



IN THE HIGH COURT OF JUSTICE

No. HC-2015-001456

IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES

PROPERTY TRUSTS AND PROBATE LIST (CHD)

Before Mr M H ROSEN QC sitting as a Deputy Judge of the Chancery Division
Monday 30 April 2018

B E T W E E N :

MIRIAM KLIERS

Claimant

- and -

(1) MORDECHAI SCHMERLER

(2) SHLOMO KLIERS

Defendants

PETER SHAW QC appeared on behalf of the Claimant

ARYEH KRAMER (Solicitor) appeared on behalf of the First Defendant

JUDGMENTS

(Transcript prepared without the aid of documentation)

JUDGMENT 1 – MORNING

Introduction

- 1 This is my short judgment delivered following the commencement of this trial, dealing with the first defendant's submission, made on his behalf by Mr Aryeh Kramer his solicitor, that he should be entitled to cross-examine the claimant and to make further submissions despite the fact that he has been debarred from defending.

- 2 The action was begun in April 2015 and in it Mrs Miriam Kliers as claimant seeks relief against the first defendant her younger brother Mordechai Schmerler (whom I will call for now, with no disrespect, simply “Mordechai”) and the second defendant her former husband Shlomo Kliers in relation to the matrimonial home which she shared with Mr Kliers from 2004 at 98 Kyverdale Road, London N16 6PL.
- 3 This property was bought in the name of Mordechai. Mrs Kliers alleges that it was agreed that Mordechai would act as nominee and would hold the property on trust for herself and Mr Kliers. Mr and Mrs Kliers had married in May 1995. Mr Kliers appears to have lived for at least a while, in Israel as a Talmudic student, and all parties are apparently members of a particular Hasidic sect in the Stamford Hill area of North London.
- 4 Mrs Kliers claims that she and Mr Kliers beneficially owned the property in the proportions of 75 per cent/25 per cent in accordance with their financial contributions. She said that the property was acquired in Mordecai's name at the directions of various authoritative gentlemen (including Mr Kliers' Grand Rabbi in Israel) because of his poor employment status and precarious income, and that her father supported that; so did their London rabbi and a community adviser.
- 5 Against that cultural background Mrs Kliers says that she eventually consented to such an arrangement which enabled a mortgage to be obtained on an interest-only basis from the Bank of Scotland. Mrs Kliers claims that her consent to this was procured by undue influence, as set out in her particulars of claim.
- 6 Mr Kliers, the former husband from whom Mrs Kliers separated in about 2012 – did not acknowledge service and was debarred from defending without permission by an order of 8 September 2015.

The debarring of Mordecai

- 7 For his part Mordechai, who was and remains registered as the legal owner of the property, served a defence claiming that he purchased it as sole beneficial owner with his own funds, and denies that Ms Kliers had or has any interest except as an assured shorthold tenant with Mr Kliers.
- 8 In the course of the proceedings it was ordered that Mordechai provide standard disclosure failing which he too should be debarred from defending the proceedings. A disclosure statement was served with his purported signature, but that signature was markedly different from other signatures on witness statements made by him. On 6 June 2016 it was ordered that he explain that, in default of which he would be

debarred from defending. It was then held that he had failed to comply with that order and, accordingly, in September 2016 he was debarred from defending.

- 9 Mordechai then applied for relief and that led to a consent order in January 2017 which permitted him to defend on various conditions, including a condition that in the event of further breach of any order he would be automatically debarred and would not be able to apply for relief from sanctions.
- 10 A subsequent specific disclosure order made in December 2017 required Mordecai to give disclosure of various relevant documents including the application for the mortgage advance in respect of the purchase of the property. He failed to comply with that and so an application was made for another debarring order. That came on eventually before Hildyard J on Monday of last week, 23 April 2018.
- 11 The learned judge held that Mordecai was in breach of the December 2017 order and that the court did not have a discretion because of the consent order in January 2017, which was automatically to result in another debarring order in the event of a further breach of order; and that there was no application for relief from sanction but, even if there had been, it would have been refused because Mordecai would have failed on all three of the relevant requirements for relief from sanctions under the *Mitchell* case. So he was again debarred from defending and that remains in place at this trial.

The consequences of the debarring order

- 12 The usual consequences of such a debarring order have been the subject of debate at the outset of the trial this morning. Mr Kramer, having lodged a skeleton argument and made oral submissions today, relies on various first instance decisions – first, *Culla Park & Ors v Richards & Ors* [2007] EWHC 1687 (QB), in which Eady J held that in a case for defamation and falsehood, even though some defences had been struck out it seemed to him that the defendants would be entitled to test the case in relation to questions of aggravated and similar damages and questions of malice.
- 13 Secondly, in *Hopton v Miller* [2010] EWHC 2232 HHJ Behrens dealt with a case in which a defendant was debarred from defending as a consequence of failing to give disclosure, and referred to the fact that the judge hearing the relief application had made it clear in his order that the defendant would be entitled to cross-examine the claimant and make submissions although not to present a positive case.
- 14 Thirdly, in *Masood & Ors v Zahoor* [2016] EWHC 237 (Ch), Peter Smith J referred to his own decision in *Rubin & Anor v Parsons & Ors* [2008] EWHC 1034 to the effect that it is a normal consequence when a court strikes out a defence and lists the hearing

so that the claimant can prove his case, that the defendant has a right to challenge a case without calling any evidence itself or himself, the judge in that case saying that was a normal consequence of striking out a defence.

15 There are other decisions recently considering similar questions (a) on the part of the Court of Appeal, twice, in *Thevarajah v Riordan & Ors* [2014] EWCA (Civ) 14, para. 38, [2015] EWCA (Civ) 41 at paras. 25 and 33 (b) in *Apex Global Management & Anor v FI Call Limited & Ors* [2015] EWHC 3269 (Ch) at para.37, a decision of Hildyard J, and (c) *Hall & Anor v Elia & Anor* [2016] EWHC 1697 (Ch) at 15 to 26, in which Proudman J summarised the various cases, including *Thevarajah*.

16 Those cases suggest that there may be no general principle whereby a defendant whose defence has been struck out, still less one which has been consequentially debarred from defending, has the absolute right to test the claimant's case in cross-examination and to make further submissions in every case.

17 In para 33 of the second decision of the Court of Appeal in the *Thevarajah* case, two deputy judges' management of that issue were considered. The Court of Appeal drew attention to the extent to which a defence could still be adduced at the trial by the Claimant as indicating the ambit of the dispute.

18 In para 70 of *Apex*, Hildyard J drew attention to the fact-specific range of options available to the trial judge. He said that on the basis of the *Thevarajah* decisions:

". . . the debarred party's pleadings may and usually should be taken into account for the purposes of defining and confining the ambit of the real dispute; and, for example, admissions may be taken as rendering proof of the admitted matters unnecessary. However, that is not to say that the proceeding party is entitled to seek adjudication of the debarred party's case: only to adjudication of its own case, and only then insofar as the court considers requisite in order to determine whether to grant relief and in what terms."

19 Mr Kramer submits that those decisions do not decide the instant question of whether or not a debarred party is entitled to cross-examine and make further submissions as part of the process considering whether or not the claimant has proved his, her or its case as against debarred defendants.

20 Be that as it may, however, I have regard to Proudman J's review in *Hall* when in particular, she considered the course of the *Thevarajah* case in which a Deputy Judge had observed that the debarred party would be entitled at trial to require the claimant to prove his claim and make submissions. It did not appear to the Court of Appeal in

the first *Thevarajah* decision that *Culla Park & Ors v Richards & Ors* necessarily supported so sweeping a proposition; and it stated that the issue in that case was a matter for decision for the judge hearing the trial, and “put down a marker” (not further defined) in relation to that.

21 In the subsequent Court of Appeal judgment in *Thevarajah*, the judgment of Tomlinson LJ (with whom the other judges agreed including, significantly, Richards LJ, who had been in both appeals) appears to support the submission that the debarred party was not in a position to contest anything that the claimant said and was not entitled to participate. I read this, as did Proudman J, as suggesting that there is no absolute rule that the debarred party is still entitled to participate by cross-examination and submissions without being able to put forward any positive case.

22 Proudman J also referred to the Supreme Court's judgment of the *Thevarajah* case (which has not been put before me), referring to Lord Neuberger's comment to the effect that but for a feeling of grievance for the appellants he would have simply have said that the appeal should be dismissed for the reasons given by the Court of Appeal, and the Supreme Court's decision that relief from sanctions should not be given without a change of circumstance.

23 As for the submission made in *Hall* (as before me) that the Court of Appeal decisions *Thevarajah* were *obiter*. Proudman J said that

“ . . . if the Supreme Court had disagreed I would have expected them to say so. Moreover, although the remarks were obiter in the sense that they did not form part of the decision on the [first appeal in Thevarajah] the Court of Appeal did 'put down a marker' in relation to them and I would be foolish to ignore what they said. Indeed it would be a brave puisne judge who would ignore such a marker. I would always start from the proposition that the Court of Appeal is more likely to be right than I am.”

24 It might be said that this approach might be all the more powerful and prudent in the case of a mere Deputy High Court Judge such as myself. In any event Proudman J concluded that Mrs Elia was, debarred from disputing any of the claims in the proceedings and whilst that did not prevent her from pointing out manifest errors, but no such errors were pointed out.

Application of the law in this case

25 Whilst in *Hall* Proudman J mentioned occasions when counsel had declined to make submissions orders on behalf of clients whom had been debarred, in this case I have

entertained Mordechai's submission so far, among other things in order to consider the just and expeditious course that this trial should properly now take.

- 26 Taking all the cases cited on board, the present Deputy Judge considers that at trial, the Court has some residual discretion to hear a debarred defendant and whether a debarred party, in this case Mordecai, might nonetheless be allowed to cross-examine and to make final submissions.
- 27 It seems to me that these rights, whilst manifestly important in our system of justice, are not absolutely lost or retained when a defendant is debarred from defending, unless the court makes this explicit. Absent a previous order to that effect, the trial judge can decide under his or her case management powers (but still of course having regard to the overriding objective) to do what is just and expedient as regard the need and justification for cross-examination and further submissions in the particular case.
- 28 In some types of dispute - I have in mind, for example, wills and probate disputes, where the court's function is not merely adversarial but also has an historical basis in inquisitorial proceedings - that might be appropriate. However the present case is extremely adversarial and the effect of the court's previous orders should not be minimised. I also bear in mind the overriding objectives by way of fairness and justice between the parties having regard to the resources of the court and the interests of the public at large, including other litigants.

Grounds and scope of cross-examination

- 29 Mr Kramer's submission is that in this case it is appropriate to allow cross-examination (and more submissions thereafter) for two main reasons. First, because he says there are inconsistencies in the case put forward by the claimant in her particulars of claim/reply to Mordechai's defence and her various witness statements, including the position as it was put first before the court when she obtained a freezing order in relation to the property on 27 April 2015.
- 30 Secondly, he says that her case and evidence throws up questions of illegality, in particular, a case that the reason why money was put into the names of other people and the property was brought in the name of her brother rather than herself and her husband (albeit that it was their matrimonial home and they provided the funds) was for the purposes of deceiving a mortgage company, the Bank of Scotland, and also to enable an assured shorthold tenancy to be documented, which would enable housing benefits to be obtained.

31 Mr Kramer also suggests that the evidence gives rise to a question of illegality as to the way in which Mr and Mrs Kliers obtained moneys in cash or through charitable contributions, thus not having to treat them as income for the purposes of tax. What is said is that possible question of illegality is one which the court should consider, albeit that it was not put forward in the first defendant's defence and, in any event, he is debarred from putting forward any positive defence.

The need to cross-examine

32 I have carefully considered those submissions in writing and orally, and in my judgment they do not justify the court – if I have any discretion – allowing cross-examination or possibly - and I say this provisionally - yet further submissions, on behalf of Mordechai, unless specifically invited.

33 In this case the question of illegality arises on the claimant's own case. She has gone into those aspects in some very considerable detail and I am concerned that they should be addressed but that is because they are apparent as issues to the court, and the extent to which I will require assistance as regards the law on that from Mr Schmerler, or on his behalf, is very doubtful indeed. But I do not rule out that possibility later, when we get to that stage.

34 So far as cross-examination is concerned, although Mr Kramer came to trial on behalf of Mordechai submitting that he should be allowed to cross-examine, he struggled to tell me what questions, it was necessary for him to put. The alleged inconsistencies which he pointed to eventually, after some searching of his notes, and a little bit of time allowed for him to retire from court to go back over them, were thin in the extreme. That may not be wholly surprising in the context of this case as a whole where hostility to Mrs Kliers' case is more obvious rather than due process on Mordechai's side.

35 Mrs Kliers has said throughout that she acted under the influence of a patriarchal body which included not only her own close relatives, by which I mean her father and others, but also her community leaders, and that her husband may well have been similarly influenced.

36 In my judgment it is possible that the process of this trial in terms of an alleged need to cross-examine on matters which are very well documented on Mrs Kliers' side, and will be investigated if necessary by me in the course of her evidence (and undocumented at trial on the other side who has been debarred more than once) is being used to harass and intimidate Mrs Kliers in the stand that she has taken - namely, that despite her participating in these transactions the disgraceful illegality

which lay behind them from the community leaders and her patriarchal superiors in that community were concerned, was as a result of their undue influence – rather than achieve justice.

37 The extent to which that features in terms of appropriate relief if she satisfies the court as regards the facts founding her claim that Mordechai was a mere nominee, and that as between her and Mr Kliers she holds beneficially in proportion 75:25 per cent are matters yet to be determined.

38 For similar reasons I doubt very much that on behalf of Mordechai further submissions as to the effect of such gross illegality alleged by Mrs Kliers to have been effectively forced upon her will in practice or should be a major foundation of the court's reasoning in a case in which both defendants have been debarred. But I have Mr Kramer's written submissions and can ask him to clarify or expand if it will assist after the evidence.

Conclusions

39 In short, no sufficient reason has been advanced to me as regards the application to cross-examine and make further, later submissions. I have not been told of any basis for cross-examination which would justify that course, and if there were such, it should have been properly prepared. The submissions which I already have, appear to me very likely to be the full extent of what more Mordechai would properly be allowed to say, but I will revisit that question after I have heard the evidence.

40 The court must be astute to ensure fairness between the parties. This is, I hope, an unusual case where, in my judgment, fairness does not justify the further steps which Mordechai apparently wishes to take in order to advance the exposure of the disgrace which it appears his community is opening itself up to. I decline to allow the processes of the court to be used when, in my judgment, that is a very real danger in the course which Mr Kramer has advocated.

41 Having said all that, I am going to guard and caution myself that this reaction is based only on what Mrs Kliers has said. The defendants are not here except through Mr Kramer's submissions. How they would, if they were here, be dealing with these issues, especially in the absence of their disclosure and cross-examination, how they would be able to explain the position which has been adopted as regards the illegality said to be rampant in this particular community, I do not wish to speculate on.

42 This is a one-sided trial because Mr Kliers has chosen to take no part and Mordechai has declined, despite so many opportunities, to comply with the court's processes in

support of his purported case that he provided the funds for and was the beneficial owner for the property, and that the agreement and funding alleged by Mrs Kliers is not the truth. If Mordechai genuinely wished to advance that case in order to provide a foundation for cross-examination and put these matters in issue in a realistic way, against Mrs Kliers' extensive and well documented evidence in support of that case, he had every opportunity to do so.

43 I am not prepared to down-play Mordechai's breach of orders and the debarring of his defence to enable empty, one-sided cross-examination of Mrs Kliers which cannot, in my view, assist in achieving a just outcome. For those reasons I decline to make the directions which Mr Kramer has sought. His solicitor is, of course, more than welcome to remain and, if I consider it necessary and appropriate, to assist further when we get to final submissions.

JUDGMENT 2 - AFTERNOON

Background

44 In this matter I gave a judgment earlier today at the beginning of the trial explaining the procedural position. I have now heard the evidence and further submissions and will give my judgment on the claims.

45 By way of summary of the relevant background the claimant Mrs Kliers began these proceedings in April 2015 having separated from the second defendant Mr Kliers in about 2012, and subsequently been granted a divorce. Both Mr and Mrs Kliers now have subsequent partners. The first defendant ("Mordechai") is one of Mrs Kliers' younger brothers.

46 The action concerns the beneficial ownership of Mr and Mrs Kliers' matrimonial home at 94 Kyverdale Road, London N16. It was purchased in August 2004, when Mr and Mrs Kliers had been married for some nine years and had three children, and registered in the legal ownership of Mordechai.

47 Mrs Kliers claims declarations as to the beneficial ownership of that property. As I explained in my judgment this morning, the parties and the social/cultural/religious background to this case, so far as relevant, can be stated to have been in the case of Mrs Kliers, or in the case of her brother and former husband, still to be members of what is called an Hasidic community, adhering to a particular rabbi and doctrine sect in and around North London, namely the Stamford Hill area.

- 48 In her particulars of claim and in a series of witness statements, including a lengthy witness statement for trial of 5 March of this year, but also in a very first witness statement in April 2015 in support of a witness statement, Mrs Kliers explains and alleges that at the time of the purchase the relevant moneys needed were supplied by herself and her then husband in the proportions of 75 per cent in her favour (approximately £103,800) and approximately 25 per cent by Mr Kliers (£32,900).
- 49 Mrs Kliers has documented her employment career and savings, and maintained a journal and other records relevant to her payments. She explains that her husband was largely unemployed and was a student in Israel and in London, and that she was not only the principal home maker, but also worked in a series of jobs, management and assistance jobs over the years in order to make that savings and contribution.
- 50 However, it seems that the views of Mr and Mrs Kliers' respective fathers, supported by – or, perhaps, even initiated by – their community leaders in Israel and in London, including rabbis from the Hasidic movement, set out to structure the purchase and ownership of their matrimonial home in a particular and unfortunate manner, to put it at its lowest.
- 51 The plan to which Mrs Kliers alleges she was influenced to agree, despite misgivings, was that because of the poor financial position of Mr and Mrs Kliers and, in particular, Mr Kliers, they would not be in a position simply to buy the property which was priced at £418,000 in a straightforward way.
- 52 At one point each of Mr and Mrs Kliers' fathers were going to contribute \$40,000 or so towards the purchase of the matrimonial home, but one and then the other withdrew from that plan. Instead, the property was to be bought in the name of Mordechai younger brother of Mrs Kliers (who is, I think, one of 10 siblings).
- 53 A mortgage was to be obtained in the sum of £300,000 from the Bank of Scotland Plc, on an interest-only mortgage. Moreover, Mr and Mrs Kliers were to enter into a purported tenancy agreement with Mordechai in order to obtain housing benefit. Her case is that, in fact, Mordecai provided no sums whatsoever towards the purchase price and made a false declaration, amongst other things stating that the property was being purchased for his sole occupation when he obtained the mortgage.
- 54 It seems as though following her separation and then divorce from Mr Kliers, according to what she has told me, the £300,000 mortgage remains. She, and to some extent her husband, using, amongst other things, purported charitable receipts, made payments to her brother to cover the interest but the principal sum remains

outstanding. Mr Kliers occupies the house still with his new wife or partner and their children, together with one of Mrs Kliers' children, I think a daughter.

55 So far as the question of housing benefit is concerned, on instructions Mr Shaw QC, who appears on Mrs Kliers' behalf, tells me that she estimates something in the order of up to £150,000 was received by way of housing benefit to pay for their purported tenancy. Whilst as Mr Shaw says, beneficial owners can be tenants of the property which they own in theory, in this case that is a further questionable element of the scheme which Mrs Kliers has explained applied in the case of this house at the instigation and influence, she says, of community leaders and the fathers of Mr and Mrs Kliers.

Mrs Kliers claims

56 The absence of the defendants from this trial has created some difficulties and curiosities as far as the court is concerned. Mr Kliers has never taken part in the proceedings. Mr Kramer, as I said this morning, is here as advocate on behalf of Mordechai, and made some wide-ranging submissions was responsive to my requests for some assistance as regards some of the issues of proof and applicable law, which arose in this situation.

57 I have had regard to the questions arising and which might have arisen, as a result of Mordechai's purported and debarred defence to the effect that he was the true owner of this house and provided the purchase moneys rather than and to the exclusion of his older sister and her husband, but they do not now require any other resolution.

58 The issues can be divided into three. First, is the question of whether or not Mr Schmerler was a bare trustee and nominee holding on trust for Mr and Mrs Kliers. As far as that is concerned, on the evidence in the witness testimony and looking at the documents, including the solicitors' file of Clifford Watts Compton ("CWC"), I am satisfied that Mr Schmerler was such a bare trustee. Mrs Kliers' uncontested evidence that the agreement was that she and her husband would provide the money for their matrimonial home, and Mr Schmerler would be their nominee, is entirely consistent with the documents in the bundle.

59 It is said that that does not include everything that has or could emanate from the defendants, but given their defaults leading to the debarments, that is not a matter to which a court can attach great weight or rely. It may well be that defendants in the position of these two do not relish the idea of having to state in open court what they might say "really happened" and to defend some of the statements to which they have

signed, either in the contemporaneous documents, or by way of a purported defence in the proceedings.

60 However, in short, the evidence which I have heard from Mrs Kliers, who verified her witness statements, and answered, in my estimation very frankly, some questions which I put to her, satisfies me (again I note, in the absence of any contrary evidence from Mr Kliers or Mordechai) that the factual allegations she makes are correct. I amplify on this as necessary below

Mordechai's possible interest

61 One particular point on which I have been addressed relates to the question of the mortgage. What is said is that the mortgage was in Mordechai's name, and Mrs Kliers does not depose to any conversation with Mordechai in which, for example, it was expressly stated between the two of them that Mordechai would be indemnified in that respect, as regards his interest and other liabilities and, moreover, that subsequent payments by Mr and Mrs Kliers in respect of such entries are irrelevant to the question of whether or not he purchased and was legal owner as trustee.

62 As far as that is concerned, the underlying question is what the common intention of the parties was. In the circumstances of this case, the absence of direct conversations between Mrs Kliers and her younger brother is not inconsistent with the overall position as I find it, which is that the family and the community leaders, on whose directions and requests in this particular society they relied and which they obeyed, clearly had an agreement, to which Mordechai has to be treated as party, to the effect that he would hold as nominee, that it would be the Kliers' matrimonial home, and they would make all the necessary payments.

63 Mr Shaw, who, as I have said, appears on behalf of Mrs Kliers, drew my attention to the useful illustration in the case of *Carlton v Goodman* [2002] EWCA 545 (Civ) in the Court of Appeal, in which the factual analysis dwelt on the fact that one of the main contributions to the purchase moneys for the property in question was in the form of a joint mortgage. In the usual way, and in principle, such arrangements can be treated as a contribution to payment of the purchase price of money capable of giving rise or featuring in the characterisation of the trust which results.

64 However, in a particular case that does not necessarily follow and one party can assist in the purchase of a property, for example by taking on a mortgage as a nominee, nonetheless as part of an overall understanding in which the liability which, on paper, is thereby assumed does not fall to be treated as a contribution to the purchase price which gives rise to or justifies an apportionment of the beneficial interest, which takes

the amount of that mortgage into straightforward account. That, in my judgment, having regard to the evidence and the facts before me, is exactly the position in the present case.

Mr and Mrs Kliers' interests

- 65 The second main issue which arises is as regards the position between Mr and Mrs Kliers. Again, the question of their respective beneficial interests as the true owners under the Trust, on the part of Mr Schmerler, turns on their common intention. The principal authorities, including the judgment of Baroness Hale in *Stack v Dowden*, are well rehearsed, the principles are well-known and are applied all the time.
- 66 The respective financial contributions of the parties is not the be all and end all in relation to the ascertainment of their common intention as regards the apportionment of their respective beneficial interests. However, in this case I do regard them as the best evidence as to what that common intention was. Mrs Kliers in her honest and, as I find, accurate evidence and recollection, does not allege that the division of beneficial interest between her and her husband was the subject of any express agreement or discussion, nor would I, in the context of this particular community, expect that necessarily to be the case, and I do not consider that it is implausible that there was no such discussions.
- 67 One of the questions that I have considered is whether or not it is more likely, as a matter of inferring or imputing intentions, to consider that there should be at least a starting point in the argument by way of a 50:50 or equal split in the respective beneficial interests in this marriage. But, in my judgment, that is not a starting point, or at least not a strong starting point.
- 68 Had Mr and Mrs Kliers' respective fathers carried out the original intention to provide equal contributions to purchase then that might be a fair starting point. However, in this community, in the absence of such equal contributions from the patriarchy, it is very difficult to say that wife would expect to have 50 per cent or any other particular contribution. It may be normal for fathers to provide the starting funds needed for a deposit but that is not what happens in this case.
- 69 In this case the way matters proceeded was very heavily reliant on Mrs Kliers, as the breadwinner as well as the homemaker, to put everything into the purchase of the matrimonial home. Again, in the absence of contrary evidence from Mr Kliers, who has stayed well out of these proceedings, it seems to me a strong likelihood, as to which I am satisfied, that the common intention was indeed that she should be a 75 per cent owner in proportion to her contribution to the purchase price.

- 70 Some of the moneys, according to her evidence, which I accept, were provided by community loans, or other payments to them jointly as a married couple seeking a home for their family. Of course, subsequent to the purchase, they provided jointly for payments to Mr Schmerler to cover the interest payment, but those factors do not outweigh, for me, the fair and reasonable basis upon which I infer the interests were divided between them.
- 71 I have no reason to consider that Mr Kliers at the time would have acted unfairly or unreasonably between himself and his wife subject, of course, to the strictures of what appears to be a dominant community led culture. There is nothing to suggest that within that culture the agreement between a married couple should provide other than that the partner who provides the money through her work, both in and outside the home, and through her employment, should have a larger share than the partner who is devoted to matters – perhaps unworldly matters, it is not for me to say – which do not justify an equal or larger share merely because he is a man rather than a woman.

Illegality

- 72 The third main issue which I have to consider relates to the possibility of illegality. I believe from what I have read and heard that that a considerable part of the driver in this dispute, and Mrs Kliers' departure from this community and her being ostracised by members of her family, including her father, relate to the way in which her father and those to whom he looked in the community - and her husband and his father similarly - dealt with financial matters including the funding of this matrimonial home.
- 73 On what she has told me it seems to me that the purpose of putting the property into Mr Schmerler's name, and the tenancy which was also involved, were to obtain funds from the Bank of Scotland as mortgagee, from housing benefit, from the London Borough of Hackney and the Department of Work and Pensions, to which there would have been no entitlement had the true state of affairs been fully and frankly disclosed to those third parties.
- 74 Mrs Kliers has accepted that this state of affairs which she has detailed despite, no doubt, pressures on her not to do so, is disclosable to those authorities, and has told me about contacts with them so far, and has offered an undertaking that there will be a disclosure and steps taken to ensure that both the Bank of Scotland (which I assume to be safe as regards the outstanding principal) and also the social security authorities are fully repaid out of the house, and I am prepared to accept the undertakings which Mr Shaw has offered.

- 75 It may be in the future that steps should be taken for charges over the house in favour, in particular, of repayment of housing benefit, and for steps to be taken as regards the realisation of the value of the house, possibly under a sale conducted by, or under the supervision of, the Bank of Scotland, if that is the right way to ensure that there are no further complications as regards those aspects.
- 76 So the remedying of the position as regards those third parties is, I accept, an important part of Mrs Kliers' aim in the proceedings. Nonetheless, the question of illegality and, rather, its effect on claims in these proceedings does have to be addressed and resolved, and were there any ignorance on the part of the court as regards that issue, Mr Schmerler has gone out of his way, through his solicitors, to emphasise it and to argue that the illegality alleged, as to which, of course, no factual evidence from him is before me in the light of his denial in his defence that the property was bought with Mr & Mrs Kliers' money and to be held by him as a nominee for the purposes that she alleges, or for any other purpose.

Does the issue arise ?

- 77 The first question is whether or not the court has to take account of the alleged illegal purpose, so to speak, of its own motion. Mr Shaw has put forward submissions doubting that proposition. He has drawn my attention to the decision of the Court of Appeal in *Otkritie International v Urumov & Ors* [2013] EWCA 1196 (Civ), and that contains in the Court of Appeal's approved judgment, a very useful summary of the principles applicable to amend a defence to plead illegality and, in particular, refers to the principle that if the facts giving rise to the illegality are such that the illegality is manifest or obvious, the court must take the point of its own motion so as to ensure that its process is not abused in furtherance of the illegality.
- 78 That is a well-known principle usefully summarised in that case, which went on to state the position if illegality is not manifest or obvious, for example because it depends on disputed facts or inferences from those facts, in which case the normal rules applicable to amendments apply. Mr Shaw points out that in this case there is no pleading as to illegality, there is no pleading at all from Mr Kliers, and Mordechai simply alleges in his defence that he paid for the property and did, therefore, not hold it as a nominee for his sister and brother-in-law to live in as their matrimonial home.
- 79 The submission, whilst properly made, in my view is incorrect because on the evidence and the facts as I find them, derived from the evidence of Mrs Kliers, the property was put into Mordechai's name because the fathers, both familial and community, considered that to be the way to achieve the purchase and the borrowing, and the receipt of publicly funded benefits. Why senior persons should consider that

to be proper it is not for me to say, but there can be no doubt that it is an illegal purpose and contrary to our law and one would have thought to the relevant religious law as well, but as to that, fortunately, I am no authority whatsoever.

80 Accordingly, I approach this issue on the basis that the court has to consider the question of illegality of its own motion and volition, and if there was ever a case where the court should do that it is probably a case such as the present. To be confronted by a plan of this nature which, on the evidence, is common practice amongst esteemed and respected religious and community leaders, is one which must cause very great concern to any court seeking to administer the law and the process of justice and legal remedy in this country if not elsewhere.

The effect of illegality

81 The relevant law as regards the effect of such an illegal purpose on the remedies which the court can, and may at its discretion, grant to a claimant in the position of Mrs Kliers, has been the subject of very considerable controversy over the last few decades. That controversy has not been wholly resolved by what is now the leading case in the Supreme Court *Patel v Mirza* [2016] UKSC 42.

82 As a result of earlier high authority, including the case of *Tinsley v Milligan* [1994] 1 AC 340 in the House of Lords, it was thought to be the law that where a claimant had to rely on illegal acts or motives in order to pursue a claim and, in particular, the relief he or she sought in that claim, or where those illegal aspects were inextricably linked with the claim and relief sought, then subject to questions of restitution and the balance as between the claimant and the defendant, as regards the question of property from the illegal acts between themselves, the courts would take what has been referred to as a 'mechanistic approach' to the grant or refusal of relief.

83 The majority in *Tinsley v Milligan* also considered questions of proportionality and whether or not in particular in the case where an equitable interest was claimed in property, which it was found was held in law for some deceptive or otherwise illegal reason, the law would refuse relief on the grounds that to grant it, and allow the claimant vindication for that equitable interest, would infringe the policy of law.

84 In *Patel v Mirza* the majority of a nine person Supreme Court held that a more flexible "range of factors approach" was preferable and accordingly, as can be seen in the judgment in particular of the late Lord Toulson, between paragraphs 101 and 112, the integrity and harmony of the law required flexibility in which the public interest in the effectiveness of criminal law should not be undermined by civil dispute resolution, but

nor should an additional penalty be imposed on a wrongdoer disproportionate to the nature and seriousness of the wrongdoing concerned.

85 Accordingly, it was held by the majority, as can also be found in the speech of Lord Neuberger at, for example, paragraphs 174 and 181, that the more flexible approach should be adopted, and that when faced with a claim based on a contract or arrangement involving illegal activity (whether or not that illegal activity had been undertaken):

". . . the court should, when deciding how to take into account the impact of that illegality on the claim, bear in mind the need for integrity and consistency within our justice system, both civil and criminal, and in particular (a) the policy behind the illegality, (b) any other public policy issues; and (c) the need for proportionality".

86 *Tinsley v Milligan* was, nonetheless, still an example of a case under the old approach as well as the new, in which it was disproportionate to refuse to enforce an equitable interest on the grounds of illegal activity, that is putting the property concerned into the name of a legal owner to gain some illicit advantage, and the policy behind the law making that activity legal was not infringed by granting declaratory relief as regards the beneficial ownership between the parties who were involved.

87 As it happens the approach of the minority in *Patel v Mirza* in the present case may not lead to any different conclusion. In the speech of Lord Sumption, in particular at paragraphs 261 to 264, there is an explanation as to why what was described as a revolution in this area of the law would not constitute a coherent or helpful development, because the concerns as to these difficult questions would not be solved and instead, it was said, a new mess would be substituted for the old one.

88 However, as can be seen in those sections of Lord Sumption's judgment, the old law – the mechanistic law – nonetheless provided for a balancing exercise having regard to public policy. Lord Sumption quoted from *Tinsley v Milligan* and said that the mechanistic approach was nonetheless qualified by "principled exceptions", and I stress that in this, as in so many areas of the law, this is not a matter of simply open discretion or free for all. The law has to be enunciated and applied according to principle.

89 The "principled exceptions" which Lord Sumption highlighted were (a) cases in which the parties to the illegal act are not on the same legal footing; (b) where overriding statutory policy requires that the claimant should have a remedy notwithstanding his [or her] participation in the illegal ac; and (c) the wide availability of restitutionary

remedies which will result from the decision in *Patel* should mitigate injustices which have resulted from the principle that "the loss should lie where it falls."

Application in this case

90 In my judgment the present is a case - and I hesitate to use the phrase 'par excellence' or even the English 'paradigm' – which is nonetheless a strong case where our principles of illegality do not and should not bar the remedies by way of declaratory relief and what will follow from it as to the beneficial ownership of this house in the way that I have already indicated.

91 First, the claimant does not only put her case on a resulting Trust basis, far from it. She states, and stated from the outset in her particulars of claim, that this arrangement resulted from the exercise of undue influence upon her, and I accept that. The pressure which was exerted on her by her father and others, under the aegis or justification of what they were told by the Rabbis should be done, in my judgment did constitute undue influence.

92 This was influence within this particular sect. It was influence which purported to have the backing of religious leadership, incredible though that may sound, and it was influence exerted by dominant males within this family and this society. It is well established, apart from questions of actual influence, that there are presumptions of undue influence which are relevant to the case of requirements imposed by religious and community leaders, and by fathers.

93 That casts the case in a particular complexion, because this is not a case where the parties involved were on anything like an equal basis when it came to formulating documenting or implementing the plan. On the contrary, it was Mrs Kliers' interests which were being put at risk by the manner in which she was required to proceed, and I accept from her that although the scope for any protest or challenge was extremely limited, it was an approach with which she had concerns, not only on the selfish front, as regards her wellbeing and the fortunes of her family, but also as regards the immorality and illegality of what was being put in place by this community.

94 It is said that there is no evidence that Mordechai knew of the illegal purposes for his involvement. I do not go so far as to find that Mordechai was subjectively dishonest in what he did, especially in his (debarred) absence. He has not participated and may have sought actively to refute that. And no doubt, as a younger sibling within this family in this context it would have been very difficult for him, too, to have questioned the process of what was involved.

- 95 But, nonetheless, it may beggar belief for the court, especially in the absence of his involvement in the way that I explained this morning, to assume positively that he *was* unaware of what went on.
- 96 First, Mrs Kliers' evidence is that this was a common practice in this community, although that conclusion would be *unpalatable* for any court and there is no need to go so far. However, secondly, Mr Schmerler, as I find, did not provide anything for the purchase price and entered into the mortgage as a nominee on the basis that he would not have to find the funds to make payments himself.
- 97 Moreover he signed up to the documentation, including the declaration to which my attention was drawn by Mr Kramer's assistance to the court, at p.165 of the relevant part of the bundle in B3, stating that the property was being purchased for his sole occupation which was not the case.
- 98 True it is that Mrs Kliers confirmed that to the solicitors, CWC, and of course this is no imputation against that firm. But, nonetheless, without finding Mordechai dishonest, to have to treat him as holding the legal title as necessarily innocent and therefore in a position to resist the remedy on the grounds that this was an illegal activity in which he was not knowingly concerned, but Mrs Kliers was, would be an unacceptable inference for the court to have to draw in the circumstances which I find before me.

Restitution and public policy

- 99 Apart from those considerations, there are considerations of restitution and public policy which militate for and not against the declarations sought. The public policy against fraud and fraudulent obtaining of mortgage loans and housing benefit is very strong. However, the policy which requires all courts to try and protect that purpose does not militate, in my judgment, against Mrs Kliers' remedy in this case as regards to declaration sufficiently to outweigh all other matters or, arguably, at all.
- 100 To leave matters where they stand is, in fact, to continue the perpetration of the fraud, and that is not the desire of a civil court nor, as it happens, is it the desire of Mrs Kliers or her motive in bringing these proceedings. The reality is that the illegal activities which have taken place have to be undone and remedied, and part of that is assisted, not damaged, by the grant of the declaratory relief together with the referral of the order and judgments of this court to the appropriate authorities.
- 101 The submissions that were made on behalf of Mordechai as regards questions of illegality sought, one might think with extreme hypocrisy, to emphasise that it would

be for the good of the community at large if relief was refused because it would demonstrate that the criminal law had to be obeyed, and if these activities are, indeed, widespread as suggested in the evidence, and in the arguments before me, then it was said that refusal of relief would so demonstrate.

102 With such respect as is appropriate for that submission I must say that I entirely disagree. This is a case where the refusal of relief will be a form of vindication for these illegal practices, and an encouragement to those who initiate and perpetrate them, and a discouragement to those who seek to challenge them, albeit over a period of years in which they have to move away from the dominance of the community and have to work through both intellectually and emotionally how they should, for their own identities, deal with these problems.

103 Accordingly, I reject the contention which Mordechai has gone out of his way to advance despite being debarred from his defence in this case, that public policy requires or justifies the refusal of the relief because of the illegality involved, and that matters should be left to lie with his continuing to have unfettered legal ownership and Mrs Kliers being refused her just beneficial share, subject, of course, to the remedy of the frauds which have been perpetrated on at least the Bank of Scotland and housing benefit authorities.

104 In that regard, Mordechai's solicitor also drew repeated attention to the fact that some of the funds utilised for the purchase of the property were received by Mr and Mrs Kliers as purported charity when, in fact, it was some part of remuneration in particular, Mrs Kliers' remuneration, which again it is said it is a habit in this community to disguise this charity in order to avoid tax on such remuneration.

105 Again, Mrs Kliers has detailed that. Again, it is no reason whatsoever to refuse her relief, on the contrary, in my judgment it is another matter which has to be remedied and, again, her undertakings as offered should assist in that and, again, the orders and judgments of the court will be referred to the tax authorities.

Conclusions

106 In conclusion, if not already obvious, I am satisfied that the Court should grant the declarations sought by Mrs Kliers. I would encourage the parties to seek to make constructive progress as regards the consequences of this judgment, in particular as regards the fate of the house and the distribution of the proceeds and disclosure to the appropriate authorities. I will hear further submissions and the parties should then submit a draft order or orders dealing including directions.

107 By way of a footnote, I express my sorrow at the circumstances of this family, including siblings, parents and others. There was put before me in the course of the hearing a letter from, as I understand it, Mrs Kliers' father, with her translation. It is dated 18 March 2018, and it appears to be addressed to Mordechai.

108 Mr Schmerler senior's letter seems to say, amongst other things, with reference to Mordechai's apparent position that he had earned the purchase moneys needed for the house from work, this:

"I wanted to wake you up: (a) It is absolute lies and forbidden to do this. (b) She earned the amount during five years and went into her marriage with . . [and then there is a reference to some money that she earned and was helped with] ... this is hers. (c) You are a trustee for both of them and it is forbidden to you to do anything except with the permission of both of them. This would be theft and more, and it is a crime of trusteeship and more. If you are being put under pressure it is still forbidden to you to do these things. Do not forget who you are ...".

109 I have already mentioned some of the community circumstances and the ostracisation affecting Mrs Kliers and her family. She gave evidence of some of her attempted contacts with her father and siblings. She was unable to explain the reason for such a letter and as far as the court is concerned, it is not evidence in the case as such - I do not assume that it is authentic and I did not have any account from Mr Schmerler senior as to what has been going on, why he said what he said in that letter, or as to its truth. But in the light of its sentiments and having sought to do the Court's duty in this unhappy case, I do express the hope for what it is worth that there is some light and that, at the end of the day, there can be some reconciliation.

MHR (paragraph 96 corrected) 02/08/17