Case No: HC02C03556

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
NEUTRAL CITATION NO: [2003] EWHC 3166 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19th December 2003

Before :

THE HONOURABLE MR JUSTICE HART

- -

Between :

MARK REGINALD SUTTON — **Claimant**

- and -

Defendant

(1) MISHCON DE REYA
(2) GAWOR & CO

- -
- -

Mr Gerald Wilson (instructed by **Anthony Gold**) for the Claimant
Mr Alex Hall-Taylor (instructed by **Barlow Lyde & Gilbert**) for the 1st Defendant
Mr Spike Charlwood (instructed by **Messrs Henmans**) for the 2nd Defendant

Hearing dates : 3rd December 2003
Handdown Judgment: 19th December 2003

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Approved Judgment

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

.....
The Honourable Mr Justice Hart

Mr Justice Hart:

1. In this action the claimant is suing two firms of solicitors for negligence in the conduct of his affairs. That is a common enough type of proceeding in this court. The unusual feature of this case lies in the context in which the respective retainers arose.

2. The claimant was, prior to September 1996, an air steward employed by Virgin Atlantic who supplemented his income by working as an "escort", that is to say as a male prostitute. In June 1996 an advertisement placed by the claimant in *Gay Times* attracted the notice of a wealthy Swedish businessman called Mr Staal. Contact was made. It is evident that Mr Staal found the particular services offered by the claimant peculiarly gratifying. Those services consisted of the claimant acting as master to Mr Staal's role as slave.

3. The first meeting between the pair seems to have been a great success from Mr Staal's point of view. He wrote that he would "like to become a real slave" and floated the possibility of doing so by moving to the UK, surrendering his income of £6,000 a month to the claimant, and making the claimant heir to his fortune of £600,000 or so. In return the claimant was to treat him as a slave, i.e. "keep me in a firm grip, taking away all my personal belongings, and leaving me totally to your mercy." Use of the whip and the cane was invited (KSC1/ 3-4).

4. This proposal was entertained by the claimant. By the end of July 1996 discussions were taking place between them as to the creation of a "Trust" to govern their relationship, and the purchase of a house to be owned 50% by the Trust and 50% by the claimant (KSC1/6-8), and the need to meet to discuss this. Mr Staal encouraged the meeting by writing, "Of course I will pay you well for this meeting". By early September the proposals had been yet further

refined. There was now to be an apartment purchased in the master's name and £500,000 placed in a Luxembourg bank account which would be available to the master and become the absolute property of the master on the slave's death. If the master left the slave, 90% of the account and of the value of the apartment would revert to the slave. The cohabitation was envisaged to commence in April 1997. In the meantime the slave proposed to pay the master £3,000 per month, to buy him a car in November 1996, and to provide a bank guarantee of £150,000 to the master against the possibility of the slave not joining the master in April 1997 (KCS1/26-38).

5. On 16th September 1997 the pair signed documentation, drawn up by the claimant, in the following terms:

> "Statement of Trust
> (1)I must promise to live with you in April 97
> (2)You must promise to live with me
> (3)You must promise to finance me with £3000/month starting 20th September, until 20th March
> (4)We must ensure everything is done legally
> (5)I trust you with my head, and now with my heart, and I will work towards ensuring that the relationship goes very well. For this to happen you must be prepared for me to become extremely angry, and extremely demanding. I am naturally demanding, however other slaves in the past have not been anywhere near my expectations – therefore you must work towards excellence at all times, and, whilst I promise to take care of you should you become sick or old age, you must work with only one thing in your mind and that is:-
> "The well being and comfort of your MASTER"
> (6)You must promise to me, for this relationship to work, that you make it so that I have as much power over everything as is physically possible.
> (7)The relationship will not work unless I have absolute power.
>
> Agreement between Staal & Sutton
>
> As of April 1997 the above two named will reside in the same premises
>
> The conditions of the cohabitation will be that Sutton is totally, totally in control.
>
> Staal will act only on instruction and command by Sutton, unless, Sutton asks the opinion of Staal
>
> You will obey (i.e. Staal) everything I say, my well being is number one, yours is number two I will keep you as I see fit, and I shall make all the decisions, you will have no authority in the household <u>at all</u>
>
> Should you disobey or not reach Sutton's high standards you will be severely punished.
>
> Sutton will, at his discretion, lock you away.
>
> You will dress as I tell you, should we be in public you will never undermine my authority, you will act as my personal assistant if in a restaurant, or shop or other public place.
>
> You will not be allowed access to my quarters of the apartment should I instruct you leave them you will not be allowed access to any <u>outgoing</u> telephone lines.
>
> You will be permitted an incoming telephone (with use of emergency service number only) and you will not know the number.
>
> I will ensure you are registered with BUPA private health insurance.
>
> You will be given around £300/month by me
>
> In effect you are my property – I will essentially own you and will have ultimate power over you and all that you do
>
> <u>YOU WILL NEVER TELL ME WHAT TO DO</u>(unless I ask your advice)
>
> Only in totally, totally extreme situations you be permitted to make suggestions – should abuse this privilege you <u>will be withdrawn right to suggest anything</u>
>
> When you speak to me you will refer to me as SIR, you will only speak to me in humble manner and should NEVER use a condescending tone
>
> I will never be expected to be available for you, if I want to go out alone or be alone you will stay in your quarters and will not move until I permit you to do so I will keep all your identification, such as passport, driving licence.
>
> You will eat what I tell you, unless I give you permission to choose if out, or if I want you to cook for me.

I will ensure you are registered at a health club and you will be permitted to use it at least four times per week, this will be your time for yourself.

Each day you will have your duties, normally starting with bringing my breakfast and then continuing to serve throughout the day

You will be permitted, having firstly consulted with me, one to three outside contacts – with which you may communicate, having asked my permission to do so."

6. On the same day they also signed an escrow instruction in relation to a sum of £125,000 held in a numbered account with SwedBank, Luxembourg, in the following terms:

> "According to a private mutual business agreement between ourselves, an amount of GBP 125,000 – shall be kept on a separate blocked deposit account under our above-mentioned client number and released only on the following conditions:
>
> 1. In the event that I, the undersigned Geurt Staal, by 1st April 1997 do not fulfil my commitment to enter into a joint venture business relationship with Mr Mark R Sutton and work with Mr Sutton at Sutton's premises, I shall authorise the Bank to transfer to Mr Sutton upon his instruction an amount up to and including GBP 125,000.
>
> 2. In the event that I, the undersigned Mark R. Sutton, by 1st April 1997 do not fulfil my commitment to enter into a joint venture business relationship with Mr Geurt Staal and let him work with me at Sutton's premises, I shall have forfeited said transfer to me of an amount up to and including GBP 125,000.
>
> 3. upon any contrary instruction issued by us under our dual authority over client number PC3866.
>
> In the event of item 1 or 2 above, Mr Sutton shall simultaneously cease to be holder of the above-mentioned client number and the Bank is hereby instructed to delete his name from the client number and not act on his instruction."

7. By January 1997 prospective slave and master were sufficiently *ad idem* to seek the assistance of the first defendant in person of Mr Perchal, an assistant solicitor in their employ. He took instructions from Mr Staal and Mr Sutton on the contents of a draft agreement which had been prepared by Mr Staal. The contents of the draft are not before the court but it can be inferred that it formed the basis of the Deed of Cohabitation subsequently drawn up by the solicitor. The solicitor advised that Mr Staal should obtain independent legal advice, and Mr Staal proposed that he would discuss the whole matter with a lawyer in Sweden. The solicitor also advised that the agreement might not be enforceable, in particular having regard to the manner in which the parties' relationship differed from the norm. Discussions took place as to what the nature of the financial relationship would be if the relationship broke down. The attendance note reads the following:

> "Staal stated that in the event that he terminates the agreement everything would go to Sutton and Sutton would have to pay him £1000 per month thereafter.
>
> Staal and Sutton discussed what would happen if Staal left Sutton. [I interpose that this is almost certainly a mistake, and that Sutton and Staal have been transposed here.] Sutton stated that he would not happy with Staal suggestion that the house and accounts would go back to Staal. Sutton said he had given up everything for Staal and Staal would be able to leave him and that everything would revert to Staal. Staal stated that he would negotiate a settlement for Sutton and after they agreed that the house and accounts would go back to Staal. Sutton agreed to this. PJP advised them that they must make a provision in case they could not reach an agreement. PJP suggested an arbitrator.
>
> PJP requested details of Staal's pensions.
>
> PJP asked Staal what he wanted done with the remainder of his property. He stated that in order for the relationship to work Sutton must have control over it. PJP stated that Staal must think carefully about this. Staal again stated that he had given it very considerable thought. Staal stated that he had worked hard all his life and been responsible for others. He now wanted someone to be responsible for him. Staal stated that he had met Sutton and knew that this was what he wanted.
>
> PJP again stated that Staal must take advice from a lawyer and that he could not sign it until he had done so. Staal confirmed that he would do so as soon as possible. PJP advised that he should discuss the whole nature of the situation with the lawyer as he was changing his life."

8. Mr Staal then sought permission from the claimant to consult a lawyer. This seems to have been granted, although Mr Staal assured the claimant that "I will not change my mind whatever [the lawyer] will tell me." There is no reason to suppose that Mr Staal did not consult his own lawyer as proposed.

9. By 5th February 1997 a suitable apartment had been located. Arrangements for bridging finance secured on the investments held in the escrow account (some £390,000) were made with SwedBank. This required both parties to accept liability in respect of the repayment of the bridging finance and to pledge the assets in the account to secure the borrowing. This documentation, all governed by Luxembourg Law and subject to an exclusive Luxembourg jurisdiction provision, was entered into by the claimant without his obtaining any advice thereon from the first defendant. Contracts for the purchase of the London apartment were exchanged on 19th February 1997 and completion took place on 24th February 1997. The apartment was transferred into the sole name of the claimant. The first defendant, by a different employee, acted on this purchase and no complaint is made in relation to this aspect of the first defendant's services.

10. Mr Perchal had in the meantime produced a draft Cohabitation Agreement, which was considered at the first defendant's offices on 26th March 1997. Agreement was reached, at Mr Staal's request, that the start date of the cohabitation should be 1st May 1997 rather than 1st April. On 14th April 1997, Mr Staal, following legal advice, wrote proposing an amendment dealing with the situation if the claimant should leave Mr Staal.

11. On 27th May 1997 the parties entered into the Deed of Cohabitation which had been drafted by Mr Perchal in accordance with their joint instructions. I can summarise its provisions as follows:

Clause 1 recited the intention to create legal relations, the fact that both parties had had independent advice, that they intended to live together, and that the purpose of the Deed was to:

"create legally binding arrangements as to financial and other matters during the course of their cohabitation and in the event of the termination of the cohabitation."

Clause 2 provided for cohabitation at the London apartment ("the Property") from 1st May 1997.

"bThe cohabitation shall be determined by the provisions of the Statement of Trust dated 16th September 1996 and the provisions of this deed will take precedence over the provisions of the Statement of Trust in the event there is a conflict between them

cThe cohabitation in the Property shall continue as long as Staal shall live PROVIDED THAT should Staal become incapacitated due to serious illness and/or age related causes Sutton shall arrange accommodation for Staal in a reputable nursing home and pay the expenses thereof"

Clause 3 provided that all Staal's property, whether acquired prior to the date of the Deed or subsequently should, unless the parties made a contrary written agreement, be transferred to and belong to Sutton absolutely. The same was to apply to any property acquired by them jointly after the date of the Deed. Sutton's property was to remain his own.

Clause 4 provided that any gifts from one party to the other shall be deemed to be an absolute gift.

Clause 5 dealt with bank accounts. The Luxembourg account was to be transferred into Sutton's sole name by 1st September. Sutton was to have full use of the income generated by the account, but was not to diminish the capital without a written agreement. That therefore dealt with a matter left open by Clause 3, namely the status of assets standing in their joint names prior to the date of the Deed. Each party was to maintain a separate bank or building society account, but the funds in each were to be Sutton's. They were also recited to have opened a joint account, the contents of which were to be Sutton's, and which it was agreed would be transferred into Sutton's sole name within one month of the commencement of the cohabitation.

Clause 6 provided that pending the transfer of the Luxembourg account, Staal would pay Sutton £4,000.00 per calendar month.

Clause 7 dealt with cars, providing that Sutton would keep his.

Clause 8 provided *inter alia* for Staal to insure his life in favour of Sutton for £250,000.

Clause 9 provided for Staal to nominate Sutton as the beneficiary of pension policies listed in the Schedule or any not listed. There does not in fact appear to have been a Schedule.

Clause 10 provided for Staal to execute an EPA in favour of Sutton.

Clause 11 ("LIVING EXPENSES") defined "Living Expenses" and made Sutton primarily responsible for their payment. Clause 11c provided.

"c. It is declared that notwithstanding practical arrangements made by the parties as between themselves as to payment of living expenses nothing in this deed is intended to vary the Statement of Trust of 16 September 1996 entered into by the parties"

Clause 12 ("WILLS") provided for Staal to execute a will in Sutton's favour within 30 days. It also provided for Sutton to execute a will in Staal's favour in the event of the termination of the relationship by Sutton's death, the provision in that event being that the Property and the accounts would go to Staal.

Clause 13 allowed either party to terminate the cohabitation by 4 week's written notice.

Clause 14 provided that:

(1) on a termination under Clause 13 by Staal "(if this has not already been done)", the legal and beneficial ownership in the Property would be transferred into Sutton's name, Staal would continue to maintain the £250,000 life insurance policy, Staal would pay Sutton £1,000 per month for the rest of Staal's life, and Staal would not change his will. Staal was to get his pensions back, but would forfeit them if he failed to pay the £1,000 a month. Sutton would cease to have any responsibility for Staal's care.
(2) On a termination as the result of Staal's death, all Staal's property so far as not already transferred to Sutton would go to Sutton;
(3) On a termination as the result of Sutton's death the Property and the accounts would revert to Staal;
(4) On a termination by Sutton giving notice, the agreement provided that:

> "i. Sutton shall transfer the Account into the joint names of Staal and Sutton;
>
> ii. parties undertake to negotiate in good faith a financial settlement for Sutton provided that in the event no financial settlement is agreed Sutton in his absolute discretion shall nominate an arbitrator whose recommendations in relation to such financial settlement will be binding on the parties; and
>
> iii. Sutton's responsibility to care for Staal and to pay the living expenses under Clause 12 and any other financial obligations Sutton may have undertaken under the provisions of this deed shall cease."

12. Mr Staal never did go to live with the claimant.

13. On 7th June a friend of Mr Staal, a Mr Dahmen, wrote to the claimant seeking a re-transfer of the Property, offering the claimant 50% of any profit achieved on sale of the Property, and stating that no claim would be made for the return of the £100,000 or so of gifts and payments which had already been made since September 1996. This was swiftly followed by a letter from solicitors instructed by Staal which sought return of the Property, return of all the gifts and payments (again alleged to be £100,000 or so) and an acknowledgement that the Cohabitation Deed was void. It also said that consideration was being given to involving the police "as we believe there may be criminal implications and we propose contacting *Gay Times* in which we understand you advertise." It threatened emergency injunction proceedings.

14. The claimant then consulted the second defendant. The claimant appears to have instructed them that he did not wish to enforce the Cohabitation Deed, and that he wished to achieve an amicable settlement. Then, on 19th June 1997 SwedBank wrote to the claimant, alleging that he had denied Mr Staal access to the Property, and that

> "we hereby reserve the right to terminate the Credit Facility and demand repayment in full."

The Bank urged the claimant "to co-operate with Mr Staal and his solicitors in order to resolve the matters amicably."

15. The second defendant then instructed Counsel to advise on the enforceability of the Cohabitation Deed. Counsel (Mr Elvidge) advised that it was arguable that the Deed was valid, the parties both having been of full age and no criminality being involved in the relationship. He adverted to the possibility of it being alleged that the relationship was based on a type of prostitution. He thought, however, that the court was unlikely to enforce this particular agreement because the Statement of Trust would be held to be against public policy, and the one-sidedness of the financial provisions would give rise to an inference of undue influence. He advised that:

> "Mr Sutton would be best advised, therefore, to negotiate a settlement with Mr Staal which should include an indemnity against the claim of SwedBank, the right to keep monies already received, and the best deal that he can obtain in relation to the house."

16. In the meantime, presumably unknown to his lawyers, Mr Staal was writing direct to the claimant seeking to resurrect a proposal for a cohabitation. The claimant seems to have toyed with the idea of pursuing this, but not to have followed through on it. Eventually, a Separation Deed was agreed between the lawyers, signed and dated on 13th August 1997, under which the claimant agreed to transfer the Property to Staal, but could continue to live there until 12th November 1997, the claimant was to be released from all liability to SwedBank and to retain the benefit of all gifts made to him in the course of the relationship, and both parties agreed that the Cohabitation Deed was void.

<u>The claims in the present proceedings</u>

17. The claimant alleges that the first defendant was in breach of duty in the following respects:

(1) that Mr Perchal ought to have advised that he could act only for the claimant;

(2)that the Cohabitation Deed was negligently drafted in that (a) it was poorly drafted, some of its provisions being inconsistent with others, and others not making "good sense", to such a degree that it "arguably lacked sufficient certainty so as to be legally effective"; and (b) that it should not have contained the references to the 16th September documentation which made it arguably void on public policy grounds;

(3)that the Deed ought to have confirmed that the Property was held by the claimant beneficially subject only to conditions applying in the event of termination and ought also to have confirmed that all Mr Staal's gifts to the claimant were his to keep. The Deed ought also to have included a full indemnity in respect of the SwedBank facility; and

(4)that Mr Staal should have been asked to obtain independent legal advice and provide certification from his adviser that such advice had been given before entering into the deed, it being alleged that he would have done so if asked.

18. As against the second defendant the claims are:

(1)that they failed to explore, or exploit in the negotiations the argument that the claimant had beneficial ownership of the Property, or at least 50% thereof; and

(2)they failed to advise him properly as to his position with regard to SwedBank's claims.

It is alleged that proper advice by the second defendant would have

resulted in a negotiated and/or litigated result under which the claimant

would have ended up with at least a 50% interest in the Property.

The Defendants' submissions in outline

19. I have before me applications by both of the defendants to strike out these proceedings either by summary judgment under CPR Part 24 or under Part 3.4. In summary, the second defendant alleges that any alleged consequences of the relationship between the claimant and Mr Staal are tainted by the nature of that relationship, whether fantasy or real, and that no, or no enforceable, legal consequences can have flowed from it; further that there is no sustainable basis upon which the claimant could have asserted an entitlement to the money or property he now says he should have obtained from the relationship. The first defendant's position is that there was no way in which the Cohabitation Deed could have been drafted so as to avoid the taint of unenforceability from which it suffered. Both defendants essentially base their argument on the proposition that the Cohabitation Deed was unenforceable on one or more of the following grounds:

(1)there was no intention to create legal relations;

(2)the contract, if there was one, was illegal on the ground of public policy being either a contract for sexual services or a contract for slavery; and/or

(3)in any event the contract was liable to be set aside for duress, undue influence, unconscionability and/or misrepresentation.

The claimant's submissions in outline

20. On behalf of the claimant it was submitted that there was plainly an intention to create legal relations. As to the allegation of illegality, the modern law was that a contract involving a sexual relationship between adults outside of marriage would only be unlawful if it amounted to a contract for prostitution, or what Professor Treitel describes as "contracts with purely meretricious purposes" : see Treitel, *The Law of Contract*, 11th edition, at p.443. It was an issue of fact to be decided at a trial as to whether such an allegation could be made in this case. As to slavery, the contract was not for slavery but for the role-play of slavery, "counterfeit slavery." Mr Staal could walk away at any time and the obligations of servility which he had undertaken were obviously not intended to be legally enforceable. The fact that Mr Staal would lose out financially if he ended the relationship was true of many relationships. The fact that he had chosen to put himself in that position, although unusual, was an act of free choice on his part. It did not make the relationship immoral. The court should not attempt to make any kind of moral audit of the relationship. There was in fact a clear public policy argument in favour of the court enforcing cohabitation agreements and a duty to do so having regard to Article 8 of the ECHR. The same Article forbade the Court at the same time to invade with disapproval the private activities of the parties within the cohabiting relationship.

21. As to undue influence, it was submitted again that this was an issue which could only be determined at trial. Although the financial provisions of the Cohabitation Deed might appear to reflect a domination by the claimant over Mr Staal, examination of Mr Staal's correspondence showed him to be very much alive to the implications of what he was proposing and indeed, so it was submitted by Mr Wilson in his luminous skeleton submissions, "very much in control throughout". The master/slave elements in the correspondence, and indeed in the relationship, should be seen for what they were, namely a fantasy or role-play. It did not follow that the whole of the relationship could be seen in those terms to the exclusion of the elements of what Mr Wilson in his oral submissions described as the

"companionship, commitment and emotional interdependence" which both parties would in reality have been hoping to derive from what was being contemplated as possibly a life-long relationship. The financial oddities in the arrangements were the result of "a desire that the role-play should have verisimilitude".

Cohabitation agreements

22. I accept the submission that there is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship. I accept also that this may also be so be whatever is planned to take place in the bedroom provided that the criminal law is not infringed. I do not, however, think that the question of whether this particular contract can be described as a contract with a purely meretricious purpose is something which can only be determined at a trial. Mr Wilson invited me to consult a dictionary as to what Professor Treitel may have meant by his use of the word "meretricious". I did not feel it necessary to undertake this (admittedly not onerous) task. The concept is not a difficult one once one appreciates that in the eye of English Law all sexual relations outside of marriage are, as Professor Honoré put it in *Sex Law*, 1978, Duckworth, "unlawful". As he then wrote, at p.44:

> "Whatever the reason, and however stable the relation, sexual intercourse between an unmarried couple is 'unlawful' though it is not in general a crime …. A contract for which the whole or part of the consideration is sexual intercourse (or any other sexual relation) outside marriage is void, as is a contract which tends to promote unlawful sexual intercourse. So, if Jack agrees to support Jill to whom he is not married on condition that she keeps house for him and that they have sexual intercourse, the whole agreement is void even if they mean it to be a legally binding one. It makes no difference that the agreement to have sex is understood rather than expressed."

But, as he went on to point out, that analysis does not prevent the cohabitors from entering into perfectly valid legal relations concerning their mutual property rights, or even (he suggests) as to other ancillary matters such as how they will divide up the work. Such a contract will not be a contract of cohabitation but a contract between cohabitors. He suggested that there was no reason why such a contract should not be upheld even though its tendency in fact might be to encourage the continuation of the 'unlawful' sexual relationship.

23. If that is the right distinction to draw (i.e. a distinction between a contract for sexual relations outside marriage and a contract between persons who are cohabiting in a relationship which involves such sexual relations), it is not, in my judgment, difficult even for a moron in a hurry (to borrow the late Mr Justice Foster's vivid simile) to see on which side of the line the Cohabitation Deed in this case falls. It was not a property contract between two people whose sexual relationship involved them in cohabitation. It was itself an attempt to express the sexual relationship in the property relations contained in the contract (or, as Mr Wilson himself put it, the property relation "sprang from" the desire to give the sexual role play verisimilitude). It was an attempt to reify an unlawful ideal.

24. In the final analysis, however, I do not think that what I have to decide in this case deserves at all to be dignified by theorising at this level. Even if (which I doubt) developments in social attitudes since 1978 (and those currently in the legislative pipeline) require one to jettison this simple approach, there are other reasons for thinking that Mr Perchal was right to advise that the agreement might not be enforceable. I accept the submissions of Mr Charlwood and Mr Hall-Taylor that it is difficult to suppose that this particular Cohabitation Deed (with or without its alleged shortcomings) could ever had withstood an attack on one or more of the grounds of lack of intention to create legal relations, undue influence or misrepresentation. I do not find it necessary to decide this question but will sketch out the nature of the difficulty.

25. The essence of the difficulty lies in the need to distinguish the "fantasy" elements of the relationship from the "real" elements. Mr Staal's correspondence (which is voluminous) is eloquent in its protestations from an early stage that he wants to be a "real" slave in the sense of totally subordinating himself to the will of the claimant. If this was really how he felt, it is clear that from the beginning he was doing all he could to subject himself to the domination of his chosen master. On that basis his assignment of effectively all his worldly wealth to the claimant must have been the result of his own (self-willed it may be said) mental and emotional subjection to the will of the claimant, and the latter's actual domination of Mr Staal. The extent of the claimant's actual domination over Mr Staal would have been apparent to the claimant. If that was the relationship it is difficult to see how the court could ever enforce such a contract against Mr Staal, however much independent legal advice he might have had.

26. If, on the other hand, it is said (as it is now said on behalf of the claimant) that there was no real relationship of dominance, that must be because everything that was passing between the two men was just an act or a role-play. But if that is right, the financial provisions of the Cohabitation Deed have themselves to be seen as part of the role-play, or at least there is no good reason for not so viewing them. If the court were to come to that conclusion, the necessary intention to create legal relations, despite their protestations to the contrary, would be absent.

27. There is, I think, a further difficulty, although it was not one which was relied on by the defendants. If Mr Staal "really" wanted to be a slave to the claimant it was imperative to the success of that project that the claimant should, to the same degree of reality, really want to be a master, and not simply represent, as a piece of role-play, that this was his approach to the relationship. In fact, as his witness statement in opposition to the applications demonstrates, this was very likely not the case. In a sustained piece of prose, of no small literary quality, he paints a picture of himself as in fact a very vulnerable person (he had been diagnosed very recently as HIV positive) and only found the master/slave fantasy fulfilling "to a certain degree" as compared with Mr Staal for whom they were "very fulfilling."

There is an unavoidable tension, and indeed conflict, in that witness statement between the insistence on the one hand that the "sexual role-play" was only a part of the relationship (see paragraph 16 of the witness statement) and the supposition that the "pretence" (paragraph 19) could only cease to be such if "our finances [could be brought] more into line with the rest of the relationship".

28. The further difficulty which was relied upon by the defendants was the non-disclosure by the claimant to Mr Staal of his HIV status. This was urged by Mr Wilson to be irrelevant to the case since (a) it was a mere non-disclosure and not a positive misrepresentation and (b) was immaterial because it was or would be the claimant's case that no sexually unsafe activity had taken place or had been contemplated. Both propositions can, perhaps, only be tested at a trial, but on the documents I have seen both are clearly questionable, and in any case, as the claimant recognises in his witness statement, the question of his health was at least arguably relevant to Mr Staal's decision irrespective of the precise sexual activities which the master's whim might subject him to: one important, indeed the only, obligation of the claimant was to look after Mr Staal, an obligation to which the claimant's own state of health would have been relevant. There was evidence that at an early stage of the relationship Mr Staal had specifically inquired as to the claimant's health, and obvious from the claimant's evidence that, notwithstanding this inquiry, he had concealed the true position: the true position (according to his evidence) was that he had been advised that he had only a short time to live (see paragraph 3 of his witness statement).

29. As indicated, however, all this seems to me largely irrelevant to the question of whether or not the claimant has a real prospect of succeeding against either firm of solicitors at trial. What it does go to show is that both firms of solicitors were correct in the advice they tendered to the claimant about the probable un-enforceability of the Cohabitation Deed. In my judgment the reason he has no prospect of success against either firm is, not that the "taint" of the Cohabitation Deed infects all that follows so as to deprive the claimant of any right to sue the solicitors for negligence, but simply that I am quite unable to see that either firm was negligent in any material respect.

30. As against the first defendant, my reasons for this conclusion are as follows. First, insofar as there are drafting infelicities in the Cohabitation Deed, they are not such in my judgment as to render it unenforceable for lack of certainty. The following points were made by Mr Wilson:

(1)He submitted that an unnecessary doubt as to the claimant's sole beneficial ownership of the Property was created by the relationship between the provisions of Clause 3 and Clause 14 of the Deed. Clause 3, it was argued, left the impression that the Property, like all other property of either Sutton or Staal would belong to Sutton, whereas Clause 14 provided for the subsequent transfer "(if this has not already been done)" of the legal and beneficial interest to Sutton in the event of Staal terminating the relationship. It would have been far better, it was submitted, if the Deed had simply provided for the beneficial interest in the property to be unambiguously Sutton's from the outset, subject to a legally enforceable regime for its divestment in the event of the termination of the relationship by Sutton either by notice or in the event of his death. I agree that other ways of achieving what the Deed set out to achieve can be imagined, although as a matter of property law some quite difficult territory might need to have been crossed. However, assuming that the Deed was in other respects enforceable, I am unable to see that the provisions as drafted would in fact give rise to any difficulty of interpretation. The Property had already been conveyed into Sutton's name. The apparent effect of Clause 3b ("Any property acquired by Sutton prior to the date of this deed and subject to … loan facility shall be deemed to be the sole property of Sutton") was to carry the beneficial interest in the Property. I cannot see that the claimant has suffered any damage as a result of this not having been spelled out in different terms.

(2)It was submitted that the absence of time limits in Clause 3 for the transfers thereby contemplated made enforcement difficult. I am unable to see why that should be so.

(3)The fact that the Cohabitation Deed contemplates the cohabitation as commencing in the future on 1st May 1997 but was itself executed on 27th May 1997 was also said to affect its enforceability. Again I do not understand why that should be so. It is not uncommon to find this kind of infelicity occurring where parties have negotiated the terms of an agreement over a period of time during which events contemplated by an agreed draft have, or have not, happened. One frequently sees this in partnership agreements.

(4)Attention was drawn to the oddity that Staal undertook at his own expense to do whatever was necessary to complete transfers and so forth, but would *ex hypothesi* have no access to any funds for that purpose. It was also odd that, stripped of his worldly goods as he was to be, the Deed nevertheless obliged him to open a bank account. I agree that there are some puzzles here but cannot see that the mere existence of these puzzles themselves rendered the Deed so uncertain as to deprive its essential provisions (which are unambiguously clear) of legal effect.

(5)It was submitted that the obligation on Sutton to find and pay for a "reputable" nursing home in the event of Staal's illness or age failed to define adequately the standard of nursing care to be provided, and whether its cost should or should not be capped by reference to the resources available to the claimant. I agree that it is possible to imagine circumstances in which this clause might have given rise to dispute, but its existence does not seem to me to undermine the validity of the Deed.

(6)The provision in Clause 14.d.ii that, on Sutton terminating the relationship, the financial settlement should be left to an arbitrator chosen by Sutton was also criticised. The criticism was on the grounds both that it was uncertain and that the power which it gave to Sutton was so unrestrained as to raise a presumption of unconscionability. So far as uncertainty is concerned, I think there may well be an argument for saying that a provision in those terms did not

amount to a valid arbitration agreement. That fact would not, however, operate to invalidate the Deed as a whole, and no damage has in fact flowed from the inadequacies of the provision. As to the unconscionability point, that is indeed true, but it is of a piece with everything else in the Deed.

31. In my judgment, therefore, there is nothing in any of these points. It is simply fanciful to say, as Mr Wilson did in his written submissions, that "it was this ineptness in the drafting of the Deed, rather than any alleged illegality or undue influence, that was most damaging to the claimant in his subsequent negotiations with Mr Staal". There is not a scrap of evidence to support that submission.

32. The next point made against the first defendant is that the Cohabitation Deed should have been sanitised so as to exclude references to the September 16th documentation. The suggestion was that incorporation of the references to this documentation somehow increased the fragility of the Deed and its vulnerability to legal attack. In addition it was said that the provision in Clause 11 of the Deed which gave supremacy to that documentation was especially dangerous. These were, in my judgment, all bad arguments. It was not denied, as a matter of fact, that the references had all been included on the claimant's express instructions. Even had they not been it is obvious (as was conceded by Mr Wilson) that the September documentation was part of the matrix of the Cohabitation Deed. It was unavoidably there by the time Mr Perchal came on to the scene. He could not simply wish it away by prestidigitous drafting. For good measure I would add that, as a pure matter of construction, it seems to me clear that the Clause 11 reference relates only to the question of living expenses.

33. Then it is said that the claimant would have been better off if the Deed had been drafted so as to make it clear that the "gifts" which had already been showered on the claimant (apparently only some £80,000 worth rather than the £100,000 later claimed by Mr Staal's solicitors) were his to keep, thus protecting him against the subsequent claim. This, however, is simply an absurd allegation in the context of advice having correctly been given that the document being drawn up might well not be enforceable. How could it conceivably have assisted the claimant to have been the proud possessor of some separate piece of paper declaring him to be the rightful owner of everything he had previously been paid by the slave for his past services as master if the solemn declaration in the Cohabitation Deed that he should have that and much more besides for his future services was itself unenforceable? The proposition is simply risible.

34. The same objection obtains in relation to the allegation that Mr Perchal was negligent in not ensuring that there was an express indemnity from Mr Staal to the claimant in relation to the joint borrowing from SwedBank. There is no allegation that Mr Perchal's advice was sought or obtained in relation to this transaction at the time it was entered into – simply an allegation that he was aware of it. How the claimant's position could have been improved by the inclusion of an express indemnity in the Cohabitation Deed is quite beyond me. If the Deed itself was vulnerable (as Mr Parchel correctly advised it was) any such provision would have fallen with it. If it was not vulnerable, any such provision was unnecessary, since the claimant was thereby to become entitled anyway to all the assets which might have rendered the indemnity of any worth.

35. The final point concerns the alleged failure of Mr Perchal to ensure that Mr Staal not only had been independently advised but could be proved to have been so advised. This again is a matter which, whatever else may be said about it, had no consequence whatsoever. So far as the documentary evidence shows Mr Staal did seek such advice. It seems that his purpose in doing so was simply to fulfil what he had been told was one of the requirements necessary to give legal verisimilitude to the arrangements into which his compulsion led him to embark. He begged the claimant's permission before doing so. I have absolutely no reason to suppose that, had Mr Perchal insisted on his producing a certificate from a lawyer to say that advice had been given to Mr Staal, such a certificate would not have been produced. I cannot see how that would have appreciably strengthened the claimant's hand in any subsequent negotiation with Mr Staal.

36. For all these reasons the case against the first defendant seems to me to be quite simply hopeless. A trial might provide opportunities for the display of forensic skill, might enable a wider public to interest itself in the salacious details of a relationship which both parties appear to have regretted, and would offer ample opportunities for lawyers' profit costs. None of these is an "other compelling reason" for allowing this action to proceed to trial within the terms of CPR 24.

37. The same applies in my judgment to the action against the second defendant. As indicated in paragraph 18 above, the complaint here is that in two particular respects the second defendant failed to exploit, or even notice, two potential strengths in the claimant's case when they negotiated (on his behalf and on his instructions) a settlement with Mr Staal. The settlement allowed the claimant to keep the fruits which he had reaped from the relationship during the pre-Deed period (amounting to some £80,000), required him to disgorge the Property, and freed him from the liability which he had undertaken to SwedBank.

38. The complaint, in relation to the Property, is that the second defendant missed the trick of arguing that the Property had in equity become the claimant's independently of the Cohabitation Deed. It is true that the second defendant did not specifically ask Counsel's advice on this point, and I assume for this purpose that they themselves offered no advice to the claimant on it and, consciously or not, discounted the value of the point in their own negotiations with Mr Staal's solicitors. I cannot see that they were wrong in so acting. There was, on the facts, nothing in the point. The contemporary correspondence in fact shows Mr Staal to be dithering in his intentions on this right up to 27th May. But even were that not so, all the arguments available to Mr Staal to upset the Cohabitation Deed would have been equally available either to invalidate any passing of the equity on the vesting of the legal estate in the Property in the

claimant, or to render such passing (had it been provided for in the transfer which it had not) voidable. Even if it be said that the argument based on illegality would have weakened Mr Staal's position if the beneficial interest had in fact already passed, the transaction was in any case so riddled with difficulty that I cannot see that it is realistically possible that to have taken this point would have improved the claimant's negotiating position to any material degree.

39. The complaint in relation to the claimant's position as against SwedBank is equally devoid of merit. There are two aspects to the complaint. The first relates to the claimant's rights in relation to the escrow instruction (see paragraph 6 above). It is said that since SwedBank gave what was in fact a false reason for removing the claimant from the account (namely that the claimant had refused to allow Mr Staal to enter the Property) this in some way gave the claimant rights against the bank. This is a mis-reading of the escrow instruction, which in fact provides that, whoever is at fault ("… in the event of item 1 or 2 above …)

> "Mr Sutton shall simultaneously cease to be holder of the above-mentioned client account and the Bank is hereby instructed to delete his name from the client number and not act on his instruction."

40. This provision seems to have been ignored by the claimant's present legal team. It shows that, at least at that stage in the relationship, Mr Staal still had his wits about him (and indeed lent force to an observation made to me by Mr Wilson in the course of argument that in these slave/master relationships the power relations are not always what they superficially appear to be or the parties would like to imagine they are). The escrow instruction also recorded an agreement by Mr Staal to pay the claimant £125,000 in the event of Mr Staal not fulfilling his:-

> "commitment to enter into a joint venture business relationship with Mr Mark R Sutton and work with Mr Sutton at Sutton's premises"

but it is obvious that this "business" relationship and the "work" involved consideration unlawful in English Law. A faint suggestion is made in the pleading that a Luxembourg lawyer might see the matter differently, but no applicable provision of Luxembourg law has been pleaded or otherwise relied on.

41. The second complaint is that the second defendant should have offered more robust advice in relation to the claimant's liability under the loan facility, in particular that they should have advised the claimant of his rights to seek indemnity and/or contribution from Mr Staal. I am, however, completely at a loss to see how such advice would have strengthened the claimant's hand. The basis on which it would have been equitable to order Mr Staal to indemnify the claimant would have been that it had never been the intention (as it was not) that the claimant should be personally liable in respect of the debt except to the extent that assets transferred to him by Mr Staal enabled him to discharge it. But to the extent that assets were to be so transferred, the very essence of the proposed relationship was that the claimant was to assume responsibility for everything financially. Once it was accepted that the Cohabitation Agreement was probably unenforceable, it was simply unrealistic for any negotiated solution to have included a provision that the claimant should get the Property (or a partial interest in it) but be free of any liability in respect of it. I cannot see any way in which the claimant could have done better than he did either by negotiation or litigation.

42. I have therefore no hesitation in holding that the action against the second defendant is as hopeless as that against the first.

43. In order to avoid an unnecessary further expenditure of court time on this case it may be helpful if I express my provisional view that I would dismiss any application for permission to appeal from this judgment on the grounds that, for the reasons which appear herein, I regard the prospects of a successful appeal as fanciful and I am unable to see that the case raises any issue of law which requires such an airing.