR JUSTICE ZACAROLI

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Between:

MR IRAJ TOHIDI	**Claimant/ Respondent**
- and –	
MR DAVID ESTRIDGE	**Defendant/ Appellant**

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- -

Clifford Darton QC and Chris Burrows (instructed by **Edward Harte LLP**) for the **Appellant**
Brie Stevens-Hoare QC and Charlotte John (instructed by **Wright Hassall LLP**) for the **Respondent**

Hearing dates: 5 & 6 April 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE ZACAROLI:

1. This is an application for permission to appeal, with the appeal to follow if granted, against two decisions of HHJ Berkley. In the first (the "Main Judgment"), the judge found that the claimant and respondent, Mr Tohidi, was the beneficial owner of various properties, legal title in which was held by the defendant and appellant, Mr Estridge. In the second (the "Barrell Judgment"), the judge refused Mr Estridge's application to re-open the Main Judgment in the light of new evidence.

Background

2. The background is set out at length in the careful and full judgments of the judge. The bare essentials are as follows. Mr Tohidi was a builder who was in the business of acquiring properties, renovating them, and selling them for a profit. Having run out of access to funding to acquire properties in his own name, he sought the help of Mr Estridge, a mortgage broker. Mr Estridge agreed to help out, by acquiring properties and taking out a mortgage in his own name, but holding the properties on trust for Mr Tohidi.

3. Mr Estridge claims, however, that as a result of events in 2008 he became, and remains, the sole beneficial owner of the properties.

4. He first claimed that this was as a result of an agreement made at the outset of his relationship with Mr Tohidi, in 2005 (the "2005 Agreement"). It was accepted by both parties that an agreement had been made at that time, including as to some form of profit entitlement for Mr Estridge, but they disagreed as to its terms. Relevantly, Mr Estridge contended that it was a term of the 2005 Agreement that if Mr Tohidi did not pay him what was due under that agreement, then the beneficial interest in the properties would automatically transfer to him (Mr Estridge).

5. Second, and in the alternative, Mr Estridge claimed that by 2008 Mr Tohidi owed him substantial sums under the 2005 Agreement, and that in 2008 Mr Tohidi agreed to pay him £80,000 on terms that, if it was not paid, Mr Tohidi's beneficial interest in the properties would be automatically relinquished in favour of Mr Estridge (the "First 2008 Agreement"). Mr Tohidi did in fact sign a cheque for £80,000 in favour of Mr Estridge, but quickly countermanded it. Mr Estridge claims that the beneficial interest in the properties was for that reason automatically transferred to him, pursuant to the First 2008 Agreement.

6. Third, and in the further alternative, Mr Estridge claimed that, in or about July or August 2008, he reached a new agreement with Mr Tohidi (the "Second 2008 Agreement"), which was subsequently evidenced by a letter of 5 August 2008 (the "5 August Letter"). Mr Estridge contended that this was a freestanding agreement under which Mr Tohidi agreed to transfer the beneficial interest in the properties to him. It was made against the background that Mr Estridge claimed that Mr Tohidi owed him substantial sums of money. The 5 August Letter recorded that "no monies are to change hands". In other words, Mr Tohidi was to be relieved of the obligation to pay that money but otherwise no payment was to be made by Mr Estridge for the transfer of the beneficial interest in the properties. The reason stated in the letter was that this was "in view of the sums that David Estridge has already expended in mortgage and other payments, such as insurance etc".

7. Mr Tohidi denies that he ever agreed to relinquish his beneficial interest in the properties on any of these bases. He says that all that was agreed in 2008 was that Mr Estridge would take over direct receipt of rents, and management of the properties, so as to have a more direct and efficient control of the portfolio. That agreement was reached in circumstances where Mr Tohidi was facing serious financial difficulties, and Mr Estridge was extremely concerned about his own financial exposure as a result of the mortgages he had entered into in order to acquire legal title to the properties.

The judge's conclusions in outline

8. Central to each of Mr Estridge's version of events is that by the summer of 2008 Mr Tohidi owed him considerable amounts of money. It is now accepted, however, that that was not so. Mr Estridge (as trustee) had never accounted to Mr Tohidi (as beneficiary) in respect of payments made/received by him in relation to the portfolio of properties. Following extensive forensic analysis undertaken by counsel at the trial, the judge concluded that, contrary to Mr Estridge's claims at the time, as at July 2008 he in fact owed a substantial sum to Mr Tohidi, and there was significant equity in the portfolio.

9. The judge rejected Mr Estridge's case that he and Mr Tohidi made either the 2005 Agreement or the First 2008 Agreement, and there is no appeal against those findings.

10. As to the Second 2008 Agreement, the judge concluded that the only agreement reached in "about June or July 2008" was as Mr Tohidi claimed: namely that Mr Estridge would take over receipt of rents and the management of the properties.

11. He further concluded that Mr Tohidi had not signed the 5 August Letter (a conclusion which was supported by expert evidenced that had been adduced by Mr Tohidi).

12. The judge concluded, in the alternative, that had Mr Tohidi entered into the Second 2008 Agreement, and signed the 5 August Letter, it necessarily followed that Mr Estridge (as trustee of the properties for Mr Tohidi) had committed a clear breach of the self-dealing rule. That was because, among other things, the Second 2008 Agreement had been made against the (false) claim that Mr Tohidi owed Mr Estridge substantial sums of money and that there was negative equity in the property portfolio, that the supposed consideration for the transfer did not exist, that Mr Estridge had failed to account properly to Mr Tohidi as trustee of the properties, and that he failed to advise Mr Tohidi to get independent legal advice. There is no appeal against the conclusion that the entry into the Second 2008 Agreement constituted a breach of the fair dealing rule. Mr Estridge does, however, seek permission to appeal against the judge's decision that Mr Tohidi was not barred by reason of his delay in asserting his claim to the beneficial interest in the properties.

13. Mr Tohidi also contended that even if he had entered into the Second 2008 Agreement and even if he had signed the 5 August Letter, the Second 2008 Agreement was void as it was not made in writing. He claimed that the 5 August Letter did not satisfy s.53 LPA 1925, as it did not purport itself to effect a disposition of the beneficial interest in the properties, but was merely a document evidencing a prior oral agreement to that effect. There is a disagreement between the parties as to whether the judge actually decided that the Second 2008 Agreement (had he found it to have been made) would have been void on this basis, or merely that he probably would have so found.

14. After the trial (which was itself held over two separate hearings, an adjournment having been necessitated by failings in Mr Estridge's disclosure) certain correspondence came to light as a result of separate proceedings which Mr Tohidi had commenced against his former solicitors, Eric Robinson ("ER"). Among that correspondence was a letter from solicitors who had been instructed by Mr Tohidi in 2009, D'Angibau, to ER dated 1 December 2009. The letter was written in the context of a request made by D'Angibau to ER, that they release their files to Mr Tohidi. In the letter of 1 December 2009, reference was made by D'Angibau to the 5 August Letter, in terms which made it clear that D'Angibau had a copy of that letter. Once the 1 December 2009 letter had come to Mr Tohidi's attention, he disclosed it to Mr Estridge.

15. Mr Estridge then made an application to the judge, following the handing down of the Main Judgment in draft. Initially, it appeared that Mr Estridge was seeking a retrial of the case, in light of the new evidence, or in the alternative that there be a limited further hearing to enable cross examination of, at least, Mr Tohidi, with the benefit of the new evidence. In essence, Mr Estridge maintained that the fact that Mr Tohidi's former solicitors had once had the 5 August Letter in their possession was highly relevant to the question whether Mr Tohidi had signed it or (contrary to his evidence at trial) was at least aware of its contents. Accordingly, his failure to object to its terms at an earlier stage supported the contention that the Second 2008 Agreement had been made. In a supplemental skeleton argument filed in respect of that application, Mr Darton QC, who appears (and appeared below) for Mr Estridge, said that Mr Estridge was simply asking the court to re-consider its draft judgment under the "*Barrell*" jurisdiction, in light of the D'Angibau correspondence, rather than any form of retrial.

16. The judge refused that application. He concluded that given the inability of Mr Estridge to satisfy the first limb of the test in *Ladd v Marshall* (a test which, while not directly applicable, was a highly relevant consideration) and having regard to the overriding objective, the new evidence was insufficient of a "game-changer" to warrant re-opening the Main Judgment.

The grounds of appeal

17. The application for permission to appeal is made on eight grounds. The first five grounds relate to the Main Judgment.

Ground 1. The judge's approach to Mr Tohidi's evidence was flawed for the purposes of the test set out in *NatWest Markets PLC v Bilta (UK) Ltd* [2021] EWCA Civ 680 ("*Bilta*"), which requires the court to test the oral evidence against the contemporaneous evidence and known or probable facts, and to consider the overall plausibility of the evidence and supporting or adverse inferences that can be drawn from other documents.

Ground 2. The judge erred in holding that his finding that Mr Tohidi had not signed the 5 August Letter was "bolstered" by the evidence from the handwriting expert. Mr Darton accepted, however, that if he were to succeed on Ground 1 or Ground 3, he did not need to succeed on Ground 2 and, conversely, if he failed on those grounds, Ground 2 could not save the appeal.

Ground 3. The judge fell into error in concluding that the parties had agreed in June or July 2008 that Mr Estridge would simply take "full control of the properties", as distinct from the transfer of beneficial ownership, because it had been Mr Tohidi's case that no

agreement at all had been reached in the summer of 2008 and, instead, an agreement as to taking over control of the properties had been reached at the beginning of the year. Accordingly, the judge had wrongly held that Mr Tohidi did not sign the 5 August Letter on the basis of a factual case which Mr Tohidi had not himself advanced, contrary to the principles set out in *Satyam Enterprises Ltd v Burton* [2021] EWCA Civ 287.

Ground 4. The judge erred in law or acted procedurally unfairly in finding (in the alternative) that the Second 2008 Agreement was to be set aside on the basis of the breach of the fair dealing rule, because the judge failed to address Mr Estridge's arguments that Mr Tohidi had waived any breach of that rule. Had he done so, he should have concluded that Mr Tohidi had confirmed the 5 August Letter or acquiesced in it, or had failed to set aside the transaction within a reasonable period of time.

Ground 5. The judge erred in finding that if the 5 August Letter had been signed by Mr Tohidi, it did not comply with s.53 of the LPA 1925.

18. The remaining grounds relate to the Barrell Judgment.

Ground 6. The judge erred in law in excluding the D'Angibau correspondence on the grounds that it could reasonably have been available at the trial for the purposes of the first limb of the test in *Ladd v Marshall*.

Ground 7. The new evidence was a "game-changer" which should have been admitted because it probably would have had an important influence on the outcome of the case.

Ground 8. The judge's conclusion that the new evidence was not a "game-changer" was based on findings of fact for which there was no evidence and/or which were contradicted by Mr Tohidi's own evidence.

Ground 1

19. Under Ground 1, Mr Estridge challenges the judge's findings of fact. It is common ground that such a challenge faces a high hurdle, as succinctly stated by Lewison LJ in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5:

> "114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] R.P.C.1; *Piglowska v Piglowski* [1999] 1 W.L.R. 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 W.L.R. 1325; *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 W.L.R. 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 W.L.R. 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:

> i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
>
> ii. The trial is not a dress rehearsal. It is the first and last night of the show.
>
> iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
>
> iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
>
> vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done.
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> 115. It is also important to have in mind the role of a judgment given after trial. The primary function of a first instance judge is to find facts and identify the crucial legal points and to advance reasons for deciding them in a particular way. He should give his reasons in sufficient detail to show the parties and, if need be, the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. There is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury. Nor need he deal at any length with matters that are not disputed. It is sufficient if what he says shows the basis on which he has acted. These are not controversial observations: see *Customs and Excise Commissioners v A* [2002] EWCA Civ 1039; [2003] Fam. 55; *Bekoe v Broomes* [2005] UKPC 39; *Argos Ltd v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] U.K.C.L.R. 1135."

20. Recognising this high hurdle, Mr Darton focussed his submissions under Ground 1 on what he submitted was an error of law in that the judge failed to follow the approach mandated by the Court of Appeal in *Bilta*, itself based on the comments of Leggatt J (as he then was) in *Gestmin SGPS SA v Credit Suisse UK Ltd* [2015] EWHC 3560.

21. There were two aspects to Mr Darton's submission. First, he relied on Leggatt J's comments in *Gestmin* that "…the best approach for a judge to adopt in the trial of a commercial case is, in my view to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual

findings on inferences drawn from the documentary evidence and known or probable facts." Second, he relied on what the Court of Appeal has recently said, in *Bilta* and in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, about delay by a trial judge in handing down judgment.

22. I will deal with the latter point first. In *Bilta*, judgment was handed down by the trial judge some 19 months after the conclusion of the trial. In *Bank St Petersburg*, the delay was 22 months. In the latter case, the Chancellor commented that the maximum time that parties could expect to wait for a judgment was three months. He was satisfied that the judge had meticulously read all the transcripts, and had not forgotten or omitted consideration of any material parts of the evidence. He nevertheless observed that the delay may have meant that the judge was less able to deal with the findings he made in the round. In *Bilta*, the Court of Appeal concluded (at [96] to [97]) that the delay of 19 months was a significant factor because whereas it could normally be assumed, where a judge omitted to refer to a particular matter in reaching a finding of fact, that the judge nevertheless had all the relevant materials in mind, that same assumption could not be made after such a delay.

23. In the present case, the trial commenced on 25 February 2020. It was adjourned on 27 February 2020, with Mr Estridge being ordered to provide further disclosure. The trial resumed on 13 August 2020 and finished the following day. The judge circulated a draft of the Main Judgment on 31 January 2021. The hearing of Mr Estridge's application under the *Barrell* jurisdiction took place on 16 July 2021. The Main Judgment was then handed down on 11 November 2021 and the Barrell Judgment was handed down on 9 December 2021 (a draft having been circulated on 7 November 2021).

24. While the overall period between the commencement of the trial and the formal hand-down of the two judgments was as long as that in the *Bank St Petersburg* case, that is an unfair comparison. The Main Judgment was handed down in draft just over five months after the end of the trial. It is true that this was 11 months since the end of the first part of the trial (the additional delay being caused by the adjournment necessitated by Mr Estridge's disclosure failings), but (as noted in the Main Judgment) the judge had full transcripts of the evidence provided at the first trial and was no doubt required to immerse himself in the detail again in order to conclude the trial in August 2020.

25. The five-month delay between the trial and the handing down in draft of the Main Judgment, although longer than the three months mandated by the Court of Appeal, is of a different order to that in either *Bilta* or *Bank St Petersburg* or the other cases there referred to. The length of time to prepare the judgment must also be seen in the context that, while there were only a few days of live evidence, the judge was presented with a trial bundle extending to more than 3,000 pages, a large number of authorities and (as I develop below) a number of difficult factual issues to resolve. In all the circumstances, this case does not involve the sort of excessive delay which would lead an appeal court to abandon or modify the usual approach to the trial judge's findings of fact, as described by Lewison LJ in *Fage* (above).

26. The focus of the other aspect of Mr Darton's submissions under Ground 1 (the *Gestmin* approach) was on the 5 August Letter. He contended that the judge erred in concluding that Mr Tohidi had not signed the 5 August Letter or agreed to its contents. (A second argument raised under Ground 1, that in concluding that the parties had agreed in

June/July 2008 merely that Mr Estridge would take full control of the properties the judge wrongly reached a conclusion on the facts that was not advocated by either party, is dealt with under Ground 3).

27. Mr Darton referred to the 5 August Letter as an "agreed document" and a "known reference point" for the purposes of the "test in *Bilta*". In his skeleton argument, he made the following points relevant to Ground 1:

(1) It followed, from the judge's acceptance that the 5 August Letter was drafted on instructions from Mr Estridge, that Mr Estridge must have understood it to reflect the prior agreement of the parties;

(2) The countersignature on the 5 August Letter was consistent with the fact that Mr Tohidi later executed a letter to letting agents, dated 11 August, directing rents to be paid to Mr Estridge;

(3) The judge, in failing to determine who forged the 5 August Letter, took another "analytical mis-step in considering the known facts and documents against the disputed issues";

(4) The judge found that Mrs Maidment may have given a copy of the 5 August Letter to Mr Tohidi, such that even if he did not sign it his denials of having seen it until 2018 were inconsistent with the case he put forward;

(5) The judge failed to conduct any analysis of why, if Mr Tohidi had been in a parlous financial state, he did nothing thereafter for many years to claim his interest in the properties, and why the 5 August Letter had not been discovered in "many meetings" between Mr Tohidi and ER concerning an IVA in 2009, or why a forger would take the risk of being discovered;

(6) The "only conclusion" the judge could have come to was, therefore, that Mr Tohidi knew of and acknowledged the 5 August Letter, but seeks to deny it now only after his IVA and divorce are behind him;

(7) ER had confirmed (in a letter to HMRC in November 2010) the transfer of the beneficial interest in the properties to Mr Estridge (as described in the 5 August Letter);

(8) The judge failed to address the above evidence, contrary to the obligation to do so under the dicta in *Bilta*. Instead, he based his decision as to "who had been the signatory to the [5 August] Letter almost entirely on the recollection of the Respondent and of the Appellant's witness, Mrs Maidment, contrary to the approach in *Gestmin*".

28. In oral argument, these points were developed or supplemented as follows:

(1) The judge wrongly addressed the question as to what the parties had agreed *before* turning to deal with the 5 August Letter. Mr Darton submitted that the 5 August Letter, as an agreed document (in the sense I have referred to above) should have been an essential part of the analysis as to what was agreed, and should have led the

judge to the opposite conclusion given that its terms are at odds with his findings as to what had been agreed.

(2) This demonstrated a key failing, according to *Gestmin*, namely relying on the recollection of witnesses (citing the judge's comment that Mr Tohidi's evidence that he had not seen the 5 August Letter until 2018 had the "ring of truth" about it) instead of inferences to be drawn from contemporaneous documents.

(3) The judge failed to stand back and test his conclusions in respect of the 5 August Letter by asking questions such as: if Mr Tohidi was not aware of the letter in August 2008, it would surely have come up in discussions between him and ER in 2009 relating to a possible IVA, so why was there no reaction from him at that point? Given another agreed document was a letter from ER to Mrs Maidment of 6 August 2008, which asked Mrs Maidment to bring the 5 August Letter to Mr Tohidi's attention, what reason would there have been for her not doing so? Having concluded (at [254] of the Main Judgment) that Mrs Maidment *may* have given Mr Tohidi a copy of the 5 August Letter, why did that not evoke a major response from him?

(4) Although the judge was not required to determine *who* forged the 5 August Letter if Mr Tohidi had not signed it, he was obliged to consider the *probabilities* of how a signed version appeared on ER's files, which he failed to do. Had he done so, he ought to have concluded that it was not probable that anyone else would have forged it, taking into account that the "forger" would have to be confident that the forgery would not be discovered.

(5) The judge's principal reasoning in addressing the 5 August Letter was flawed, because it focused on the failings by ER in ensuring that their client (Mr Tohidi) was fully aware of the implications of signing it. This, said Mr Darton, had no bearing on the *provenance* of the letter, and failed to meet the point that it was an accepted fact that the letter had been drafted by ER on the instructions of Mr Estridge.

(6) There was insufficient reasoning for the judge's conclusion that another letter (dated 11 August 2008, in which Mr Tohidi purportedly referred to the properties as belonging to Mr Estridge) was forged.

29. Impressively though these points were advanced by Mr Darton, I am not persuaded that they demonstrate an error of law in the judge's approach.

30. At times, Mr Darton's submissions risked elevating Leggatt J's comments in *Gestmin* to a hard statement of principle. Leggatt J's warning in *Gestmin* was as to the fallibility of human memory. His comment that little if any reliance should be placed on the recollections of witnesses, as opposed to "inferences drawn from the documentary evidence and known or probable facts" does not altogether remove the relevance of what witnesses purport to recollect. Nor does it preclude a judge from reaching a conclusion based on his or her perception of a witness's reaction to events, as part of the overall picture.

31. In the particular passages of the judgment highlighted by Mr Darton, the judge was doing just that: commenting that Mr Tohidi's reaction to the allegation that he signed

the 5 August Letter – or at least signed it knowing and understanding what it meant – had the ring of truth about it (see the Main Judgment at §248, and §180, to which the later paragraph implicitly refers back). More importantly, however, this was far from the only – or indeed a principal – basis for the judge's conclusion on the second 2008 Agreement.

32. Reading (as it must be read) the judgment of the judge as a whole, I am satisfied that his approach to the critical finding of fact – i.e. what was agreed between Mr Tohidi and Mr Estridge in 2008 in relation to the properties – was one which he was entitled to take, and was consistent with legal principles and the comments of Leggatt J in *Gestmin*. It was based on a careful review of the entirety of the evidence, and the inherent probabilities arising from that evidence.

33. It is important, in analysing the judgment, to keep in mind that the critical question was what had in fact been agreed between the parties in 2008, and *not* whether the 5 August Letter was signed by Mr Tohidi. The letter was one aspect of that question. It was, however, only one aspect. I do not accept Mr Darton's submission that it is an "anchor point" which the judge should have accepted in preference to the recollection of the witnesses. While it was common ground that the letter was genuine, in the sense that it was written by ER, and purported to reflect their understanding of what they had been told by Mr Estridge, it was certainly not accepted to be an accurate reflection of what had been agreed between Mr Estridge and Mr Tohidi. Nor must it be taken, as Mr Darton submitted, to reflect even Mr Estridge's understanding of the agreement made. For reasons which the judge gave in the Main Judgment, and which I address below, it was far from being a reliable source of evidence in either respect.

34. I consider that there was ample evidence on which the judge was entitled to base his conclusion that the only agreement reached in 2008 was for the transfer of the right to receive rents and manage the properties. That evidence included the following.

35. First, neither Mr Estridge nor Mr Tohidi had a sophisticated understanding of a number of legal concepts that were relevant to the question as to precisely what they had agreed to transfer: beneficial title or the right to receive rents and manage the properties. Second, Mr Estridge's case that he acquired the beneficial interest in the properties pursuant to the Second 2008 Agreement was inconsistent with the two other ways in which he claimed that beneficial interest in the properties had passed to him. Third, that case was one which emerged relatively late in the course of the proceedings. Fourth, Mr Estridge's own witness statement did not in fact support that case, so that the judge was faced with the fact that *neither* of the parties to the alleged agreement supported the Second 2008 Agreement in their witness statements. Fifth, when asked at trial what he would have done had a sale of the properties in 2008 produced a surplus, Mr Estridge said he would have paid it to Mr Tohidi. Although he then qualified it by saying he believed it would have been the right thing to do, as opposed to because he believed he was legally obliged to do so, the judge was entitled to place heavier reliance on his first response. Sixth (and a point which the judge considered to be of some importance in view of the fact that the alleged agreement was one in which Mr Tohidi was deprived of his interest in the properties for no real consideration), Mr Tohidi had put substantial time and effort into building works on the property portfolio.

36. There is nothing inconsistent with Leggatt J's comments in *Gestmin* in relying on these matters. The judge did not place undue reliance on the recollection of witnesses. He

was fully entitled, in my view, to take into account the fact *neither* party in fact recalled making the agreement in the terms alleged by Mr Estridge, and that Mr Estridge had asserted versions of events that were inconsistent with it.

37. As to Mr Darton's submission that the judge addressed the 5 August Letter only after he had reached a conclusion about what had been agreed, I accept the submission of Ms Stevens-Hoare QC, who appeared for Mr Tohidi, that the fact that the judge addressed matters in a linear fashion does not mean that he did not have in mind, at an earlier part of his judgment, matters that he addressed later on. In fact, at the point in his judgment where he reached his conclusion as to what had been agreed, he had already referred to, cited extracts from and commented upon the surprising features of the 5 August Letter (see in particular §39-41 and the second set of paragraphs wrongly numbered §36-37).

38. I accept that, as Mr Darton submitted, the numerous "extraordinary aspects" of the 5 August Letter which the judge identified (at §237 to §245) have no bearing on the provenance of the letter. That, however, is not the point the judge was addressing. As is clear from §236 of the Main Judgment, the first issue he had to address was how the 5 August Letter came about "coupled with the fact that its terms are at odds with my findings on the 2008 Agreement". In other words, he was here focussing on the probative value of the 5 August Letter as evidence of what had in fact been agreed between Mr Estridge and Mr Tohidi. All of the "extraordinary aspects" of the letter do indeed, in my judgment, undermine its value as a record of what the two men had agreed. The absence of any attendance note from the solicitors (who themselves did not give any evidence), the lack of any steps taken by the solicitors to ascertain that Mr Tohidi (as beneficiary) was protected in circumstances where the agreement purported to deprive him of all beneficial interest in the trust property, and the lack of any direct contact between the solicitors and Mr Tohidi, all go to undermine the value of the letter as evidence of what had in fact been agreed. For similar reasons, it cannot be inferred that the letter accurately reflects what Mr Estridge himself understood had been agreed. That is particularly so when it is appreciated that neither Mr Tohidi nor Mr Estridge had a sophisticated understanding of legal concepts and that ER purported to set out in the letter what they "understood" to be the terms of the alleged oral agreement.

39. Accordingly, I consider that the judge was entitled to find that the fact that ER wrote the 5 August Letter did not undermine his conclusion, based on all the other evidence, as to the terms of the agreement that had been reached between the parties in 2008.

40. Further, I do not accept Mr Darton's submission that the judge failed, in reaching this conclusion, to stand back and test it against all the evidence.

41. Insofar as this submission is based on the lack of reaction that the terms of the letter must have evoked from Mr Tohidi, it must be seen in the context of the judge's conclusions as to the way Mr Tohidi worked – in particular that his business was a "team" (see §76) and that he was prone to relying on "trusted associates", including to the extent of signing a document put forward by them without giving consideration to it (see §179-181). The fact that, as the judge found, Mrs Maidment was someone Mr Tohidi trusted is important given that it was Mr Estridge's case that Mrs Maidment was the person who took the 5 August Letter to Mr Tohidi.

42. Insofar as it is based on Mr Tohidi's failure to assert his interest in the properties for a long time, the judge rejected the contention that Mr Tohidi had failed to do anything over the intervening years to make contact with Mr Estridge or to assert his interest. I find no basis to interfere with that conclusion of fact. It is true that Mr Tohidi could have done far more to assert his interest prior to 2015, but the judge clearly had this in mind in reaching his conclusion (see, for example, §204 of the Main Judgment).

43. Insofar as the submission is based on the fact that Mr Tohidi discussed a potential IVA with ER in 2009, and that in that context ER must have pointed out that he no longer owned the properties, I similarly do not accept that this reaches above the necessary threshold. The evidence was that Mr Tohidi had only a preliminary discussion with the solicitors on the possibility of an IVA. There was no evidence from ER. It is of course possible that ER raised with Mr Tohidi, in the preliminary discussion about an IVA, the fact that Mr Estridge claimed to be the beneficial owner of the properties, but it is also possible that they did not do so. If they did, nothing is known about the terms in which they did so. The judge was aware of the issue (recording at §163, for example, Mr Darton's submission on it). I do not think that his failure to provide a specific answer to it is enough to show that the conclusion he reached as to the Second 2008 Agreement was wrong in law or one that no reasonable judge could have reached.

44. Mr Darton also placed reliance on the signature of Mr Tohidi on the letter of 11 August 2008 (directing rents to be paid to Mr Estridge). He criticised the judge's conclusion that this signature was also forged. In my judgment, however, the 11 August 2008 letter is of little if any relevance to the key issue determined by the judge. That is because, even assuming Mr Tohidi signed it, its terms are neutral on the question whether the agreement reached in 2008 was as to transfer of control of the portfolio or transfer of beneficial ownership. The reference in it to the properties being "owned" by Mr Estridge does not distinguish between legal and beneficial ownership, particularly when it is appreciated that neither of the parties had a sophisticated understanding of legal concepts.

45. In relation to all of these matters relied on by Mr Darton, as I have already noted, it is not enough to identify factors which weigh in the balance against the judge's conclusion. When weighed with the matters I have referred to above, on which the judge relied in reaching his conclusion as to what was agreed between the parties, I do not think that Mr Darton's criticisms of the judge in this respect reach the threshold of demonstrating an error of law.

46. In light of the conclusions of the judge to which I have already referred, the question whether the 5 August Letter was forged assumes considerably less importance. That was the conclusion the judge reached, at §246: "…the 5 August letter is a document providing only flimsy support for Mr Estridge's case, *whether or not Mr Tohidi signed it*." As I have endeavoured to explain, I do not think that Mr Darton's arguments under this first ground of appeal – based on *Gestmin* – demonstrate an error of law in that conclusion. It follows that, even if the judge's conclusion that the 5 August Letter was forged was wrong, that would not affect his main finding as to the terms of the underlying agreement.

47. On the question of whether Mr Tohidi signed the letter, the only positive evidence adduced by Mr Estridge was that of Mrs Maidment. The judge rejected her evidence, and it is not suggested that he was wrong to do so. Mr Darton's principal complaint is

that while the judge was not required to determine *who* forged the document, he was required to consider the likelihood that it was forged at all and that, in this respect, he failed to grapple with the problem that the "forger" would have risked discovery. However, as Ms Stevens-Hoare submitted, the purpose of the 5 August Letter was limited to recording an agreement reached between ER's clients, to be placed on ER's file for its comfort. It was not a document that was to be put to any other use, where its falsity would quickly become apparent. Set against the fact that the judge (having rejected the evidence of Mrs Maidment) had no reliable evidence as to how the letter came to be supplied to Mr Tohidi, or signed by him, I do not think that his conclusion on the question of forgery was one which was not open to him.

48. For the above reasons, while I consider that the arguments presented under Ground 1 are sufficient to warrant permission to appeal being granted, I dismiss the appeal based on Ground 1.

Ground 2

49. As I have already noted, Mr Darton accepted that he could not succeed on Ground 2 if he failed on other grounds. Given my conclusions on the other grounds, I accordingly refuse permission to appeal on Ground 2 on the basis that it does not present a real prospect of a successful appeal.

Ground 3

50. I can deal with this ground shortly. I also consider that it does not give rise to an argument with a real prospect of success. The fact that the judge concluded that the agreement reached in 2008 was in the terms contended for by Mr Tohidi, but was not made at the time Mr Tohidi claimed it had been made, is *not* in my judgment an example of a court adopting its own fact-theory which is not advanced by either party. As Briggs LJ said in *Sibir Energy Ltd v Slocom Trading Ltd* [2014] EWCA Civ 83, at §70:

> "It is commonplace in civil litigation for parties to advance rival evidential cases, and support them by single-minded submissions, but for the judge to find that the truth lay not at the opposing ends of the spectrum thereby created but somewhere in the middle. This is, as Mr John rightly submitted, a classic example of such a case. To suggest that the judge was constrained to opt for one or the other of the two extremes contended for would be to impose an unrealistic, mechanistic and unjust fetter upon the trial judge."

51. Those comments apply with equal force in this case. The suggestion that the judge was wrongly coming up with a "third" and unpleaded theory, in accepting Mr Tohidi's evidence as to the substance of what was agreed in 2008, but rejecting his evidence as to the precise timing of that agreement, is in my judgment hopeless. Accordingly, I refuse permission to appeal on Ground 3.

Grounds 4 and 5

52. In light of my conclusions on Grounds 1 to 3, even if these grounds of appeal had merit, they would not lead to the decision of the judge being overturned. For that reason, I refuse permission on these grounds.

The Barrell Judgment

53. The application for permission to appeal the judge's decision in the Barrell Judgment is an appeal against the exercise of the judge's discretion. It is common ground that such an appeal cannot succeed unless it is shown that the judge applied the wrong principles, took into account matters that were irrelevant, failed to take into account relevant matters or reached a decision that was perverse and outside of the generous ambit afforded in the case of exercise of discretion: see for example *Walbrook Trustee (Jersey) Ltd v Fattal* [2008] EWCA Civ 427 at §33.

54. The alleged errors of principle are set out in Grounds 6 to 8.

Ground 6

55. The essence of Mr Darton's submission under this ground is that the judge misunderstood, and misapplied, the test of "fault" in considering the explanation for why the new evidence was not available at trial for the purposes of the first limb of the test in *Ladd v Marshall*.

56. At one point, it appeared to be submitted that where the fault in not producing relevant evidence at trial was that of the party's solicitor, that should not be visited on the party himself. I understood it to be accepted, however, that no distinction is to be drawn between solicitor and client for this purpose: see *Evans v Tiger Investments Ltd* [2002] EWCA Civ 161, per Potter LJ at §39.

57. Instead, Mr Darton submitted that the judge should have held that Mr Tohidi was himself partly responsible for the fact that the new evidence had not been produced at trial, and that his conclusion (at §49 and §50 of the Barrell judgment) that Mr Tohidi was "wholly innocent of any blame" was an error of law.

58. He cited in support of this proposition *Skrzypkowski v Silvan Investments* [1963] 1 WLR 525. In that case, a retrial was allowed in a case where a tenant applied for a new lease of business premises. The landlord's surveyor had inspected the premises, but missed the fact that the demise included a garage. He ought to have known that it included a garage, but when he was shown around by the tenant, the tenant had not mentioned it. The judge concluded that, although the landlord's surveyor was at fault the tenant had significantly contributed to the error, by putting the surveyor "off his guard" in showing him around the premises without referring to the existence of the garage. The Court of Appeal refused to interfere with that decision, concluding that there was no error law in the approach taken by the trial judge.

59. I consider that the circumstances of this case are far removed from those in *Skrzypkowski*. The key document in question was the letter from D'Angibau of 1 December 2009, which referred to them having in their possession a copy of the 5 August Letter. The 1 December 2009 letter had at all times been within Mr Estridge's control, being in the possession of *his* solicitors. It was within ER's files and was sent to Mr Estridge's solicitors conducting the litigation, as part of a PDF containing a

number of documents. His solicitors had disclosed some of the documents within that PDF, but had failed to disclose the letter of 1 December 2009 or otherwise deploy it at trial. There can be no doubt that Mr Estridge (through his lawyers) was at fault in not making the document available at trial.

60. The judge noted, at §9 of the Barrell judgment, that although this was a document which had once been in the possession of solicitors formerly acting for Mr Tohidi, he (being a litigant in person) had *not* been obliged to produce a list of documents (in which documents that had once been, but were no longer, in his possession or control would be listed). He was instead only obliged to disclose such documents he had in his control or possession. The judge said that "By this time, D'Angibau had ceased trading and the file had been destroyed. The only surviving copy of the correspondence was with ER/WR" (WR being Mr Estridge's solicitors by the time of the trial). The judge also took account of the fact that Mr Tohidi *had* sought to obtain copies of documents from ER but, at Mr Estridge's insistence, he had been denied access to them. In other words, the reason Mr Tohidi did not already have a copy of the letter in his possession was itself due to Mr Estridge's actions.

61. Mr Darton also submitted that the fact that the letter of 1 December 2009 existed itself proved sufficient fault on the part of Mr Tohidi: it showed that his evidence that he had not seen the 5 August Letter until 2018 was untrue, either knowingly or mistakenly. I do not accept that submission, which begs the question as to what the evidence of Mr Tohidi – and perhaps others that might be called if there were to be a re-hearing on this point – would be.

62. In these circumstances, I consider that the judge was fully entitled to conclude that Mr Tohidi was wholly without *blame*. He had not failed to comply with any disclosure obligation imposed upon him. Critically, unlike in the *Skrzypowski* case, Mr Tohidi had not contributed in any way to the error made by Mr Estridge or his lawyers. Accordingly, I find no error of law in the judge's conclusion in this respect.

Grounds 7&8

63. These grounds criticise the judge's conclusion that the D'Angibau Letter was not a "gamechanger". Mr Darton submitted that it was, in the sense that it would have had an important impact on the outcome at trial, even if not decisive.

64. That was because: it increased the probability that Mr Tohidi had received a copy of the 5 August Letter, and thus undermined the judge's finding that Mr Tohidi's evidence that he had not seen the letter had the ring of truth about it; it made Mr Tohidi's failure to claim back the properties until 2015 even more inexplicable; it made Mr Tohidi's evidence that he had not instructed D'Angibau to investigate a complaint against ER and that he had not known of the 5 August Letter until 2018 untrue; and the D'Angibau correspondence could not be explained away by the involvement of "Mr Farid" as, on Mr Tohidi's case that gentleman would have had no reason to enquire of Mrs Maidment as to the 5 August Letter (as postulated as a possibility by the judge at §51 of the Barrell Judgment), and it was highly unlikely that Mr Farid would have obtained a copy of it and provided it to D'Angibau without taking the trouble to enquire of Mr Tohidi whether the contents of the letter were true.

65. It is important to keep in mind that the judge's decision, that there had been no agreement to transfer beneficial interest in the properties, was reached *whether or not* Mr Tohidi signed the 5 August Letter and – necessarily therefore – whether or not he had seen it before 2018. In light of this, the short answer to these grounds of appeal is that the new evidence would have had insufficient impact on the judge's principal reason for finding in Mr Tohidi's favour to reach the necessary threshold. I accept that the D'Angibau correspondence had greater relevance to the question of delay and waiver but, given the judge's conclusion on the Second 2008 Agreement, that point did not arise (and, given my conclusions on Ground 1 and 3, it does not arise on appeal either). Accordingly, I consider that the judge's conclusion that it was not a "game-changer" to be unimpeachable.

66. In any event, this is one factor, to be balanced with others in the exercise of discretion. The others include the explanation for why the evidence was not available at trial, and the overriding objective. The stronger these other factors, the more of a "game-changer" the new evidence would have to be. There were strong factors pointing against re-opening the Main Judgment under the *Barrell* jurisdiction (as the judge noted in the Barrell Judgment). These included that: considerable resources had already been expended on the case; these had been increased significantly by Mr Estridge's failures in respect of disclosure; the trial had already been adjourned precisely because of those failings of Mr Estridge; Mr Estridge (or his solicitors) was clearly at fault in the relevant document not having been available at trial; and given that the many uncertainties to which the D'Angibau Letter gave rise could not be resolved by a simple re-jigging of the Main Judgment (which is all that Mr Darton was seeking), but would require a retrial. In light of these matters, I consider that the judge's conclusion that the D'Angibau Letter was not a *significant enough* game-changer was one that was well within the ambit of the discretion he was required to exercise.

67. Mr Estridge takes issue, under Ground 8, with certain of the matters on which the judge relied in concluding that the D'Angibau Letter was not a game-changer.

68. The particular matters complained of are:

(1) Mr Tohidi had been adamant at trial that he had known in 2008 that he was not in significant debt to Mr Estridge and that he had not been intimidated by Mr Estridge;

(2) Mr Tohidi had at no stage suggested that he was suffering from mental illness;

(3) Mr Tohidi had not suggested that he could not understand the 5 August Letter without assistance;

(4) The judge therefore erred in taking these matters, which required him to dismiss parts of Mr Tohidi's evidence, into consideration (at §52 of the Barrell Judgment).

69. For the reasons I have already given, even if the judge was wrong in the reliance he placed on these matters, I consider that, overall, he was fully entitled to exercise his discretion in the way he did. I make the following additional points on these specific matters.

70. As I have already noted, a trial judge is not required to accept *all* aspects of a witness' evidence, so the mere fact that the judge relied on findings based on his perception of

Mr Tohidi and the evidence overall, but which were not reflected in what Mr Tohidi said, is not a reason for impugning the decision.

71. That is particularly so in relation to the question whether Mr Tohidi believed he owed considerable sums to Mr Estridge in August 2008, as Mr Estridge had insisted. §52 of the Barrell Judgment must be read together with §232 of the Main Judgment, where the judge found that although Mr Tohidi did not believe it "in his heart of hearts" he was persuaded by Mr Estridge in 2008 that he was indebted to him: "Mr Tohidi's evidence under cross examination was that he did not, at the time, genuinely believe that he owed money to Mr Estridge is only something that he has now been able to demonstrate, but which he was not able to do so at the time, and so felt pressured to accept Mr Estridge's version of their account together." That is a finding of fact made by a judge who was steeped in the evidence. It is not one which I am persuaded I should overturn.

72. So far as the reference in §52 of the Barrell Judgment to Mr Tohidi's mental health is concerned, I accept that this was not something for which there was any evidence (which the judge expressly noted). I do not think, however, it was a critical part of the judge's reasoning. Rather, the point the judge was making was that Mr Tohidi's behaviour in 2008 must be viewed in light of the fact that he was at the beginning of a very difficult stage of his life. That was something which was amply supported by evidence.

73. As to the point that Mr Tohidi had never said that he needed assistance to understand the 5 August Letter, this also must be seen together with the body of the Main Judgment. As I have noted above, the judge placed considerable reliance on the "team" aspect of the way Mr Tohidi worked: trusting those around him (see §41 above). This was what underpinned his conclusion that – whether or not Mr Tohidi signed the 5 August Letter – the parties had not reached an agreement to transfer beneficial interest in the properties to Mr Estridge.

74. Accordingly, I do not accept that any infelicities in this part of the Barrell Judgment undermine the overall exercise of the judge's discretion. For these reasons, while I give permission to appeal in respect of Grounds 6 to 8, I dismiss the appeal on these grounds as well.

Conclusion

75. For the reasons set out above, I refuse permission to appeal on Grounds 2, 3, 4 and 5 and, while I grant permission on Grounds 1, 6, 7 and 8, I nevertheless dismiss the appeal.