Neutral Citation Number: [2023] EWHC 2051 (Ch)

Case No: CH-2023-000057

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)

ON APPEAL FROM THE COUNTY COURT SITTING AT CENTRAL LONDON
ORDER OF HIS HONOUR JUDGE MONTY KC DATED 7 FEBRUARY 2023

7 Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 7 August 2023

Before:

THE HONOURABLE MR JUSTICE RICHARD SMITH

Between:

MR VYTAS KARPAVICIUS

MRS ZIVILE KARPAVICIENE **Appellants**

and

MR JOHN WAITES **Respondent**

Mr John Virgo (instructed as a **direct access** barrister from Guildhall Chambers) for the **Appellants**
The **Respondent** was acting **in person**

Hearing date: 27 June 2023

APPROVED JUDGMENT

This judgment was handed down remotely at 10.30am on 7 August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

Mr Justice Richard Smith:

Introduction

1. This judgment concerns an appeal against the order of His Honour Judge Monty KC (**Judge**) in the Central London County Court on 7 February 2023 (**Order**) by which he declared and ordered that:-

(a) The Respondent, Mr John Waites, was the sole legal and beneficial owner of certain land at the rear of The Grove, 22 Ramsgate Road, Louth LN11 0NH, registered at HM Land Registry under title no LL111975 (the **Land**) (paragraph 1); and

(b) The Second Appellant, Mrs Zivile Karpaviciene, shall execute a transfer of the full legal and beneficial interest in the Land to the Respondent for nil consideration, in default of which, the Respondent had liberty to apply for the court to sign this (paragraph 2).

2. The Judge also directed that enforcement of the Order be stayed pending the outcome of any application to the High Court for permission to appeal and a stay (paragraph 7). On 20 March 2023, Mr Justice Adam Johnson continued the stay of execution. On 26 April 2023, I granted permission to appeal limited to the grounds stated in my order (which essentially reflected the Appellants' grounds of appeal) and I too continued the stay. I heard the appeal on 27 June 2023 (**Appeal**). The Appellants were represented by Mr Virgo of counsel (who appeared below). The Respondent attended in person.

Background

3. The background to the matter is helpfully set out in the judgment also dated 7 February 2023 and I respectfully adopt the Judge's party nomenclature, namely Mr Karpavicius and Mrs Karpaviciene for, respectively, the First and Second Appellants, and Mr Waites for the Respondent.

4. Mr Waites and his wife had previously renovated properties. Mr Karpavicius is a builder. The parties had known each other for some ten years, with Mr Waites having made certain loans to Mr Karpavicius over the period, including to allow him to undertake certain renovation or development projects or to purchase plant and equipment. On this occasion, the intention was to develop the Land and for any profit to be split equally between Mr Karpavicius and Mrs Karpaviciene on the one hand and Mr Waites on the other. The possibility of the joint development project was discussed in about 2018. The Land, located at the end of Mr and Mrs Waites' garden, was identified. It had planning permission for two residential properties. The owner of the Land approached Mr Waites to sound out his interest in buying this for £250,000. Mrs Karpaviciene became involved in the negotiations and the purchase price was agreed at £230,000. The purchase was completed on 7 February 2020 in the name of Mrs Karpaviciene. Certain minor works were carried out on site but, by mid-March 2020, a number of issues had arisen between the parties. By July 2020, it was clear that the joint development would not proceed. Following the further deterioration in the parties' relationship, Mr Waites brought a claim for Mrs Karpaviciene to transfer the Land to him.

5. Although nothing was set out by the parties in writing, it was common ground that Mr Waites would be providing the purchase price and Mr Karpavicius his labour in the development of the houses on the Land, with the profit to be split in the manner already indicated. There was, however, a dispute between the parties as to the reason why the Land was purchased in the sole name of Mrs Karpaviciene. Mr Waites contended that the parties thought there might be a stamp duty saving if the Land was registered in her name as it was thought she might be considered a first time buyer. There was also a desire to "*put a barrier*" between Mr Waites and the seller of the Land. Although there was no express declaration of trust in favour of Mr Waites, having provided the entirety of the purchase monies, he was the real owner of the Land. The provision of the purchase monies may

have been 'dressed up' as a loan for the benefit of others but it was not a loan; Mr Waites was the true purchaser and, therefore, beneficial owner of the Land.

6. Mr Karpavicius and Mrs Karpaviciene asserted a very different position. They said Mrs Karpaviciene was the true owner of the Land and the £230,000 used to pay the purchase price was a loan by Mr Waites to her (or her and her husband) to enable her to buy the Land. There may have been a possible stamp duty saving through its purchase in her name but that was not the reason. In this regard, the Judge found (at [41]-[46]) that:-

> "41. In the present case, I have no doubt that the intention was to try and avoid having to pay stamp duty, and that is why the purchase was in Mrs Karpaviciene's name and why the parties all referred to the £230,000 as a loan. But it was, in reality, not a loan, and all of them (Mr Waites, Mr Karpavicius and Mrs Karpaviciene) knew that it was not. ………
>
> 43. In my judgment, the money was labelled as a loan – and the purchase was in Mrs Karpaviciene's name – in order to try and get a stamp duty saving (which in the event they did not get, because stamp duty was paid). Since no actual attempt was made to avoid stamp duty, there was no representation to HMLR and thus no attempt to defraud; the only person who was misled was Ms Reilly [Mrs Karpaviciene's conveyancer].
>
> 44. The true nature of the transaction was that Mr Waites was to be the beneficial owner. He could not have a trust deed naming him as beneficial owner, because that would have prevented the stamp duty avoidance, and similarly that is why he and Mr Karpavicius and Mrs Karpaviciene went along with the £230,000 being described as a loan.
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> 45. This was a risky path to have taken, just to avoid £2,000 or so in stamp duty. It totally deceived Ms Reilly, and it would have been a fraud or attempted fraud on HMLR had an attempt actually been made not to pay stamp duty. I expect that by the time it was decided simply to pay stamp duty, it was too late to unwind what Ms Reilly had been told and to have a deed of trust.
>
> 46. In any event, I find as a fact that despite labelling the £230,000 as a loan, the true nature of the transaction was that it was not a loan. ….."

<u>The legal arguments</u>

7. Different causes of action were advanced before the Judge as the basis for claiming the transfer of the Land, with Mr Waites prevailing on both his resulting trust and implied contractual term analyses. These legal arguments arise again for my consideration on the Appeal.

8. In relation to the resulting trust analysis, the Appellants' essential argument on the Appeal (as at first instance) was that, having called the provision of the purchase price monies a loan and having relied on it as a loan (or allowed others to do so), it was not open to Mr Waites now to deny this and to say it was his own purchase. To that end, they relied on three authorities, *Gascoigne* v *Gascoigne* [1919] 1 KB 223, *In re Emery's Investment Trusts* , *Emery* v *Emery* [1959] 1 Ch 410 and *Tinker* v *Tinker* [1970] 1 All ER 540. I summarise each briefly.

<u>Gascoigne</u>

9. In *Gascoigne*, a husband acquired a lease of land which he put into his wife's name. An option to extend the lease term was exercised and he built a bungalow on the land. The husband paid for each of the lease, the extension and the bungalow construction costs. On appeal, Lush J held that:-

> "[The judge's] findings of fact must be taken to mean that the plaintiff, with his wife's knowledge and connivance, concocted the scheme of putting his property in her name,

> while retaining the beneficial interest, for the purpose of misleading, defeating, and delaying present or future creditors. Now, assuming that there was evidence to support the finding that the [wife] was a party to scheme which the [husband] admitted, but without deciding it, what the learned judge has done is this: He has permitted the plaintiff to rebut the presumption [of a gift] which the law raises by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it. The plaintiff cannot do this; …..”

Emery

10. In *Emery*, the claimant was a British subject married to a US citizen with whom he lived in South America, where he was employed and therefore entitled to hold US dollars. US Savings Bonds purchased with the husband’s money were registered in the name of his wife, the husband as an alien being unable to hold these, albeit with the husband expressly named as a beneficiary with her. Later, the husband changed the bonds for common stock in US securities, also registered in the name of his wife, with the intention that the beneficial interest should be as to one half to him, one half to his wife, albeit no mention was made of his beneficial interest to avoid payment of US withholding tax to which, as an alien, he was liable under US Federal law. The husband sought to recover one half of the property representing the US securities in question. Wynn-Parry J held that the husband’s intention that the beneficial interest in the US securities should be shared equally was not enough to “*carry him to success*”. Once the equitable presumption of advancement had arisen, and it was necessary for the husband to attempt to rebut the presumption to assert that the property in question was put into his wife’s name to avoid the payment of tax on his beneficial interest, “*it seems to me that Gascoigne v Gascoigne completely covers the present case*”.

Tinker

11. Finally, in *Tinker*, the husband bought a house which, on legal advice, he put into his wife’s name so that, if his business failed, his creditors would not be able to take his home. The marriage broke up, with the wife claiming the house. Despite the husband acting honestly (compared to the husband in *Gascoigne*), the Court of Appeal followed *Gascoigne*, finding the husband to be “*on the horns of a dilemma*”:-

> “[The husband] cannot say that the house is his own and, at one and the same time, say that it is his wife’s. As against his wife, he wants to say it belongs to *him*. As against his creditors, that it belongs to *her*. That simply will not do. Either it was conveyed to her for her own use absolutely: or it was conveyed to her as trustee for her husband. It must be one or the other. The presumption is that it was conveyed to her for her own use: and he does not rebut that presumption by saying that he only did it to defeat creditors.”

12. Based on these authorities, Mr Karpavicius and Mrs Karpaviciene argued that “*once a loan, always a loan*”, a position from which the parties here could not resile such that it was not open to Mr Waites to say he was the purchaser of, and beneficially entitled to, the Land. The Judge, however, said that *Gascoigne* and *Tinkler* were not on point. These authorities did not stand for the proposition that, if the parties (mis)described their transaction, for example as a loan, with a view to obtaining a tax advantage, the transaction was, in fact, to be treated as a loan. Rather, the true nature of the transaction depended on its substance, not the label the parties attached to it (or the reason for using that label). In each of *Gascoigne* and *Tinkler*, the husband had sought to go behind the true nature of a transaction effected by a transfer to the wife in an attempt to rebut the presumption of advancement. In the present case, the true transaction was a purchase, deliberately mislabelled by the parties as a loan to get a tax advantage, even though those involved knew it was not. This case being distinguishable, he rejected the Appellants’ argument and gave effect to the purchase monies resulting trust which, based on his voluntary payment of the purchase price of the Land, arose in Mr Waites’ favour (*Westdeutsche Bank* v *Islington LBC* [1996] 2 WLR 806 at [831]).

Patel

13. In my view, the Judge was right to reject the Appellants' argument, albeit I reach that conclusion based on the fuller picture revealed by the authorities than was argued before him at trial. In my pre-reading for the Appeal, it struck me that the approach of the courts in cases such as *Gascoigne* and *Tinkler* might now need to be revisited in light of the more recent judgment of the Supreme Court in *Patel* v *Mirza* [2016] UKSC 42. I raised this with Mr Virgo at the Appeal hearing who had, in fact, already supplemented the authorities bundle with that judgment about which he also made oral submissions at the hearing. Given that Mr Waites had not had an opportunity to consider *Patel*, I afforded him the opportunity after the hearing to make brief written submissions about it. He did so on 30 June 2023. Both parties submitted that *Patel* was of limited, if any, relevance. However, in my view, it is more instructive than that – in fact, it is determinative.

***Tinsley* and the 'reliance' principle**

14. In *Patel*, there was considerable discussion of what the authorities describe as the 'reliance' principle, particularly as expounded in *Tinsley* v *Milligan* [1994] 1 AC 340. In the latter case, Miss Tinsley and Miss Milligan each contributed to the purchase of a home. It was vested in Miss Tinsley's sole name but on the mutual understanding that they were joint beneficial owners. It was put in her sole name to assist Miss Milligan make false claims for state benefits which she did over a number of years with Miss Tinsley's connivance. Eventually, Miss Milligan confessed to the authorities what she had done but the parties fell out. Miss Tinsley gave Miss Milligan notice to quit and brought a possession claim against her. Miss Milligan counterclaimed for a declaration that the property was held by Miss Tinsley on trust for the parties in equal shares.

15. The majority in the House of Lords decided in favour of Miss Milligan. In his leading speech, Lord Browne-Wilkinson's starting point was that title to property can pass under an unlawful transaction but that the court would not assist an owner to recover the property if he had to rely on his own illegality to prove his title. He held that the same applied to real property in which the claimant had a beneficial interest. It was therefore enough for Miss Milligan to show that she had contributed to the purchase of the property and that there was a common understanding that the parties were joint owners. She did not have to explain why the property had been put into Miss Tinsley's sole name. However, if the relationship between them had been that of daughter and mother, and each had contributed to the purchase of a property in the daughter's name, the result would have been different, because there would then have been a presumption of advancement in the daughter's favour. The mother would in those circumstances have had to rely on the illegal nature of the transaction to rebut the presumption and her claim would therefore have been defeated by the doctrine of illegality. Lord Browne-Wilkinson acknowledged the procedural nature of this approach (at [374]):-

> "The effect of illegality is not substantive but procedural. The question therefore is, 'In what circumstances will equity refuse to enforce equitable rights which undoubtedly exist."

16. Significantly for present purposes, the House of Lords in *Tinsley* noted that in the majority of related cases, including *Gascoigne* and *Tinkler*, the presumption of advancement applied. In those cases, the rule had been stated as being that a claimant cannot rely on evidence of his own illegality to rebut the presumption that the claimant intended to make a gift of the property to the transferee. The crucial point was said to be the inability of the claimant to lead evidence rebutting the presumption of advancement, the claimant seeking to recover property voluntarily transferred to, or purchased in the name of, a wife or child, for an illegal purpose.

<u>The continuing relevance of the 'reliance' principle</u>

17. On that basis, it might be thought that the application of the 'reliance' principle in this case leads to exactly the same result as the Judge found. There was no relationship between Mr Waites on the one hand and Mr Karpavicius and Mrs Karpaviciene on the other leading to a presumption of advancement which Mr Waites needed to rebut in reliance on his own illegality in seeking to avoid stamp duty. To the contrary, as in *Tinsley*, Mr Waites having voluntarily advanced monies to Mrs Karpaviciene, the presumption that arose was one of a resulting trust operating in Mr Waites' favour, with no need for him to lead evidence of his own illegality (or to prove the negative that those monies were not advanced by way of loan).

18. However, the law has since moved on. In *Patel*, Mr Patel claimed to recover monies paid to Mr Mirza to bet on the RBS share price using insider information the latter expected to obtain from RBS contacts. The betting ultimately did not take place but Mr Mirza refused to return the money. Being a claim in unjust enrichment, the 'reliance' principle arose from the need for Mr Patel to show the consideration that had 'failed', requiring him, in turn, to show the nature of the arrangement and, therefore, to rely on his own illegality. The majority in *Patel* considered well-founded the criticisms of the 'reliance' principle in *Tinsley* and expressly departed from it, indicating a more 'flexible' approach to whether illegality should result in the denial of a claim. In giving the lead judgment, Lord Toulson summarised the rationale for the illegality doctrine under English law in the following terms (at [120]-[121]):-

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate.
>
> 121. A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal."

<u>*Patel* - the Appellants' position/ discussion</u>

19. Mr Virgo argued that *Patel* was of limited, if any, relevance to what the court has to decide on the Appeal. First, *Patel* was concerned with the scope of restitutionary relief in an illegality context. As to this, although the claim in *Patel* was advanced in unjust enrichment, it is clear that the reasoning of the Supreme Court was of much broader application. Indeed, and answering the Appellants' second point, although *Tinker* and *Gascoigne* were not expressly addressed in *Patel*, the 'reliance' principle they embodied was addressed by reference to *Tinsley* which itself examined the underlying line of authorities, including those two cases. As noted, *Patel* departed from the

reasoning indicated by that line of authorities, many concerned, as in this case, with the operation of the law of resulting trusts.

20. Third, the Appellants argued that, even if *Patel* did apply to this case, the arrangements made by the parties here with a view to avoiding tax still fell foul of the broader textured approach it indicated. However, I am unable to conclude that enforcing the resulting trust that arose in Mr Waites' favour would produce inconsistency and disharmony in the law so as to cause damage to the legal system. In this case, the relevant prohibition was intended to limit the relevant stamp duty relief to genuine first time buyers or, expressed more broadly, to prevent the avoidance of the payment of tax. Although very important objectives, I am in no doubt that it would be 'overkill' in this case if the court took it upon itself to upend Mr Waites' purchase of the Land and, further still, to do so by imposing on the parties a transaction which, on the Judge's findings, was a fiction. That response would be entirely disproportionate when the stamp duty potentially to be avoided was relatively minor, the correct stamp duty was, in fact, paid, all the parties were 'in on' the arrangement and, had that arrangement in fact proceeded, the powers of the tax authorities would still have been available to ensure the payment of any tax due and to impose any appropriate penalty.

21. Mr Virgo sought to argue that the 'broad justice' of the case militated in favour of the outcome for which he contended: Mr Karpavicius and Mrs Karpaviciene acknowledge that the loan was due to Mr Waites and that outcome was consistent with the 'spirit' of the intended joint venture. I found this argument unpersuasive: first, based on the Judge's findings, the parties' understanding was that Mr Waites had purchased the Land. Even if they also understood that the outside world should be told something different, the justice of the case more readily suggests that they should be held to their (internal) mutual understanding; second, even if the joint venture had gone ahead, the parties would have shared any profit equally. On the Appellants' case, they would be entitled to any profit arising on the sale of the land (after repayment of the Loan) without having contributed to the purchase price or, certain conveyancing costs and initial minor works apart, otherwise to the development. The injustice to Mr Waites (and disproportionality of outcome) would be palpable in that event. Finally, although the Appellants may have incurred some limited expenditure, there does not appear to be any reason in principle why this could not be recovered, for example in restitution.

Overall conclusion

22. Albeit for different reasons not argued before the Judge, I therefore find that he was correct to (i) disregard the parties' labelling of the purchase of the Land as a loan and (ii) give effect to the resulting trust arising in Mr Waites' favour through his provision of the purchase price of the Land.

23. Having reached that view, the Appeal fails. I therefore do not need to consider the alternative ground of appeal based on the Judge's further holding as to an implied term.

24. The Appeal is dismissed. The stay of execution of the Order falls away.