Neutral Citation Number: [2022] EWHC 2807 (Ch)

Case No: BL-2020-000043

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (CHD)

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 21/11/2022

Before :

DEPUTY MASTER BOWLES

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Between :

John McLinden	**Claimant**
- and -	
Shiao-Chen Lu	**Defendant**
and	
Shabnam Khan (On behalf of the Estate of Fazal Khair Khan)	**Third Party**

AND in the application between:

Shabnam Khan (On behalf of the Estate of Fazal Khair Khan	**Applicant**
-and-	
(1) John McLinden	
(2) Shiao-Chen Lu	
(3)Mohamed Munaver Khan	
(4) The Official Receiver	**Respondents**

AND in the matter of Mr Mohamed Munaver Khan
in Bankruptcy (No. 5542 of 2013)
AND in the matter of the Insolvency Act 1986

Between:

Shiao-Chen Lu	**Applicant**
-and-	
Shabnam Khan (on behalf of the Estate of Fazal Khair Khan_	**Respondent**

John McLinden QC in person

Simon Hill (appearing by direct access) for **Shabnam Khan**

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Oliver Phillips (appearing pro bono under the auspices of **Advocate**) for **Shiao-Chen Lu**

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Hearing dates: 25th, 26th and 27th July 2022

-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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DEPUTY MASTER BOWLES

Deputy Master Bowles: :

1. By his order dated 4th November 2011, District Judge Lightman, sitting in the Central London County Court, granted a final charging order in favour of the Defendant, Ms Shiao-Chen Lu (Ms Lu), in respect of premises at 45 Avarn Road, Tooting SW17 9HB (Avarn Road). Avarn Road was registered in the name of the Third Defendant, Mohamed Munaver Khan (who, without disrespect, I shall refer to as Munaver). The charging order purported to secure, in favour of Ms Lu, the sum of £546,578.53, together with accruing interest and costs, owing to Ms Lu pursuant to a judgment that she had obtained against Munaver in June 2010. The interim charging order in favour of Ms Lu had been granted by District Judge Gilchrist on 31 December 2010. Although a party to the current proceedings, Munaver, who died on or about 24 January 2022, has taken no active part in these proceedings and, by my order of 31st January 2022, I directed that these proceedings could continue in the absence of any person representing his estate. In the event, no application has been made by, or on behalf of his estate, to join in the proceedings.

2. The fundamental question with which this judgment is concerned (albeit a question with many ramifications) is whether the November 2011 charging order was rightly made, or whether, as contended by the Third Party, Shabnam Khan (Ms Khan), on behalf of the estate of Fazal Khair Khan (Fazal), her grandmother, the beneficial ownership of Avarn Road, at the date of the charging order, was vested in her grandmother, such that the November 2011 charging order should be discharged.

3. An a priori question, arising out of the original litigation between Ms Lu and Munaver, is whether, in the context of the judgment delivered by District Judge Lightman, when making final the November 2011 charging order, the existence of some beneficial interest in Avarn Road in favour of Munever has already been determined and, if so, whether it is open to Ms Khan, on behalf of her grandmother's estate, to seek, in these proceedings, to relitigate that determination and seek, as she does, the discharge of the November 2011 charging order and a determination that the beneficial ownership of Avarn Road was, at the date of that order, vested in Fazal and now forms part of her estate, or whether, having regard to the District Judge's determination and all other relevant circumstances, Ms Khan's attempt to assert her grandmother's beneficial ownership in this litigation is an abuse of process.

4. A further question for determination is whether, whether or not the district judge made any determination as to beneficial interest and even if the court is satisfied that Fazal did not own the entire beneficial interest at the date of the final charging order, she, nonetheless, held some beneficial interest, now vested in her estate.

5. Additionally, a question potentially arises as to whether such beneficial interest, if any, as was vested in Fazal had been vested in her illegally, such that she and now her estate should not be entitled to enforce the transaction giving rise to her interest; alternatively, even if the transaction was effective, whether I should give leave to Ms Lu to bring an application under section 423 of the Insolvency Act 1986, on the footing that any transfer of the beneficial interest in favour of Fazal had been effected at an undervalue and for the purpose and with the intent of enabling Munaver to put his assets beyond the reach of his creditors and on the further footing that, if such an application was successfully made, the court could and should set aside the transfer in

question such that Ms Lu should be entitled to enforce her outstanding judgment against Munever, or, now, his estate, as being a victim of the transaction in question.

6. The circumstances giving rise to these questions and the history of this litigation, up to and including my earlier judgment in these proceedings and including and explaining the involvement of the Claimant, Mr McLinden, in these proceedings are fully set out in my earlier judgment, [2021] EWHC 3171 (Ch), at paragraphs 3 to 19 and are not repeated here. The long and the short of it is that, if the November 2011 charging order falls away, not merely will Ms Lu be unable to enforce her June 2010 judgment against Munever against Avarn Road, but Mr McLinden's interim charging order over the November 2011 charging order, in support of his judgment against Ms Lu, will also fall away.

7. The narrative set out in my earlier judgment, specifically paragraph 8, must be read, now, subject to the detailed submissions made to me by Mr Phillips, for Ms Lu, as to the true meaning and effect of District Judge Lightman's judgment, when making final the November 2011 charging order, and as to what was actually decided by District Judge Lightman. The precise meaning and effect of the district judge's judgment, was not a matter which was put in issue, or closely investigated, in the trial of the Bankruptcy Issues, as defined in my earlier judgment, albeit that, as is clear from my judgment, the perceived effects of his judgment formed an important part of the context in respect of those issues.

8. What is clear and what, however, is correctly set out in paragraph 8 of my judgment is that Fazal's right to contend that she, not Munaver, was the beneficial owner of Avarn Road was expressly reserved by District Judge Lightman and what is equally clear and what was material to the Bankruptcy Issues, as is set out at paragraphs 34, 35, 40 and 41 of my judgment in respect of the Bankruptcy Issues, is that Ms Lu was very well aware that the beneficial ownership of Avarn Road had been left open by the district judge and that Fazal continued to assert beneficial ownership.

9. Ms Lu's case in respect of the Bankruptcy Issues, as set out in the foregoing paragraphs, was unequivocal. The reason that she had not placed any value upon the 2011 charging order in her 2013 bankruptcy petition and the reason that she had not made mention of the November 2011 charging order in her proof of debt, subsequent to Munaver's bankruptcy, pursuant to that petition, was that the ownership of Avarn Road, as between Munaver and Fazal, had been left unresolved.

10. In the light of the district judge's explicit reservation, or preservation, of Fazal's right to assert her beneficial ownership and, as importantly, in the light of Ms Lu's awareness and understanding that the district judge had left open the question of beneficial ownership, it is very hard to see that the estate's assertion of beneficial ownership in these proceedings falls readily within the usual parameters of abusive re-litigation.

11. District Judge Lightman's decision in respect of Avarn Road is, at best, confusing. Mr Phillips, in his careful and measured submissions, acknowledged the tensions, as he put it, that existed between some parts of the judgment, which is, in fact, more in the nature of a colloquy, and other parts.

12. The matter is not helped by the fact that there were before the district judge, on 4th November 2011, two separate interim charging orders; the one relating to Avarn Road, which was made final, the other relating to another property, 82 Westminster Way, Botley, Oxford OX2 0LP (Westminster Way), where a separate issue as to beneficial ownership, in that case as between Munaver and his brother, Mohamed Akram Khan (Akram), existed and where Akram was asserting that the property, held in his name, was held by him beneficially. A further layer of difficulty is provided by the fact that, as I read the transcript (page 3 A to B), the only matter technically before the District Judge was an application by Akram to strike out the interim charging order relating to Westminster Way, together, perhaps, with an application made by Ms Lu for specific disclosure, again, in respect of the litigation concerning Westminster Way (transcript page 4 E to F).

13. I have read and considered the entire transcript of the hearing before the district judge, in so far as it relates to Avarn Road and in so far as it is possible to distinguish his remarks relating to Avarn Road and those relating to Westminster Way. The transcript is, I think, unedited and the sentence and, in particular, the paragraph structure is more that of the transcribers than that of the district judge.

14. Mr Phillips, rightly, drew my attention to the district judge's opening observation, as he put it, as to his approach to the making of final charging orders (transcript 6 D to H). His practice, over many years, had been, as he stated, to make charging orders final and to leave for later determination, in enforcement proceedings, the question as to whether the registered title holder, in respect of whom the final charging order had been made had, in fact, owned the beneficial interest. That practice had, however, as the district judge explained, been called in question by another district judge at the Central London County Court, who had adopted the view, correctly, in my view, that, where it was asserted that the person against whom the charging order was sought was not beneficially interested, then it was necessary, before making the order final, to determine whether the person against whom the order was sought had a beneficial interest.

15. By an earlier order, dated 18th April 2011, another district judge, District Judge Price, had made an order, in respect of both Westminster Way and Avarn Road, joining Akram as a party to the charging order proceedings, limited to his assertion of ownership in respect of Westminster Way and directing disclosure, the preparation of a bundle and the attendance of Munavar and Akram for cross-examination. At that stage Fazal was not a party. However, by order of 28 July 2011, Fazal was, like Akram, joined as a party, limited to her assertion of beneficial ownership of Avarn Road.

16. Those orders plainly envisaged that beneficial ownership would be determined, or considered, before the interim charging orders were made final and they provide the context against which District Judge Lightman's observations at transcript 6 F to H fall to be understood. What he is saying, in that passage, is that notwithstanding his usual practice, the court 'having gone down the route' of considering beneficial interest at the making final stage of the charging order process, justice required him to continue down that road in respect of each of the two properties. While I think that his emphasis was on Westminster Way, since he refers to a determination of the beneficial interest of a person in whose name a property has been registered, the position advanced by Akram, in respect of Westminster Way, I have no doubt that, at

that stage, his thinking also embraced Avarn Road, which he felt could be dealt with 'speedily'.

17. Having dealt with a thoroughly unmeritorious application to strike out the interim charging orders, based upon an alleged surrender by Ms Lu of her security over the two properties, in the course of unsuccessful bankruptcy proceedings against Munaver, which had been dismissed in August 2011, the district judge reverted to the question of making final the charging order over Avarn Road at transcript 10C and following.

18. Although, as the district judge acknowledged, the application to make final was not technically listed and although neither Munaver and Fazal were present at court, Ms Lu's representative, nonetheless, successfully persuaded the district judge to proceed with the application.

19. In support of the application, Ms Lu's agent, adopting, as it appears, what I will call the usual approach taken by the district judge in respect of making final charging order, submitted, at transcript 10F, that, if the order was made it would be Ms Lu's risk if, in due course, it transpired that there was no beneficial interest to enforce.

20. That submission, notwithstanding his earlier comments, or observations, would seem to have found favour with the district judge. In discussion with Akram, when invited by the district judge to speak for his mother, the district judge stated, at transcript 11E, that if the order was made final it would remain open to Fazal to assert her sole beneficial ownership and that, if she did so, the question would have to be tried.

21. The district judge's judgment is to be found at transcript 12 B to E. He was satisfied that Munaver, against whom Ms Lu had obtained her interim charging order, held the registered title to Avarn Road and, on that basis he was prepared to make the order final. In regard to Fazal's rights, or the rights of any other person asserting a claim on the beneficial ownership, he reiterated that those rights and claims could be raised in any enforcement proceedings. Materially, one of the persons who the district judge said might possibly have beneficial rights was Munaver. Plainly, therefore, he was not holding, or determining that Munaver had such rights. Rather, the rights of Fazal and any other potential claimants were preserved.

22. The following paragraph of the transcript 12 E to G is one upon which Mr Phillips places some reliance, as being indicative of a finding by the district judge that Munaver had, at least, some beneficial interest in Avarn Road. While the paragraph is undoubtedly opaque, I do not read it in that way. It seems to me that having decided to make the charging order over Avarn Road final, without determining beneficial ownership and leaving that question to be resolved in enforcement proceedings, the opening part of the next paragraph, commencing 'That is why …' is in the nature of an explanation as to why it is, in the view of the district judge, normally, unnecessary to resolve beneficial ownership at the stage when charging orders are made final; namely because, in his view, such matters could be resolved in enforcement proceedings.

23. The district judge's subsequent reference to this perhaps being the one case where, unusually, he might refuse to grant a final charging order because of matters which

could be raised in enforcement proceedings is not, I think a reference to Avarn Road, at all, in respect of which he had already decided to make a final charging order.

24. Rather, the district judge was referring back to and reiterating, albeit parenthetically, what he had already decided, at transcript 8F to G, in respect of Westminster Way. At transcript 8 F to G, the district judge had explained to Akram that, in respect of Westminster Way and because, in managing the case, the parties and District Judge Price had 'gone so far down the route' of determining beneficial ownership, there 'ought to be a decision' on that question and a full scale hearing for that purpose. At transcript 12 F to G, the district judge returns to this (and, hence, to Westminster Way) in near identical terms; 'Having gone down this route so far … it (Westminster Way) is going to be the one where the decision will have to be made'. The district judge is not referring to Avarn Road, where the decision to make final the charging order has been made, but to Westminster Way, where, in the future, the decision as to ownership would have to be made and where, if made by the district judge, it would be, as again explained by the district judge, at transcript 22 B to C, the first time he would have ruled upon such a point, prior to making a charging order final.

25. My clear conclusion, arising out of all the foregoing, is that the district judge, although making final the charging order, made no decision as to beneficial ownership and, specifically, as to Munaver's beneficial ownership.

26. Mr Phillips, adverting, understandably, to the terms of the Charging Orders Act 1979 (the 1979 Act), with which, as he submitted, the district judge must have been familiar, and to the requirement, under that Act, that the charging order be granted over a beneficial interest of the judgment debtor, contended that the district judge must have had that matter in mind and must, albeit sub silentio, have decided that Munaver had some beneficial interest.

27. I am quite satisfied that that was not the case and that, in respect of Avarn Road, the district judge adopted what was, plainly, his long standing practice of putting over disputed issues of ownership to be considered, or determined, at the point when the charging order was sought to be enforced.

28. A number of matters flow from this conclusion.

29. Firstly, this is not a case of re-litigation and is not, in consequence, abusive, on that basis. Mr Phillips supported his abuse argument by reference to the fact that, in respect of the November 2011 charging order, there had been an abortive appeal on procedural grounds which had been withdrawn and which had resulted in an unpaid costs order against Fazal; those costs, with accrued interest, standing as at 25 July 2022 at £14,396.39. It was his submission that it was the combination of an attempt to re-litigate while leaving unpaid the costs associated with the original litigation which, in this case, rendered the re-litigation abusive.

30. That argument, however, falls away in circumstances where, as here, there is no re-litigation. There is no doubt that an attempt to re-litigate, following, for example, a strike out of the original claim, may well be regarded as abusive, if attempted without first making good the costs incurred by the successful party in the originally abortive litigation. That, however, is not this case. An unpaid costs order incurred in the course of litigation, may in appropriate circumstances give rise to a debarring, or striking out,

order, in the event that those costs remain unpaid. Absent such an order, itself not one readily made, the carrying on of that litigation is not, in itself, an abuse of the process.

31. Secondly, the approach adopted by the district judge, in granting a final charging order over Avarn Road, without first determining the existence of a beneficial interest in the judgment debtor, was, as it seems to me, so flawed as to, in itself, afford grounds for the discharge of the charging order. Mr Phillips submitted that it was only in rare circumstances that grounds exist to discharge a final charging order and that, absent such circumstances, Ms Khan's application to discharge the November 2011 charging order was, for that reason, abusive. In my view, however and as just stated, far from the application to discharge being abusive, the conduct of the district judge, which was, or, at least, should have been exceptional, affords clear grounds for discharge, before, even, the merits of Fazal's claim to beneficial ownership are resolved. It would, as it seems to me, to be manifestly unjust for the court to treat, or to regard, an application to discharge the improperly obtained order as abusive, in circumstances where, as I find, a final charging order has been improperly granted, where the relevant legislation affords a specific jurisdiction for the discharge of such an order (section 3(5) of the 1979 Act) and where the basis upon which the final charging order is sought to be discharged is, precisely, the determination of beneficial ownership, which the court explicitly left open for future determination.

32. I should add, for completeness, that, even if I had found that the district judge had, as I have put it, determined sub silentio that Munaver had some entirely unascertained beneficial interest in Avarn Road, I would not have been minded to treat the application to determine beneficial ownership and discharge the November 2011 charging order as constituting abusive re-litigation.

33. I reiterate what I set out in paragraph 10 of this judgment. The district judge's explicit reservation of Fazal's right to assert her beneficial ownership of Avarn Road, coupled with Ms Lu's awareness and understanding that the district judge had left the question of beneficial ownership open for further determination, renders this case an unlikely candidate for a finding of abusive re-litigation.

34. In the usual case as explained by Lord Bingham, in **Johnson v Gore Wood & Co. [2002] 2 AC 1 at page 23**, re-litigation is abusive for two separate reasons.

35. Firstly, as between the parties, it is an abuse of the legal process, where an issue, or dispute, has been properly determined between those parties, for the dissatisfied party to re-invoke the process, in an attempt to secure a better outcome, and to, thereby, put the other party to the expense, in time, cost and vexation, of dealing anew with a matter already properly resolved. The public interest requires both finality in litigation and, also, that a litigant should not be vexed twice in the same matter.

36. Secondly, as between the re-litigating party and the court, it is abusive, in circumstances where the resources of the court are limited and where there is a necessity for efficiency and economy in the conduct of litigation, not merely in the interests of the parties, but in the interests of the litigating public as a whole, for a matter, already resolved, to be brought back before the court and for the court's resources to be expended anew on the same litigation.

37. Neither of those considerations apply in this case. The question of beneficial ownership was explicitly left for later determination.

38. There is no question of Fazal, or her estate, seeking to re-litigate something already properly determined. Nor is there any question of Ms Lu being taken by surprise by Ms Khan's application, on behalf of Fazal's estate, to seek that determination. Ms Lu has, at all material times, been aware that beneficial ownership has been left at large and she has, as set out earlier in this judgment, conducted herself on that basis. There is no question of her being vexed twice in the same matter.

39. Correspondingly, this is not a case where the determination of the beneficial ownership of Avarn Road will result in any waste of the resources of the court, or in Ms Khan, on behalf of Fazal's estate, seeking to procure an excessive share in those resources, in seeking that determination. The approach of the district judge, even if he had, sub silentio, made some undefined finding as to beneficial interest, was, in effect, to treat that finding as defeasible at the point when beneficial ownership was properly explored and determined. The court can have no complaint, having adopted that approach, when the parties to the litigation, or one of them, takes up the court's own invitation, in that regard,

40. I do not think that this conclusion is at all modified by the fact that there remains the unpaid costs order outstanding, as previously set out. I reiterate what I said at paragraph 30 of this judgment. The costs order does not debar Ms Khan, on behalf of Fazal's estate, from procuring the determination of beneficial ownership left open by the court, or render her application for that determination abusive.

41. In so far as it is relevant to go to the minutiae, there is no suggestion in any of the evidence before me that Fazal was a woman of means, or that, without family assistance, she would have had the resources to pay the costs in question. That, in itself, raises questions as to whether it would ever have been appropriate, having regard to the need to protect her access to justice, to make any kind of debarring order, arising from that non-payment.

42. Mr Phillips rightly pointed out that Ms Khan, on behalf of the estate, has paid for the services of solicitors and counsel, in respect of earlier aspects of this litigation, and queries, therefore, why she has not procured the payment of these costs. Ms Khan, however, is only representing the estate and, on the evidence that I have heard, the monies she has used in representing the estate are not estate monies but her own monies and monies that she has borrowed. It is not immediately obvious to me why she should use her own monies to pay costs incurred by her grandmother, where her position, in respect of any monies that she may expend on this litigation, can only be that of someone who may, in due course and if the estate has funds, be able to look to the estate for indemnity in respect of monies spent on its behalf.

43. Be this last as it may, I am satisfied, for the reasons already set out, that Ms Khan's application for a determination of beneficial ownership and, the corresponding discharge of the November 2011 charging order is not abusive and not one that the court, for that reason, should refuse to adjudicate,

44. I turn, then, to the question of beneficial ownership; a question which, as I have already remarked, raises many ramifications.

45. The starting point is the original, or initial, purchase of Avarn Road by Fazal, as to which, in contradistinction to very many other matters in this case, there is very little dispute, or argument.

46. Avarn Road was purchased in the joint names of Fazal and her son, Munaver in or about June 1994 and registered in their favour on 23 June 1994. The purchase price was £56,000. Fazal had, prior to the purchase, lived in a Housing Association property, at 15a Lucien Road, London SW 17. She had lived in that property with her mother. On the death of her mother, in 1989, Fazal was asked to relocate and, to that end, pursuant to a tenant's incentive scheme, she was given a grant of £16,000. Although the details are not entirely clear, those monies, or some of them, went into the purchase of Avarn Road, the balance being provided by a mortgage from Northern Rock. Munaver became involved as a joint owner and joint mortgagee with Fazal, because Fazal had insufficient funds to purchase the property outright and was unable to procure a mortgage in her sole name. At the date of the purchase Fazal, who died on 8 March 2019, aged 87, would have been in her early sixties and it was, as I understand it, primarily for that reason that she was unable to procure a mortgage in her own right.

47. It is not in doubt but that, in purchasing Avarn Road in this manner, Fazal secured a substantial beneficial interest. The mortgage advance, apparently of circa £46,000, was hers equally with her son. The balance of the purchase monies was provided by her. There is nothing in any of this to suggest that, on purchase, Fazal held any lesser beneficial interest than the beneficial joint tenancy presumptively arising out of the purchase in joint names; nor has any such suggestion been advanced. It is, likewise, not in doubt but that Avarn Road was purchased as a home for Fazal or that it remained her home at all times until her death in 2019.

48. Avarn Road did not, however, remain in joint names.

49. By a transfer dated 19 September 1995 and registered on or about 25 September 1995, Avarn Road was transferred from the joint names of Munaver and Fazal into Munaver's sole name. The transfer, to which Northern Rock was a party, provided for a consideration of £1, in respect of the transfer, that the transfer would be subject to the Northern Rock mortgage, and for the release of Fazal from any further liability under the mortgage. The transfer further recorded Fazal's agreement that she had no interest standing in priority to that of Northern Rock.

50. As to that, although initially in issue, by the end of the trial it had become common ground that, by reason of section 2 of the Law of Property Act 1925, read with section 205(1)(xxi) of that Act, the effect of the transfer, by the two joint legal owners, was that any beneficial interest then vested in Fazal was overreached into the proceeds of sale arising from the transfer, even if the consideration for that transfer (putting to one side the fact that Fazal was released from her obligations under the mortgage) was only the sum of £1 shown on the face of the transfer.

51. As I have already indicated, Fazal's beneficial interest, at the point of the initial purchase of Avarn Road was no less than that of a beneficial joint tenant. There is, however, some question as to whether that was her beneficial interest at the date of the 19 September 1995 transfer. That question arises from the fact that, in the first annual report prepared by Munaver's trustee in bankruptcy (Munaver having been

made bankrupt by Ms Lu, in February 2014, as set out, in extenso, in my earlier judgment), Munaver's trustee refers to a declaration of trust, dated 14 September 1995 and, therefore, preceding the transfer. That declaration, which is not before the court, is allegedly in different terms to and inconsistent with a subsequent declaration of trust, dated 7 February 1996, which Ms Khan, on behalf of Fazal's estate, asserts, to have been effective in confirming, or creating, a 50% beneficial interest in favour of Fazal.

52. It is unfortunate that the earlier declaration of trust is not available to the court and that the court, therefore, has no knowledge either of its terms, or of the circumstances in which it was entered into, or as to why it was replaced, as it would appear it was, by the February 1996 declaration. In a case, such as this, where, as explained later in this judgment, Ms Lu nourishes understandable suspicions as to the conduct of Munaver, in his dealings with Avarn Road, the existence of this earlier undisclosed declaration of trust undoubtedly contributes to those suspicions and, in particular, to the suspicion that that declaration, together with the February 1996 declaration and a subsequent declaration, dated 10 May 2010, upon which Ms Khan also relies, were 'shams' created by Munaver, with a view to obscuring his assets from his creditors.

53. I will return to the question of 'sham', in respect of both the 1996 and the 2010 declarations later in this judgment. I would say, however, at this stage, that I am not persuaded that Ms Khan has, in this regard, or generally, been guilty of any deliberate non-disclosure. Having seen her give her evidence and be cross examined by Mr Phillips, I am satisfied that she has, as she has told me, done her best to produce all the documents that she can. I am further satisfied that, far from the absence of documentation working to her advantage, that absence has, inevitably, rendered her task, on behalf of her grandmother's estate more, rather than less, difficult.

54. Be this last as it may, there is no doubt, substantively, that the effect of the 19 September 1995 transfer was to overreach whatever beneficial interest Fazal then had, with the result that, following the date of that transfer and subject to any valid declarations of trust, or to circumstances giving rise to an informal trust interest, by way of constructive trust, Munaver held Avarn Road both legally and beneficially.

55. It is in that context that I turn, in the first instance, to the February 1996 declaration of trust.

56. The declaration of trust is plainly a home-made document and, for that reason and not unsurprisingly, it betrays certain misunderstandings as to joint ownership. In particular, it contemplates, or appears to contemplate, that the legal estate was and could be held as tenants in common and, accordingly, refers to the transfer to Munaver of Fazal's 'legal ownership of 50%' of the property and, post-transfer, to Munaver holding '50% of legal ownership' on trust for Fazal. Additionally, the declaration contemplates a transfer of the legal estate to Munaver, which, by the date of the declaration of trust, had already taken place and which, in consequence, has no regard to the overreaching effect of the transfer, even if, which I doubt, the parties would ever have had overreaching in contemplation.

57. All that said, the essence of the transaction seems to me to be clear. Avarn Road, having been purchased, as it was, in joint names, was to be transferred, as it was, into Munaver's sole name, for the purpose, as set out in the declaration, of enabling

Munaver 'to obtain financing for his business'. The transfer, however, was not intended to reduce Fazal's prior beneficial interest and, accordingly, the declaration provided that Fazal was to 'remain the beneficial owner of 50% of the property'.

58. I do not think that the fact, that the draftsman of the declaration was unaware that a tenancy in common cannot exist in a legal estate and, in consequence, drafted the declaration on a false footing, has any bearing upon the validity of the declaration of trust. The declaration of trust was not and was not intended to be dispositive of the legal estate. The underlying intention, namely that the entire legal interest vest in Munaver was, in point of fact, achieved.

59. Nor do I think that the fact that the declaration of trust post-dated the transfer, resulting in the overreaching of Fazal's prior beneficial interest, has the effect of invalidating the declaration.

60. Mr Phillips focuses upon the word 'remain' and submits, given that, at the date of the declaration, Fazal had no beneficial interest, by reason of overreaching, that there is an uncertainty of subject matter as to any trust. He submits further that, because the parties to the declaration entered into the declaration upon the basis of a mistake of law, namely that Fazal had a continuing beneficial interest, when she did not, that the entire declaration fails for mistake.

61. I am not persuaded. I think it entirely clear that the overriding intent which emerges from the declaration of trust was that Fazal was to have a 50% interest in Avarn Road and that that 50% interest, by way of an undivided share in the property, was the subject matter of the trust. I do not think that the fact that the parties may have understood, or believed, erroneously, that she already had such an interest detracts, at all, from the clear intent that, going forward, she should have that interest, nor from the fact that, by way of the declaration of trust, Munaver, who, at the date of the declaration, was legal and beneficial owner of Avarn Road, declared, in her favour, that she had that interest.

62. Likewise, I do not think that the declaration of trust is negated, or invalidated, by mistake. Mr Phillips, I think, places too much weight upon the word 'remain'. In any case where joint owners convey property to one of their number, as sole owner, but where it is desired that the outgoing co-owner is to retain his or her beneficial interest, or remain a beneficial owner, the process of retaining that interest, given the effect of overreaching, requires that the new owner replicates the beneficial interest of the previous co-owner by creating a new trust. In those circumstances, the outgoing owner retains his or her beneficial interest, or, to use the language of the February 1996 declaration of trust, remains a beneficial owner, by way of the new trust.

63. In the case of the February 1996 declaration of trust, it seems to me that the parties, Munaver and Fazal, intended no more than to achieve, in the context of Avarn Road, that which I have described in the previous paragraph, namely to substitute a new trust in favour of Fazal in replacement of the beneficial interest that she had had prior to the transfer to Munaver, such that, after the transaction was concluded, she remained a 50% beneficial owner.

64. I do not think that, in declaring that Fazal remained a 50% beneficial owner, the parties were, as, I think, Mr Phillips suggests, simply asserting, or confirming, that,

post-transfer, Fazal would retain the existing 50% beneficial interest, which, pre-transfer, she was evidently seen to have had in Avarn Road and that, in effect, the transfer to Munaver of the entire legal estate was to be subject to Fazal's existing interest. Rather, the very purpose of the declaration of trust, as its name suggests, was to declare a new trust, in favour of Fazal, such that, in the new circumstances, arising from the projected transfer, she would, nonetheless, remain, as she had been prior to that transfer, a 50% beneficial owner of the property.

65. In those circumstances it does not seem to me that the fact that, unbeknown to the parties, Fazal's prior interest will have been extinguished prior to the execution of the declaration of trust is of any particular relevance, nor, consequently, that it gives rise to any argument that the declaration was entered into under, or invalidated by, a mistake.

66. In the result, I am satisfied that, pursuant to the February 1996 declaration of trust, taken at its face value, Fazal did retain a 50% interest in Avarn Road.

67. That determination, however, is, in light of Mr Phillips' submissions, contingent. It is contingent upon the authenticity of the declaration of trust. It is contingent upon the declaration of trust, even if authentic, in the sense of being executed at the date upon which it is said to have been executed, reflecting the true arrangements existing between Munaver and Fazal. For purposes of this litigation and a determination within this litigation, it is contingent, also, upon the court being entitled to have regard, at all, to the terms of the declaration.

68. The last point, which I will deal with next, arises out of the fact that the declaration of trust was, as at 1996, an instrument which, under the Stamp Act 1891, required to be stamped and which, in the absence of stamping and pursuant to section 14 (4) of that Act, could not 'be given in evidence, or be available for any purpose whatever'.

69. At the date of trial the declaration had not been stamped and, consequently, subject to the matters next explained and discussed it, was not a document to which I was entitled to have regard in determining the issues in this case. It would appear that the stamp duty payable, in respect of the instrument, was, or would have been, 50p.

70. It is well established that the bar on the use of an unstamped instrument in civil proceedings extends, beyond the original instrument, to copies, to recitals contained within an unstamped instrument and to oral evidence of the contents of the instrument. As the statute makes clear, the instrument cannot be made available for any purpose and, accordingly, it could not, as it seems to me, be used as evidence of the joint intentions of the parties to the instrument for purposes of establishing a joint intention constructive trust.

71. As explained, however, in **McGuane v Welch [2008] EWCA Civ 785**, drawing upon the established practice of the court, as set out, in **In re Coolgardie Goldfields Ltd [1900] 1 Ch 475**, the bar upon the use, in civil litigation, of an unstamped instrument will be lifted, such that the instrument can be prayed in aid in civil proceedings, upon the receipt and acceptance by the court of an appropriate undertaking from a solicitor, in his, or her, capacity as an officer of the court, in respect of the stamping of the instrument and the paying of all necessary fees.

72. As appears from the judgment of Cozens-Hardy J, in **In re Coolgardie Goldfields**, the practice of accepting a solicitor's undertaking as to stamping derives from a case heard by Sir John Romilly, in 1855. The rationale for the practice is set out, by Cozens-Hardy J, at page 479 of his judgment, namely that it is a practice which exists to avoid the necessity of standing over a part-heard trial to accommodate the stamping of an unstamped instrument. The mischief of the prohibition in section 14(4) of the Stamp Act, namely to procure that, if instruments are to be used in litigation all stamping fees have been duly paid, is met by the undertaking given by, as it is put, the court's own officer to secure the stamping of the document in question and the payment of all necessary fees and penalties.

73. Although, the practice set out in **In re Coolgardie Goldfields**, contemplates that, in a case where an undertaking is proffered and accepted in order to enable use to be made of an unstamped instrument in the relevant litigation, the order, arising out of the use of the unstamped instrument in that litigation, will not be perfected until the stamping has taken place, it does not appear to me that must necessarily always be the case, or that the court's practice cannot be tailored to meet particular circumstances.

74. In **In re Coolgardie Goldfields**, itself, where a solicitor, having given his undertaking sought to withdraw it and where, therefore, the relevant stamping had not taken place and the order had not, in consequence, been perfected, the court, while requiring compliance by the solicitor, nonetheless, went ahead and perfected the order, albeit without any recital in the order of the unstamped instruments.

75. Similarly, in **Hameed v Qayyum [2008] EWHC 2274 (Ch),** in a case where the suggestion existed that the Stamp Office would not accept the monies (some £30) required to procure the necessary stamping, the possibility that the instrument would not be stamped and that the solicitor giving the undertaking would be left holding the monies in question to the order of the Stamp Office, did not preclude the court from accepting an appropriately devised undertaking and admitting the instrument in question into evidence.

76. **Hameed v Qayyum** is material to the present case in at least one further respect. In this case the court does not have the original of the 1996 declaration of trust, but only copies. The question has, therefore, been raised as to whether an undertaking to have a copy of the instrument in question stamped is sufficient to admit the copy instrument into evidence, as evidence of the original. In reliance upon Irish authority, **Nally v Nally [1953] I R 19,** itself founded upon remarks of Lord Blackburn, in **London & County Banking Company v Ratcliffe (1881) 6 Appeal Cases 722**, Judge Purle QC, in **Hameed v Qayyum** answered that question in the affirmative. I agree. It seems to me, as it did to Judge Purle, that that approach to the court's practice, in respect of undertakings as to stamping, is both sensible and desirable. It ensures that fees due to the revenue in respect of the stamping in question are paid, while enabling the court to make its own determinations upon the best available evidence.

77. A further question raised by Mr Phillips is as to whether an undertaking as to stamping can only be accepted from a solicitor who is on the record for one of the parties to the litigation, specifically, the party who seeks to rely upon the unstamped instrument. While, unsurprisingly, I have no doubt but that in the very large majority of cases the solicitor proffering the undertaking will be the solicitor for one of the

parties, I see nothing, either in principle, or in authority, to suggest that that must be the case. Rather, it seems clear to me, from the passage, in **In re Coolgardie Goldfields**, at page 479, referred to above, that the principle, if it can be so called, underlying the court's practice, is that the undertaking should come from a solicitor, in his, or her, capacity as an officer of the court, rather than as a representative of a party to the proceedings**.**

78. Although, in the usual case, the undertaking will emanate from a solicitor for one of the parties and although, as contemplated, in the passage at page 479, that solicitor will, in that case, be able to seek indemnity from his, or her, client, the fact, that that is the usual case, is, as it seems to me, peripheral. The practice, as explained (see, also, page 477), is that the court will not accept the undertaking of the parties, or, therefore, that of a solicitor, in his, or her, capacity as a representative of one of the parties, but, only in his, or her, capacity as the court's 'own officer'. In that context, it seems to me that the question as to whether the court's officer is, or is not, on the record is a matter of no significance at all.

79. In this case, an undertaking was, initially, proffered by the solicitors, Regal Law, who had previously acted for Ms Khan, in the trial of the Bankruptcy Issues (at this trial Ms Khan acted in person, with the benefit of counsel, Mr Hill, acting under the Direct Access scheme). Those solicitors had, in the earlier proceedings, acted with complete propriety and, in consequence and in principle, there is, or would be, no difficulty in accepting their undertaking. The undertaking, however, by letter dated 14 July 2022, referred not to the copy of the 1996 declaration of trust, but to the unavailable original. It undertook that that document would be properly stamped within a reasonable time.

80. That position was modified at trial and, at trial, I indicated that I was prepared to accept an undertaking from those solicitors, to the effect, that a copy of the 1996 declaration of trust would be stamped within 21 days of the undertaking (given on the final afternoon of the trial (27 July 2022)), and that, on the faith of that undertaking, I would admit the copy of the declaration of trust into evidence, as evidence of the contents of the original.

81. I did so, notwithstanding Mr Phillips' perfectly proper submission that the undertaking had been, as was the case, proffered very late in the day. It did not and does not seem to me that the fact that stamping was not addressed by Ms Khan, or her then advisers, at an earlier date has caused Ms Lu, or the court, any material prejudice and certainly not prejudice of a nature that should preclude the court from accepting the proffered undertaking and, thereby, enabling this court, in resolving the issues of ownership, to do so having regard to all the available, or potentially available, evidence.

82. I took the view, then, that any difficulties faced by Regal Law in complying with their undertaking and in procuring stamping of the copy declaration of trust and any matters potentially arising from such difficulties could be dealt with when this judgment was handed down. They did not, however, affect the admissibility of the copy of the 1996 declaration of trust, as evidence of the original declaration. In the event, I have received confirmation from Regal Law that the copy declaration of trust has been stamped, as at 31st August 2022, with the result that no such difficulties will now arise.

83. On that footing, I turn to the authenticity of the declaration, in the sense set out in paragraph 67 of this judgment. I have no doubt but that, the 1996 declaration was made at the date when it is said to have been made.

84. I do not think it either surprising, or controversial, that the original of the declaration of trust is no longer available. The declaration was executed over 25 years ago and its relevance to the questions at issue in these proceedings did not, so far as I am aware, arise any earlier than 2011, itself some 15 years after the date of execution. The two parties to the declaration are dead.

85. Mr Phillips, in his skeleton argument, attached, understandably, considerable weight to the fact that the evidence filed by Munaver and Fazal in the proceedings to make final the 2011 charging order made no mention of the 1996 declaration, nor a subsequent, 2010, declaration, which I will discuss later in this judgment. An investigation of his own papers carried out during the trial by Mr McLinden, established, however, that, although not mentioned in the filed evidence, both the 1996 and the 2010 declarations of trust had been disclosed and produced in those proceedings.

86. In that context, the fact, that the declarations were not mentioned in the filed evidence, seems to me to point very clearly against either declaration being an ex post facto creation. It is not realistic to think that, having fabricated declarations of trust, the creators of those fabrications, presumably, Munaver and Fazal, would then neglect to place them at the forefront of their defence to the 2011 charging order being made final.

87. The authenticity of the 1996 declaration is, in any event, in my view, underwritten by the evidence of Mr Kamal Ismail Faki, a witness to the 1996 declaration. Mr Faki presented as a completely honest and straightforward witness and I have had no doubt at all as to the veracity of his evidence.

88. Mr Faki had been a family friend of Fazal. He had been asked by Fazal to come to her home in Tooting to witness an important document. He had been present when the document had been explained to Fazal by the other witness and he had witnessed both Munaver and Fazal signing the document. He was shown a copy of the 1996 declaration of trust and he confirmed his signature on it. He had no independent recollection of the date of the declaration, but it had been a long time ago.

89. There is nothing in that evidence to cast doubt on the authenticity of the declaration. It was signed by him and, if, as I find, genuine, it was, indeed, signed a long time ago. Any independent recollection of the date would, as it seems to me, to be so surprising, at this distance in time, to, in itself excite some measure of suspicion.

90. The other alleged witness to the declaration of trust, a Ms Najma Khan, did not attend to give oral evidence. She had made a statement, confirming that she had witnessed the declaration. She had, she said, witnessed the declaration in her personal capacity and had, therefore, given her private address. This somewhat gnomic passage in her statement would appear to relate to the fact that she had, in witnessing the statement, referred to herself as a solicitor and was, therefore, as I read it, intending to explain that, although a solicitor, she was not witnessing the declaration in that capacity.

91. I was told by Mr Hill, for Ms Khan, that the absence of Ms Najma Khan was explained by the fact that contact had been lost and, therefore, that it had not been possible to advise her of the trial date. I was asked to admit her evidence under the Civil Evidence Act 1995. I am not, however, prepared to do so.

92. The directions order made, in this case, following its transfer from the Queen's Bench Division dealt with witness statements and provided that, in circumstances where the maker of a witness statement was not called to give oral evidence, the witness statement would not be taken into account without the permission of the court.

93. I received no evidence at all as to the efforts which had been made to locate Ms Najma Khan, or as to the circumstances in which contact had been lost and, in consequence, I was afforded no proper basis upon which to give permission to admit her evidence. In that circumstance and having regard, also, to the fact that, as appears from her witness statement dated 16 August 2020, there were, or would have been, matters that Ms Lu would have wished to raise in cross examination of Ms Najma Khan, in testing her evidence, my clear view is that her evidence should not be taken into account.

94. In the event, however, for the reasons already given, I do not regard the absence of Ms Najma Khan's evidence as material. I am satisfied that the 1996 declaration of trust is authentic.

95. I am also satisfied that it reflects the true arrangements made between Fazal and Munaver and that it was not, in any sense, legal, or otherwise, a sham.

96. An agreement, or arrangement, is sham, in law, and of no effect, if it is designed to camouflage, or hide, rather than give effect to, the true arrangements between the parties. Mr Phillips' submission, echoing the judgment of Mr David Young QC, in **Midland Bank Plc v Wyatt [1995] 1 FLR 696** at page 707, was that the 1996 declaration of trust, as well, as discussed later in this judgment, the 2010 declaration of trust, were never intended by Munaver to endow Fazal with the interest set out in each of these documents but were documents intended to be 'put in the safe for a rainy day'.

97. In the case of the 1996 declaration of trust, the purpose of the trust document, as submitted by Mr Phillips, was, or must have been, to protect Fazal and/or Munaver against attempts to enforce any judgment obtained against Munaver by purporting to vest Fazal with a half share in Avarn Road when, in truth, she had no such interest.

98. I reject this submission. I do not think that there is any evidential basis upon which the court could properly conclude that the 1996 declaration of trust did not represent the true intentions of the parties, at the date when it was entered into, or did not genuinely invest Fazal with a 50% interest in Avarn Road.

99. The declaration must be set against its factual matrix, namely the fact that prior to the 1995 transfer and the 1996 declaration of trust, Fazal was, at the least, a beneficial joint tenant of Avarn Road. In that context, the natural, or ordinary, expectation, in respect of any transfer of the legal interest to Munaver as sole legal owner, in order, as set out in the recital to the declaration, for Munaver to obtain financing for his business, would, as it seems to me, be that the arrangements enabling Munaver to use

Avarn Road as security would, in so far as possible, preserve, or replicate, Fazal's prior beneficial interest. That is what happened. The 1996 declaration of trust reflected the real arrangements made between Munaver and Fazal to enable Fazal to retain under the new trust that which she had had prior to those arrangements taking effect. The new arrangements protected her beneficial interest, but not by way of pretence, or sham.

100. In the event, Munaver did not follow through upon his intention to raise finance. Had he done so, the protection afforded by the declaration of trust would not have been absolute. Inevitably, Fazal would have had to agree to subordinate her interest to that of the new mortgagee, as she did when the 1995 transfer was effected and as she did again, in 2010, when, following the 2010 declaration of trust, Avarn Road was re-mortgaged in favour of Santander. In that circumstance and had Munaver's security been called upon, then, subject to whatever advantage Fazal might have been able to obtain from a possible equity of exoneration, her share, as well as Munaver's would have been exposed to the mortgage lender.

101. In this regard I do not accept, as submitted by Mr Phillips, that the fact of the projected mortgage financing is, in itself, indicative of pretence, or sham, as demonstrating an intention in Munaver to hold himself out as sole legal and beneficial owner, in a manner inconsistent with the 1996 declaration. That submission presupposes that Fazal's interest would not have been declared. Given what took place both in 1995 and, subsequently, in 2010, there is, in my view, no proper foundation for that submission.

102. Mr Phillips, further, sought to pray in aid, in respect of the 1996 declaration of trust, as well as the, later, 2010 declaration of trust, his contention, discussed later in this judgment, that Munaver had a proven propensity to obscure the ownership of his assets, as a protection against the enforcement of any judgments obtained against him.

103. Assuming, for this purpose, that propensity, I remain unpersuaded that that propensity has any bearing upon the status of the 1996 declaration of trust. At the date of the 1996 declaration of trust, there is no evidence of any weight such as to suggest that Munaver was in any need of protecting his assets, or of creating sham documents for that purpose. The most that Mr Phillips could point to was drawn from the evidence filed by Munaver and Fazal, in respect of the 2011 proceedings, namely that Munaver wanted to borrow on the security of Avarn Road to stabilise his business. That is a far cry from his assets being at risk of enforcement. The far greater likelihood, in respect of the 1996 declaration of trust, is that, for the reasons and in the context already set out, the declaration of trust genuinely reflected the arrangements between Munaver and Fazal and genuinely reflected Fazal's intended beneficial interest.

104. That conclusion is fortified, in my view, by the conduct of Fazal and Munaver, in 2011, in respect both of the 1996 and 2010 declarations of trust. As set out in paragraph 86 of this judgment, the failure of Munaver and Fazal to place the declarations, although disclosed, in the forefront of their opposition to the making final of the 2011 charging order, suggests, in my view, very strongly, that the declarations, as well as being authentic, were genuine. It is highly unlikely that a declaration put away for a rainy day would not be brought forward and placed, as it were, front and centre, when that rainy day arrived. While the failure to place appropriate reliance upon the declarations is, undoubtedly, an oddity and,

speculatively, may well indicate a lack of adequate advice and guidance, at that time, that failure is not indicative either of ex post facto fabrication, or that the declarations were sham and were, as submitted by Mr Phillips, designed to disguise the true ownership of Avarn Road.

105. In the result, I am satisfied that the 1996 declaration of trust should be taken at face value and did vest a 50% interest in Avarn Road in Fazal.

106. In light of that conclusion and specifically my conclusion that the unstamped copy of the 1996 declaration of trust should be admitted into evidence, as evidence of the contents of the original, an alternative submission made by Mr Hill, on behalf of Ms Khan, as to Fazal's putative beneficial interest, post the 1995 transfer, under a joint intention constructive trust, does not arise for determination. The matter, however, having been argued, I should, I think, record, that I would not have found that submission to be made out.

107. The constructive trust argument was not raised by Ms Khan in her Points of Claim in respect of the Bankruptcy Issues and the current issues. It was only advanced by her in her Reply. As such, it constitutes a departure from her originally pleaded case and should, in consequence, have been pleaded by way of amendment. However, in view of the fact that Ms Lu has been well aware of the constructive trust argument since the filing of Ms Khan's Reply, in February 2021, and that she, by her counsel, was fully prepared to meet that argument, I indicated that I would be prepared to grant a pro forma permission to amend, provided that matters did not proceed beyond those raised in the Reply and formulated in Mr Hill's skeleton argument.

108. The problem, however, with the constructive trust argument, as formulated by Mr Hill, in his skeleton argument, is that it seeks to utilise the 1996 declaration of trust as evidence of the joint intention of Munaver and Fazal that Fazal should have a 50% interest in Avarn Road. As foreshadowed in paragraph 70 of this judgment, in the event that I had decided that the 1996 declaration of trust should not be admitted into evidence and in the event, therefore, that Ms Khan could not rely upon that declaration, as establishing Fazal's beneficial interest, that finding would, also, have excluded the use of the declaration of trust as evidence of the parties' joint intentions.

109. The further problem, even if reliance could have been placed upon the declaration of trust, as evidence of Munaver and Fazal's joint intention, as to beneficial ownership, is that the Reply, as pleaded, asserts no case at all as to why it would have been inequitable for Munaver to resile from that joint intention.

110. Although, in **Stack v Dowden [2007] 2 AC 432** and **Jones v Kernott [2012] 1 AC 776**, the court's focus was on joint intention, nothing in either of those cases mitigated, or modified, the other core requirement of this species of constructive trust, namely that the party asserting such a trust must demonstrate that his, or her, conduct, in reliance upon the agreed, inferred, or imputed, joint intention of the parties that he, or she, would have a beneficial interest, renders it inequitable for the other party to resile from that joint intention, or understanding.

111. In this case, neither the Reply, itself, nor Mr Hill's skeleton argument, in support of the constructive trust argument, addresses, or adverts, to this requirement, or ingredient of a joint intention constructive trust.

112. The only matter raised, or referred to, in the skeleton argument that could constitute, or amount to, the relevant conduct is the contention that, post transfer, Fazal made substantial payments towards the Northern Rock mortgage. I am not persuaded, however, that the evidence available to me, primarily Fazal and Munaver's own evidence in respect of the 2011 proceedings, supports that contention. Ms Khan's own evidence, to the effect that her grandmother made substantial payments towards the mortgage, seems to me to be no more than an assertion.

113. Fazal's evidence, in the 2011 proceedings, was that her children jointly contributed towards the payment of the Northern Rock mortgage and, further, that her daughter in law, Najmunissa Khan made various payments totalling £22,000, in respect of the property. Najmunissa Khan, herself, in a witness statement dated 1st November 2011, prepared in respect of the 2011 proceedings, evidences payments to Northern Rock in excess of £21,000.

114. Fazal, in her evidence, does not, in terms, assert that she, herself, made any such payments and, given the terms of the 1995 transfer to Munaver, which released her from liability under the Northern Rock mortgage, it would have been surprising if she had. In any event, the burden of her evidence is that it was her family that always made sure that she had a roof over her head and that it was part of their culture to care for elderly and sick parents, such as herself.

115. Munaver's evidence is, substantially, to the same effect; namely that he and the whole family, including his wife, Najmunissa, paid the mortgage and other outgoings.

116. There is nothing in any of that material which could possibly enable me to say that Fazal has conducted herself in such a way, in reliance upon a joint intention that she have a 50% interest in Avarn Road, such as to render it inequitable for Munaver to resile from that intention.

117. Correspondingly, there is nothing in that material from which the court could possibly infer or impute the requisite joint intention. If any inference at all can be drawn from the pattern of payments, post transfer, it is that the collective intention of Fazal's family was that she should be secure in her home.

118. The Northern Rock mortgage, largely, as it seems, because of the capital payments made by Najmunissa, between February 2006 and January 2007, was redeemed by early 2007. Thereafter, Avarn Road was mortgage free until 2010. In that period and on the findings I have made, beneficial ownership was shared equally between Fazal and Munaver, as set out in paragraph 105 of this judgment.

119. In May 2010, subject, as with the 1996 declaration of trust, to its authenticity, a further declaration of trust, dated 10 May 2010, was executed. Ms Khan's case, on behalf of Fazal's estate, is that, pursuant to that declaration, the entire beneficial interest in Avarn Road vested in her grandmother.

120. The declaration recited the equal beneficial joint ownership, as between Fazal and Munaver, Munaver's wish to realise his share of the equity in Avarn Road, Fazal's inability to buy him out and the consequential agreement between Fazal and Munaver that Munaver should raise a mortgage secured upon Avarn Road, in the sum of £130,000, reflecting one half of the agreed value of Avarn Road, and that that

mortgage should, then, be repaid by Fazal, with the assistance of Akram, such that on receipt by Munaver of the mortgage funds, Munaver would have received the full value of his share in Avarn Road, would retain no further beneficial interest and would hold the entire beneficial interest on trust for Fazal.

121. The operative part of the declaration declared that Munaver held Avarn Road on trust for Fazal absolutely and that on any sale the net proceeds would be held on that trust. Munaver, further, covenanted that there would be no further mortgages or dealings with Avarn Road without Fazal's consent.

122. The mortgage contemplated by the May 2010 declaration of trust was effected by Munaver, by a first legal charge in favour of Santander, dated 3 August 2010. The sum advanced by Santander, as contemplated in the declaration of trust, was £130,000. As already set out, in paragraph 100 of this judgment, Fazal joined in the mortgage, as occupier of Avarn Road and agreed, in the mortgage deed, to postpone and subordinate her interest to that of Santander.

123. As, further foreshadowed, in this judgment, at paragraph 86, I am satisfied that the 10 May 2010 declaration of trust is authentic, in the sense that it was executed when it is said, on its face, to have been executed. Two matters, in addition to what is already set out in paragraphs 86 of this judgment, assist me to that conclusion.

124. Firstly, it is not in dispute but that, in August 2010, steps were taken to protect the May 2010 declaration of trust on the register. Application was made on 16 August 2010 to register a restriction against the title. The application adverted specifically to a declaration of trust dated 10 May 2010, lodged with the application, and to what purports to be the gravamen of the 2010 declaration of trust, namely that Munaver, the registered proprietor, held the legal interest on trust and retained no beneficial interest in the property. Munaver was, on its face, a signatory to the application. The application was stamped and fees paid on 20 August 2010 and it would appear that the restriction arising from the application, albeit in different form, was placed on the register as from 23 August 2010.

125. Against that background there cannot be any serious doubt that the May 2010 declaration of trust came into existence prior to 16 August 2010 and, in that context, there is no reason at all to believe that it was not executed when it was said to be executed, namely on 10 May 2010.

126. Secondly, I did not find myself in any doubt as to the veracity of Mr Vijaykumar Patel (Mr Patel), who gave evidence of witnessing Fazal's signature to the May 2010 declaration and who confirmed that it was his signature that appeared upon the copy of the 2010 declaration of trust relied upon by Ms Khan.

127. He was, he told me, a friend of Munaver and had been asked by Munaver to witness the declaration. Munaver, he told me, wanted to get his share of the house for his business. He had gone to Fazal's house to witness the declaration. Munaver, Akram, Fazal and the other witness, Nadeem Khan, had all been there. Mr Patel had, while sitting with Fazal, had a conversation with her about the declaration. Munaver needed money and Fazal had not had the money to buy out his interest. Her only option was for Munaver to borrow money on and for her with help from Akram to pay off the

mortgage. The house would then belong to her. She wanted to sign an agreement so that there would be no problems with her children.

128. Unsurprisingly, Mr Patel had no independent recollection of the exact date that he signed the declaration. He recalled, however, that it had been Summer and he believed that it was on the date shown on the declaration.

129. While Mr Phillips, understandably, questioned the absence of the original declaration and drew attention to the non-payment of Stamp Duty Land Tax in respect of the ostensible transaction effected by the declaration of trust, as discussed later in this judgment, I am in no doubt, given Mr Patel's evidence, that the original declaration was signed and witnessed as stated by Mr Patel and that he did so in the Summer of 2010, prior to 16 August 2010, and probably on 10 May 2010. Although I have no direct evidence of Munaver signing on that occasion, it seems profoundly unlikely, given his presence, his apparent signature upon the declaration and his interest, as explained to Mr Patel, in getting the declaration signed, that he did not do so.

130. Nadeem Khan, the other witness to the declaration did not give evidence. A very late witness statement dated, 19th July 2022, had been served in respect of her evidence and, although at the outset of the trial the indication that I was given was that she would attend the trial, in the end she decided not to do so. In that context, I was asked, as with Najma Khan, to admit her evidence under the Civil Evidence Act 1995. As with Najma Khan, I decline to do so.

131. I have already referred to the court's direction, in this case, to the effect that the evidence given by any maker of a witness statement who does not give oral evidence will not be taken into account other than with the court's permission. It is also the case that, had Nadeem Khan attended to give oral evidence, that evidence could not have been given, given that her witness statement was not served/exchanged in compliance with my order, dated 31 January 2022, that any further, or supplemental, witness statements be served by 25 April 2022, save with the permission of the court under CPR 32.10.

132. I was given no reason as to why Nadeem Khan's witness statement was served late, nor why, should she have attended, I should have relieved her from sanction and allowed her to give oral evidence. The only reason given for her eventual non-attendance was, apparently, some concern that, should she give evidence, she would be harassed by Ms Lu. Without a great deal more, I can give no weight to that.

133. In circumstances where I would not have allowed Nadeem Khan to give oral evidence, I agree, with respect, with the observations of Turner J, in **Gladwin v Bogescu [2017] EWHC 1287 (QB),** at paragraph 34, that to admit her witness statement under the Civil Evidence Act, would be to endorse a 'worst evidence rule' and that, to avoid that consequence, the court would be empowered to exclude her witness statement from consideration, pursuant to CPR 32.1(2).

134. In this case, I would, had it been necessary, have exercised that power. Given, however, that Nadeem Khan's witness statement cannot be used without my permission, pursuant to the court's existing case management directions, and given that no convincing reason has been proffered as to why I should allow her statement to be used in these proceedings and that, for that reason, I am not prepared to admit

her evidence, there is, as it seems to me, no need, on this occasion, to exercise the court's power under CPR 32.1(2).

135. None of the last foregoing, however, affects my conclusion, as expressed in paragraph 123 of this judgment, that the 10 May 2010 declaration of trust was executed on that day.

136. Accordingly, I turn next to the question (again, as with the 1996 declaration of trust) as to whether the May 2010 declaration reflected the true arrangements between Munaver and Fazal, or whether this declaration was a pretence, or sham, designed to disguise, or hide, Munaver's interest in Avarn Road from potential creditors.

137. As outlined earlier in this judgment, Mr Phillips, in support of the proposition of sham and in support of a linked contention that the secured borrowing contemplated by the May 2010 declaration was intended by Munaver as a means whereby he could extract monies from Avarn Road with a view to placing those monies out of the reach of his creditors, submitted that Munaver had a proven propensity to obscure the ownership of his assets and to take steps to evade his creditors and that, in determining the validity of the May 2010 declaration and the purposes underlying the declaration and Munaver's associated secured borrowing against Avarn Road, I should bring into account that propensity and, as he would submit, the likelihood that Munaver's actions in respect of the May 2010 declaration and in respect of Avarn Road reflected another application of this propensity.

138. In seeking to establish the propensity upon which he relied, Mr Phillips, in his final submissions, focussed upon a number of judgments in respect of which Munaver's conduct had been seriously called into question.

139. His starting point was the judgment of Judge McMullen QC, in the litigation between Ms Lu and Munaver, which gives rise to the judgment against Munaver, upon which the application for the 2011 charging order was founded and which, therefore, is at the root of this entire litigation.

140. That judgment was handed down on 11 June 2010 in the sum of £546,575.53., together with mesne profits and costs. In the course of his judgment, the trial judge described Munaver's conduct as that of a person seeking to obscure his own involvement in the relevant transaction. Perhaps more directly in point, Judge McMullen was satisfied that a business, referred to in the judgment as AIC and purportedly owned by a Mr Solanki was not so owned but was either owned or controlled by Munaver. Additionally, it was not, so far as I can see, in any dispute but that Munaver's practice, described as 'opaque', was to divert monies to which he was entitled to third parties. All that said, it is not insignificant that the judge, although critical of Munaver, did not consider the case appropriate to indemnity costs.

141. The next judgment prayed in aid by Mr Phillips is that of H H Judge Gerald, handed down on 4 July 2012. This was the hearing of the application to make final the charging order over 82 Westminster Way, which had been put over for trial by District Judge Lightman at the hearing on 4 November 2011, discussed at the outset of this judgment and at which the district judge had chosen to make final the charging order over Avarn Road without determining the beneficial interests of the parties and, in particular, whether Munaver was beneficially interested in Avarn Road.

142. The basis of the argument put forward by Munaver, in resisting the making final of Ms Lu's charging order had been that, by a letter dated 3 April 2003, written very shortly after, as I understand it, the county court at Oxford, had declared Munaver to be the beneficial owner, Munaver had disposed of the beneficial interest in favour of Akram. Judge Gerald determined that that letter was a fabrication created in order to defeat Ms Lu's interim charging order. He was satisfied that neither Akram nor Munaver had come to court to tell the truth. He was, also, satisfied that Munaver and Akram had deliberately chosen to register the property in a name that was neither of their full names, such that, in their dealings with third parties, it was unclear as to with whom ownership lay.

143. Mr Phillips next drew my attention to the judgment of Patten LJ, in the Court of Appeal, given on 20 February 2013. Munaver had sought permission to appeal Judge McMullen's judgment and, in respect of that application had been directed to provide security. Munaver's applied for relief from sanction, following his failure to provide security and Patten LJ gave judgment on that application. He described Munaver's application as having been made on an entirely false basis and described Munaver's evidence, in respect of the application, as being demonstrably false. Relief was denied and, as a consequence, his application for permission to appeal fell away.

144. The fourth judgment relied upon by Mr Phillips is a further judgment of Judge Gerald, dated 2 May 2013. Munaver had brought further proceedings against Ms Lu and had applied for security for costs, on the footing set out in CPR 25.13.(2)(g), namely that Munaver 'had taken steps in relation to his assets that would make it difficult to enforce an order for costs against him'.

145. Judge Gerald determined that the only sensible inference to be drawn in respect of Munaver's conduct in regard to 82 Westminster Way, was that the fabrication in that case had been carried out with the intent of misleading the court as to the true ownership of that property and, ultimately, with the intent of defeating his creditors. He took the same view in respect of another property, Unit 9 Dilloway Estate.

146. Mr Phillips also relied upon comments of Judge Copley, in respect of Munaver, in a case concerning a fraudulent accident claim, Oriakhel v Vickers, where judgment was given on 25 January 2007. Judge Copley was satisfied that Munaver had been involved in the fraudulent accident claim. He was satisfied that Munaver had not told the truth and that, by the use of various limited companies he had sought to obfuscate the issues and his various trading activities.

147. Mr Phillips submitted that these findings, in respect of Munaver, should be admitted into evidence, as constituting 'similar facts'.

148. The admissibility of 'similar fact' evidence, in civil proceedings, was considered by the House of Lords, in **O'Brien v Chief Constable of South Wales [2005] 2 AC 534**. As explained by Lord Bingham, at paragraph 52, the test for admissibility is relevance. Similar fact evidence is admissible if it is potentially probative of an issue in the proceedings.

149. That broad answer to the question of admissibility is, however, qualified, as explained by Lord Bingham, at paragraph 55, by what are, effectively, case management considerations. The court must have regard to the nature and quality of the similar fact

evidence. If that evidence is relatively uncontroversial and does not lead to the creation of side issues of such a nature as to unbalance the trial, then the evidence will be admitted. If, however, the proposed similar fact evidence is not reasonably conclusive as to the similar facts themselves and would require the trying out of contested collateral issues, then, as a matter of active case management and in the exercise of the court's powers to exclude evidence and limit cross examination, the evidence will not be admitted.

150. In this case, by his choosing to rely upon a series of judicial findings, the evidence that Mr Phillips sought to have admitted did not require the determination of any collateral issues and did not, in any way, unbalance the trial, with the result that there is no bar upon the evidence, if relevant, being admitted.

151. What then does the evidence prove? To what, if any, issue, is it potentially probative?

152. Taken as a whole, it seems to me to show that Munaver had a willingness, when it suited him, to fabricate evidence, a willingness, again, when it suited him, to place his assets, including businesses and properties, in other names, or to otherwise obscure his property ownership, and a willingness, also, to, act in those ways in order to place assets out of reach of his creditors.

153. Those matters are, as it seems to me, plainly relevant to the issues in these proceedings and, particularly, to those identified by Mr Phillips, as set out in paragraph 137 of this judgment. Accordingly and for that reason, I consider the evidence to be admissible.

154. That said, I think it important to make clear the limitations of that evidence. It is evidence of a willingness, in Munaver, in certain circumstances, to hide, obscure, or disguise, assets and to act, in that way and even by way of fabrication, to defeat creditors. It is not, in itself, evidence that Munaver acted in that way on any particular occasion, or, in particular, that he acted in that way in respect of any the matters in issue in these proceedings. It is, also, of note that none of the evidence relied upon by Mr Phillips goes to the particular core conduct put in issue in this case by Ms Lu; namely the creation, whether by fabrication, or as a sham, of false declarations of trust.

155. In this regard, I have already, in this judgment, indicated, at paragraphs 102 and 103, that, in respect of the 1996 declaration of trust, I am not persuaded, even making allowance for any propensity, or willingness, in Munaver, to obscure the ownership of his assets in order to evade his creditors, that that propensity or willingness, underlay the 1996 declaration of trust, such that it was not a genuine declaration. By the same token and for the avoidance of any doubt I have not regarded the fact, that, in respect of 82 Westminster Way, Munaver fabricated a letter purportedly gifting his beneficial interest in that property to Akram, as displacing, or outweighing, the evidence going to authenticity that I have set out in this judgment and upon which I have made my finding that both the 1996 declaration and the 2010 declaration are authentic.

156. In regard to the May 2010 declaration of trust, I have already indicated, at paragraph 104 of this judgment and for the reasons set out in that paragraph, that, as with the 1996 declaration, I find it very unlikely that, as submitted by Mr Phillips, this was a declaration prepared by Munaver, to hide, or disguise, his ownership of Avarn Road,

in the event that steps be taken to enforce against that property. If this was a document prepared, as he submitted, to provide Munaver with 'cover', in respect of a rainy day, then, rhetorically, why was it not central to his defence, in respect of the 2011 charging order, when that rainy day arrived?

157. I can understand why Ms Lu and, on her behalf, Mr Phillips may have suspicions in respect of this document, fortified, no doubt, by their knowledge of Munaver's willingness, as last discussed, to hide, or obscure, his assets from his creditors. The declaration was executed in May 2010, very shortly before, as it transpires, Judge McMullen gave judgment against him for a substantial sum. It would not have been at all impossible for Munaver, conscious that there was a forthcoming trial, to take steps, in advance of that trial, to put his rights in Avarn Road out of the way of his creditors. In that event, however, the same point as is highlighted in the previous paragraph arises. Why, if you concoct a sham declaration of trust to provide protection if a judgment goes against you, do you not advance that sham declaration, in your defence, in answer to the very judgment that caused you to create the sham?

158. My answer to what is otherwise a wholly unexplained conundrum, is that the declaration was not a sham, that it was, in fact, entered into, at the time that it was entered into, as a genuine 'buy out' of Munaver's half share, through the medium of a mortgage of the property funded by Fazal and Akram, and that, at that time, it was genuinely contemplated that the monies drawn down from the re-mortgage would be used by Munaver in his business.

159. I have seen nothing in the evidence inconsistent with that explanation, or such as to suggest that the declaration of trust was not genuine. It is consistent with the unchallenged evidence of what Mr Patel told me that he was told, when called upon to witness Fazal's signature upon the declaration. While it is, I suppose, possible that he was given a sham explanation as to why he was witnessing a sham document, I find that unlikely. It is consistent, also, with Fazal's evidence in the 2011 charging order proceedings. The idea that Munaver, a businessman, might want to release his equity in Avarn Road for his own business purposes is not, intrinsically, unlikely.

160. Mr Phillips was not able to point to anything in the evidence such as to show that Munaver treated Avarn Road, after the declaration, in a way that was inconsistent with the declaration reflecting the true intentions of the parties. He borrowed against the property, as contemplated in the declaration. The agreed value of £260,000 was not obviously untrue. In support of her first bankruptcy petition against Munaver, Ms Lu valued Avarn Road, as at March 2011, at £200,000, basing herself, in part, upon another property in Avarn Road, marketed, in need of modernisation, at £240,000. So far as the, admittedly, limited evidence goes, mortgage payments were made from a joint account held by Fazal and Akram, as agreed in the declaration.

161. Ms Lu sought, I think, to suggest, given that the bank statements disclosed by Ms Khan were incomplete, that this was a deliberate ploy by Ms Khan to hide the fact that Munaver had, himself, placed money in the joint account, such as to make it show, untruthfully, that Fazal and Akram were paying the mortgage when they were not. In my view, that is a speculation far too far.

162. Additionally, I disagree, with respect, with a suggestion appearing in the trustee in bankruptcy's first report, in respect of Munaver's eventual bankruptcy, that his

mortgage application in respect of the Santander mortgage was fraudulent, because his liability under the mortgage to make repayments was inconsistent with the 2010 declaration. There is no inconsistency. The fact that as between Munaver and Santander the liability to pay the mortgage was, as it, inevitably, would be, that of Munaver's is not at all inconsistent with the agreement that, as between Fazal and Munaver, the liability would be that of Fazal/Akram.

163. Put shortly, the position in respect of the May 2010 declaration has no equivalence with the matters that enabled the judge, in **Midland Bank v Wyatt**, to conclude that the trust deed, in that case, was a sham, or which enabled Judge Gerald, in determining that Munaver was the owner of 82 Westminster Way, to conclude that there had been a fabrication. In both those cases the conduct of the party propounding the relevant documents had been inconsistent with the terms of, in the one case, the sham document and, in the other, the fabricated document. There is no such evidence in this case, nothing else to warrant a finding that the declaration was sham and, as set out above, no reason, at all, to believe that the declaration had been, as submitted by Mr Phillips, prepared in readiness for a rainy day.

164. There remains, in respect of the May 2010 declaration, one further question, namely whether it fails, as an effective disposition of Munaver's then existing 50% interest in Avarn Road to Fazal, on grounds of formalities.

165. The point advanced by Mr Phillips turns upon what he submits is the effect of recitals (g) and (h) of the declaration of trust and the fact that those recitals reference an agreement between Fazal and Munaver that, as from the receipt by Munaver of £130,000 of contemplated mortgage funds, Munaver would have no further beneficial interest in Avarn Road and that following that receipt Munaver would hold the entire beneficial interest in Avarn Road upon trust for Fazal. Mr Phillips' submission is that that recital reflected the true intention of the parties, notwithstanding that the operative provision of the declaration of trust declared unequivocally and without any qualification that Munaver held Avarn Road on trust for Fazal absolutely and that there was no suggestion at all in that operative provision that it was not to have immediate effect.

166. Building upon that construction, Mr Phillips submits that the declaration does not provide an effective compliance with section 53(1)(c) of the Law of Property Act 1925. The written declaration, because, properly construed, the operative provision was to be read as contingent upon the receipt of the mortgage funds, did not, there and then, constitute a disposition of Munaver;'s beneficial interest. The disposition only took effect upon the receipt by Munaver of the relevant mortgage funds, but, at that point, it was not supported by writing.

167. I am not persuaded.

168. Firstly, I do not think that one can subordinate the operative terms of the declaration of trust to the recitals in the way that Mr Phillips contends. It seems to me that recitals, where they exist, may provide the background to, or the reasons underlying, an operative provision in a deed, or declaration, but they neither qualify, nor override, that provision.

169. I am fortified in that view, while accepting, of course, that every document has to be separately construed in its own context, by the approach adopted by Judge Purle, in **Hameed v Qayyum**, at paragraph 37. In that case, deficiencies, as Judge Purle put it, in the accuracy of certain recitals did not preclude the declaration, in that case, to the effect that the property in question was held on trust for the beneficiary absolutely, from having full effect.

170. In this case, the fact that Munaver disposed of his interest in Avarn Road, in favour of Fazal, by declaring her absolute beneficial ownership of the property, notwithstanding that, under the terms of his agreement with Fazal, as set out in the relevant recitals, he was not obliged to do so until he was in receipt of the mortgage monies reflecting his share in Avarn Road, did not, in my view, prevent that disposition and that declaration having full effect, as at the date of the declaration.

171. Secondly, even if the correct construction of the May 2010 declaration is as submitted by Mr Phillips, I do not think that that construction has the effect for which he contends.

172. Section 53 (1)(c) provides no more than that 'a disposition of an equitable interest …must be in writing signed by the person disposing of the same…'. It does not provide that such a disposition, to be effective, must be one with immediate effect. If, for example, the owner of an equitable interest declares, in signed writing, that he transfers his interest to another from a particular future date, I do not see any reason why that is not a valid disposition of his interest as from that date.

173. Correspondingly, a written and signed declaration by Munaver that following receipt of the relevant mortgage funds the whole beneficial interest, including, therefore, his, then existing 50% interest, will be held on trust for Fazal, seems to me to constitute a perfectly good disposition by Munaver of his beneficial interest in favour of Fazal, as from the date of the receipt of the relevant funds.

174. In the result, I am satisfied that Mr Phillips' point on formalities is not a good one and, therefore, that from either the date of the May 2010 declaration or the 3rd August 2020, when the Santander mortgage monies were received by Munaver, Fazal became the absolute beneficial owner of Avarn Road.

175. A corollary of that conclusion and, specifically, my conclusion that the May 2010 declaration reflected a genuine arrangement whereby Fazal, with Akram's help, would buy out Munaver's interest at its full value and that, following on from the declaration, that arrangement was genuinely put into effect, is that the transfer of Munaver's beneficial interest to Fazal, pursuant to the declaration, was neither a transfer at an undervalue, nor a transaction, or transfer, entered into for the purpose of putting Munaver's beneficial interest out of the reach of his creditors, such as to bring section 423 of the Insolvency Act 1986 (the 1986 Act) into play.

176. As to that, Mr Phillips accepted, from the outset, that, even if section 423 had been brought into play, no originating process in respect of such a claim was before the court. He submitted, however, that the court could, nonetheless, in these proceedings grant leave to proceed with such a claim, pursuant to section 424 of the 1986 Act. Leave would have been required, even if the transaction had been at an undervalue and had been made for the purpose of putting assets beyond the reach of Munaver's

creditors, by reason of Munaver's 2014 bankruptcy. Section 424 of the 1986 Act provides that where the debtor (Munaver) has been made bankrupt, the section 423 application can only be made by a victim of the transaction (in this scenario Ms Lu) with the court's permission.

177. In the event that I had taken the view that this was potentially a transaction at an undervalue, falling within section 423 of the 1986 Act, I would have been prepared to entertain Mr Phillips' application for leave, notwithstanding the absence of any formal application in that regard. The application had been foreshadowed. The parties were not taken by surprise. Any formal inadequacy in the process was one that could be waived, or met by a pro forma application notice.

178. All that said, for the reasons set out in paragraph 175 of this judgment, I am satisfied that there has been no transfer, or transaction, at an undervalue, in this case, and, in those circumstances, the question of leave is not now one that falls to be determined.

179. That, however, is not the end of this matter. As foreshadowed in paragraph 5 of this judgment, there remains for consideration the question as to whether Fazal's rights in Avarn Road, as absolute beneficial owner, are, notwithstanding that beneficial ownership, unenforceable, upon grounds of illegality.

180. The illegality in question arises, or is said to arise, by reason of the proximity between the May 2010 declaration and Munaver's bankruptcy in February 2014.

181. Section 357 of the 1986 Act provides that a bankrupt is guilty of an offence if he has in the period of five years ending with the commencement of his bankruptcy made any gift or transfer of his property, or effected any charge on his property. That offence, however, is not committed if the bankrupt can avail himself of the defence of innocent intention set out in section 352 of the Act; that is to say, if the bankrupt can prove that, at the time of the conduct otherwise constituting the offence he had no intent to defraud or to conceal the state of his affairs. Unusually, section 350(5) provides that no proceedings in respect, among other things, of the section 357 offence may be instituted other than by the Secretary of State, or with the consent of the Director of Public Prosecutions.

182. No such proceedings were ever brought against Munaver, although, plainly, .the May 2010 declaration, the transfer, thereby, of Munaver's 50% beneficial interest in Avarn Road and the Santander charge were all effected within the relevant five year period.

183. For purposes of the application of the common law doctrine of illegality, the first question is whether Munaver's transfer of his 50% interest to Fazal for full consideration, as I have found, constitutes an offence at all. The second question, arising only if the first is decided in the affirmative, is whether, in all the circumstances and applying the structured approach to illegality set out by Lord Toulson JSC, in **Patel v Mirza [2017] AC 467**, in particular at paragraph 120, public policy requires that Fazal, not herself alleged to have been guilty of any illegal, or criminal, conduct should be denied her right to enforce, in court, her absolute beneficial interest in Avarn Road. In that regard, Lord Toulson suggests, at paragraph 116, in **Patel v Mirza**, that it will only be in a rare case and for particular reasons that a property owner will be deprived, on grounds of illegality, of his right to enforce his title.

184. Reverting to the first question, it seems to me, as a matter of the construction of the statutory defence, established by section 352 of the Act, that it is implicit in the section that the absence of any intent by the bankrupt to defraud, or to conceal his affairs, which must be established by the bankrupt in respect of the statutory defence, is an absence of that intent in respect of the gift, transfer, or charge in question and that the fact that, at the date of the gift, transfer, or charge in question, the bankrupt might, in respect of other matters, have an intent to defraud, or to conceal, would not, in respect of the gift, transfer, or charge, said to give rise to the offence, preclude the defence being made out.

185. The question, then, for this court, given the absence of any proceedings against Munaver, in respect of the transfer of his 50% beneficial interest to his mother, is whether, if such proceedings had been commenced by the Secretary of State, or with the consent of the Director of Public Prosecutions, the statutory defence would, or would not, have been made out. Because illegality is raised by Ms Lu, the burden of establishing that illegality and, therefore, that the statutory defence would not have been made out falls upon her.

186. It seems to me that, on the findings that I have made, the clear likelihood is that that defence would have been made out. I am satisfied, for all the reasons already set out and discussed, that the transfer by Munaver of his subsisting beneficial interest in Avarn Road to Fazal, in consideration of her paying out his interest by financing, with Akram's aid, the Santander mortgage, was a genuine transaction, was not fraudulent and was not intended to conceal Munaver's affairs. Rather, the transfer was made to give effect to the buy out.

187. I do not think, if it be the case, that the fact, that Munaver's intention, in respect of the monies raised by the Santander mortgage, might have been to hide those monies from his creditors, establishes any intent to defraud in relation to the transfer, itself, or infects the transfer with any fraudulent intent which might exist in respect of the Santander mortgage, or the monies arising from that mortgage.

188. In any event and although the position is rather more complicated, I am not persuaded, or satisfied, on the facts, that Munaver's intention, in respect of the mortgage monies raised by the Santander mortgage, was fraudulent, or that his intention, in respect of the monies extracted from Avarn Road, by the means of the mortgage, was to hide those monies from his creditors.

189. The probability, as set out in paragraphs 158 and 159 of this judgment is that, as at the date of the May 2010 declaration, Munaver did not have any intent to defraud creditors, or to conceal his affairs and that his intent, genuinely, was to borrow against Avarn Road for the good of his business. There seems no doubt, as set out in his trustee in bankruptcy's first report, for the year February 2014 to February 2015, that Munaver was in serious arrears in respect of his business premises and, as it appears from the same report, that a significant part of the mortgage monies advanced actually went to that purpose. In those circumstances, I am not persuaded that, as at May 2010, prior to Judge McMullen's judgment, his intentions were other than those conveyed to Mr Patel, as set out in paragraph 127 of this judgment.

190. I accept, however, that, by the time the charge was effected and the mortgage monies drawn down, in August 2010, things were different. There was now a substantial

judgment against Munaver and, given his willingness to hide assets from his creditors, one can readily contemplate that the temptation to hide the drawn down funds from Ms Lu would have been substantial.

191. Whether that is what he did and whether that is why he did what he did is another matter. While the first trustee's report, referred to above, describes Munaver as transferring the mortgage funds using a complex network of accounts, both in his own name and that of associated companies and while the trustee's belief was that this was orchestrated, in part, to obfuscate the use of the funds, it remains the case that it is acknowledged, as set out above, that a significant part of the mortgage funds went to pay arrears. There is also evidence, emanating from Munaver's then legal advisers, by letter dated 24 February 2015 that other parts of the funds went to pay Munaver's legal costs of the McMullen proceedings. The trustee, in his first report, indicated that further enquiries as to these funds would be made and that a further report would be made. So far as I can see, however, no further report was ever made to creditors as to any balance of the mortgage funds.

192. Mr Phillips' submission was that I should conclude from these facts that a substantial amount of the drawn down funds were unaccounted for and that, at least by the date that the mortgage was effected and the monies were drawn down, Munaver's intention had been to utilise the mortgage to extract his share of the value of Avarn Road, in order to put that share out of the reach of his creditors; specifically, Ms Lu.

193. It does not seem to me, however, that the evidence supports that submission. While there is a question mark over an unidentified amount of the drawn down funds, the preponderance of the evidence seems to be that the bulk of the drawn down monies were put to lawful purposes. It must be borne in mind that, at the date of the mortgage, there were no bankruptcy proceedings in place in respect of Munaver and, until, I think, September 2010, no statutory demand in respect of the unpaid judgment. There was, at that stage, no legal bar upon Munaver's use of the drawn down funds. In that context, the fact that he utilised those funds, or the bulk of them, to pay other liabilities was not, in my view, fraudulent, or probative of a fraudulent intent, in respect of the mortgage, or the mortgage funds drawn down, or evidence from which I should infer that such monies as are not accounted for were secreted away and not used for entirely lawful purposes.

194. In those circumstances and even allowing for Munaver's established willingness to obscure, or hide, assets, I remain unpersuaded that, on the evidence available to me, there is any basis upon which I could properly conclude that Munaver's conduct in respect of the Santander mortgage was fraudulent, or that, at the date, whether of the transfer, or of the mortgage, his design was to hide the drawn down monies, or a substantial part of those monies, from his creditors.

195. The consequence of the foregoing, reverting to section 357 of the 1986 Act, is that I am not satisfied that, in any proceedings under that section and even if, in determining the legality of the transfer, the court dealing with those proceedings was entitled to have regard to Munaver's intentions in respect of the drawn down mortgage funds, Munaver would not have been able to make good the section 352 defence.

196. Given that conclusion and given that, as already stated, the burden, in these proceedings, is on Ms Lu to establish illegality in respect of the May 2010 declaration

of trust and the transfer of Munaver's beneficial interest and, hence, to satisfy this court that the section 357 offence has been committed, it seems to me that that burden has not been met and that illegality has not been made out.

197. In the result, what I will call the **Patel v Mirza** question (the question as to whether Fazal should be entitled to enforce her absolute beneficial interest in Avarn Road, notwithstanding the illegality of the transfer by which she secured her absolute interest, and to rely upon that interest, as entitling her to the discharge of the November 2011 charging order) does not, strictly, require a determination.

198. The matter having been argued out, however, I think that I should indicate the view that I would have taken had I concluded that the transfer had been illegal and that it had, contrary to my view, been effected in order to enable Munaver to hide drawn down mortgage funds from his creditors.

199. The short answer is that I would not have held the transfer, or Fazal's interest, arising from the transfer, to be unenforceable,

200. My starting point would have been paragraph 116 of **Patel v Mirza** and the proposition, in that paragraph, that it will only be in very rare circumstances that a property owner will be deprived, on grounds of illegality, of the right to enforce his title.

201. Mr Phillips submitted, in effect, that this was one of those rare cases where the property owner should be deprived of that right and that to allow Fazal, or her estate, to enforce rights obtained in respect of a transfer which, on the assumption of illegality, had been effected in order to allow Munaver to defraud his creditors, would, picking up Lord Toulson, at paragraph 120 of **Patel v Mirza**, be harmful to the integrity of the legal system.

202. I cannot agree. It seems to me that it would be very much more harmful to the integrity of the legal system if Fazal, or her estate, were to be deprived of the right to enforce her title to Avarn Road. The reason or a reason, as it seems to me, why the common law courts will only rarely refuse to enforce a property owner's title, is the recognition by the court that a policy which is potentially disruptive of the enforcement of vested property rights is not one that encourages confidence in the legal system and that, in that regard, public policy requires that a property owner should not readily be precluded from enforcing his, or her, rights.

203. This must be the more the case in a case like the present, where the transfer would have been legal at the outset and would only have become illegal as a result of Munaver's bankruptcy within the prescribed period (an event entirely outside Fazal's control) and where, also, as set out in paragraph 183 of this judgment, the person potentially deprived of her entitlement to enforce her rights is someone against whom no illegal, or criminal conduct is alleged and who, on my findings, has acquired the 50% share in Avarn Road which it is said that her estate should be unable to enforce, in circumstances where, by paying the Santander mortgage instalments, she, albeit with the assistance of her family, has given full value for that share.

204. Over and above policy, a refusal, in this case, to allow Fazal, or her estate, to enforce her rights would, as it seems to me, to be manifestly disproportionate. Fazal, as set out

above, has been guilty of no wrong doing and, in that context to deprive her of her rights consequent upon any election by Munaver to put drawn down mortgage funds out of the reach of his creditors, would constitute a radically unfair penalty in respect of her innocent involvement in Munaver's wrongdoing.

205. There seems to me to be, also, one further policy consideration, tending toward the permitting of enforcement, in this case and cases like it; namely the desirability within a coherent legal system, of maintaining the distinction between civil and legal processes and in recognising the different purposes of each of such processes.

206. Insolvency law seems to me to be a clear case in point. The 1986 Act establishes a number of criminal offences, of which the section 357 offence is one, and, correspondingly, a battery of civil processes, designed to protect creditors and the insolvency process generally from the consequences of misconduct by a debtor, in respect of his bankruptcy, and, more generally, pursuant to section 423 of the Act, from a debtor's misconduct, in seeking to put his assets out of reach of his creditors.

207. It seems to me that, where specific and focussed civil remedies exist, not merely is there no need to bring into play principles of common law illegality but to do so risks a distortion of the intended process. To apply principles of common law illegality, where a bankruptcy offence has been committed, but where other insolvency remedies exist, risks, as it seems to me, the substitution of the potentially blunt instrument of common law illegality for the more focussed civil remedies created by the 1986 Act.

208. Section 357 is a good example. Prosecution for the offence created by the section is safeguarded by the provision that only the Secretary of State, or a person acting with the consent of the Director of Public Prosecution can bring proceedings. It is plainly not intended that it is an offence which should be readily prosecuted and is likely, as it seems to me, to be reserved for cases of egregious misconduct by the bankrupt. To seek to apply the section, in a civil guise, by way of common law illegality and without any of the statutory safeguards, seems to me to be a use of the section in circumstances where it was not intended to operate, with potentially large consequences and where, if there has been relevant conduct, or misconduct, matters are better left to the specific civil processes created by the 1986 Act.

209. In the result, had there been need for formal determination, I would not have refused to enforce Fazal's absolute beneficial property right in respect of Avarn Road.

210. The consequence of all of the foregoing is that, as set out in paragraph 174 of this judgment, I am satisfied that, as from, at the latest August 2010, but more probably from the date of the May 2010 declaration of trust, Fazal was and her estate now is the beneficial owner of Avarn Road.

211. It follows that I am satisfied that the November 2011 charging order should never have been made final and should now be discharged, pursuant to section 3(5) of the Charging Orders Act 1979.

212. It follows, also, that, the November 2011 charging order having fallen away, there is no charging order, in favour of Ms Lu, upon which Mr McLinden's interim charging order can bite and that that interim charging order must, therefore, be discharged.