Neutral Citation Number: [2019] EWHC 1587 (Ch)

Case No: CH-2019-000079

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

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

Date: 21/06/2019

Before:

MR JUSTICE MORGAN

- -

Between:

(1) SONNY MICHAEL BALL **(2) LEAHANN CLAIRE BALL (Née LEWIS)**	**Appellants**
- and -	
DIANE DE MARZO	**Respondent**

- -
- -

Lina Mattsson (instructed by **Hodge Jones & Allen LLP**) for the **Appellants**
Piers Hill (instructed by **Geoffrey Leaver LLP**) for the **Respondent**

Hearing date: 12 June 2019

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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.

MR JUSTICE MORGAN:

The order under appeal

1. This is an appeal against the order made in the County Court at Central London by His Honour Judge Monty QC on 7 March 2019. Permission to appeal was granted by Arnold J on 29 March 2019.

2. The order concerned a residential property known as 75 New Road, Abbey Wood, London SE2 ("the Property"). The Property was registered in the names of the Appellants, Sonny Michael Ball and his wife Leahann Ball (whose unmarried name was Lewis). In the proceedings in the county court, the Respondent, Diane de Marzo claimed a beneficial interest in the Property. As this is essentially a family dispute it is convenient to refer to the parties by their first names. Diane is the step-mother of Sonny.

3. In the order made on 7 March 2019, the Claimant is Diane and the Defendants are Sonny and Leahann. The order included a declaration that:

> "The Property is held by the Defendants upon trust for the Claimant and the Defendants jointly. The Claimant has a 37.5% beneficial share and the Defendants hold the remaining 62.5% beneficial share of the Property as tenants in common in equal shares."

4. The judge then made an order for sale of the property and he gave directions as to how the proceeds of sale were to be applied. There was a mortgage on the property. The mortgage had been granted by Sonny and Leahann as the registered proprietors of the property. Diane was not a party to the mortgage. The judge directed that the proceeds of sale would be used in the first instance to discharge the mortgage and then to pay the various costs and charges of the sale. The order then provided that the balance of the net proceeds of sale was to be paid to the parties in accordance with the earlier declaration as to beneficial ownership save that:

> "(i) The Defendants shall discharge the full sum of the mortgage from their share of the proceeds of the sale under the rules of equitable accounting;
>
> (ii) For the avoidance of doubt, the Claimant shall therefore be entitled to 37.5% of the sale price, subject to the payment of her share of [the costs and charges of sale]. If the Defendants' 62.5% beneficial share of the Property is insufficient to discharge the mortgage in full, any shortfall (the Shortfall) shall be dealt with in accordance with paragraph 2 below.
>
> 2. If there is a Shortfall the Claimant may apply to the court for a determination of how such Shortfall should be dealt with … ."

5. The judge then ordered that the Defendants should pay 70% of the Claimant's costs of the claim, to be assessed on the indemnity basis.

The three judgments

6. The judge had conducted a trial in this matter over 3 days in December 2018. He reserved his judgment and handed down judgment on 25 January 2019. In that judgment he gave his reasons for finding that the parties had entered into and were bound by a written agreement called a House Purchase Agreement in these terms:

> "House Purchase Agreement
>
> Between: Diane De Marzo
>
> Sonny Ball
>
> Leahann Lewis
>
> Diane De Marzo has gave (*sic*) Sonny Ball and Leahann Lewis £150,000 towards the purchase of:
>
> 75 New Road
>
> Abbey Wood
>
> London
>
> SE2 OPN
>
> This is a 37.5% share of the property.
>
> This is not an interest free loan, it is just an agreement between 3 people; that they all own a share of the property and live in it until the three people agree to sell and go their separate ways. There is a minimum time before the property can be sold and we have agreed on 2 years. Then if anyone wants to sell the property and release their share, this can be done giving all parties time to find another property.
>
> The reason for the agreement is the Solicitor left it too late for the parties to do it officially and the house would have been lost, if the purchase was done using the proper channels."

7. The House Purchase Agreement was signed by all three parties and was witnessed by two other family members. It was dated 22 February 2015.

8. At the trial, the case for Sonny and Leahann was that the House Purchase Agreement was a forgery. The judge rejected that case and gave his reasons for so finding. The judge then proceeded to make further findings of fact which he said fortified his conclusions that the House Purchase Agreement was a genuine agreement binding the parties. In the course of those further findings, the judge referred to an email of 13 January 2015 to which I will refer later in this judgment when dealing with the third ground of appeal.

9. Later in his judgment, the judge dealt with a number of other issues which are not now material on this appeal. However, it is relevant to note that in making further findings, the judge rejected parts of the evidence which had been given by Diane.

10. The judge then dealt with submissions made on behalf of Sonny and Leahann to the effect that Diane should be refused any relief because she had tried to mislead the court and to the effect that she should be refused equitable relief in the form of a declaration that she had a beneficial interest in the Property as she had not come to court "with clean hands". This part of the judgment is the subject of one of the grounds of appeal and I will refer in more detail to the judge's reasons when I consider the relevant ground of appeal.

11. The judge then addressed the specific issues which had been argued before him. As regards the ownership of the Property, he held that the effect of the House Purchase Agreement was that Diane was to have a 3/8 share in the Property and that the parties had intended Diane to be a joint beneficial owner of the Property to the extent of a 3/8 share.

12. Following the hand down of the judgment, there was a further hearing on 7 March 2019 at which various points were argued. One such point related to the treatment of the mortgage granted by Sonny and Leahann. In relation to that point, the essential facts were that when the Property was purchased, the Property was transferred to Sonny and Leahann who became the registered proprietors of the Property. The purchase price of the Property was £382,000 and the total cost of purchasing the property (including fees, charges and Stamp Duty Land Tax) was approximately £400,000. Diane had contributed approximately £150,000 (more accurately £149,049) towards the purchase price. Sonny and Leahann had not contrtibuted any sum directly to the purchase price but they had borrowed approximately £250,000 from a lender and the repayment of the loan was secured by a repayment mortgage granted by Sonny and Leahann to that lender. Diane was not a party to the loan or the mortgage.

13. On 7 March 2019, the judge gave an ex tempore judgment explaining how the proceeds of sale of the Property should be used to repay the mortgage on the Property and the resulting accounting to be carried out as between the parties. His conclusions were then reflected in the order which he made on 7 March 2019, to which I have already referred.

14. The judge then heard submissions as to costs and he gave a further ex tempore judgment giving his reasons for concluding that Sonny and Leahann should pay 70% of Diane's costs on the indemnity basis.

The background facts

15. Sonny and Leahann now appeal on four grounds. In order to understand the first two grounds of appeal, it is necessary to refer to further matters.

16. The House Purchase Agreement recorded that Diane had contributed £150,000 towards the purchase of the Property. The judge found that the precise figure contributed by her was £149,049. The House Purchase Agreement provided for Diane to have a 3/8 share in the Property by reason of a contribution of £150,000. That was plainly on the basis that the parties were dealing with round numbers rather than precise figures and were

treating Diane as having contributed £150,000 towards a cost of purchase of £400,000. £150,000 is obviously 3/8 of £400,000.

17. The judge was given specific evidence as to the various payments made by Diane which made up the £149,049. He held that some £135,000 came from the sale of properties in Spain. In 2015, at the time of the purchase, the parties appeared to proceed on the basis that all of the £149,049 was money to which Diane was entitled and, in particular, the parties appeared to proceed on the basis that the £135,000 which came from the sale of the Spanish properties was Diane's money.

18. Sonny and Leahann appear to have proceeded on that basis for the following reasons. The Spanish properties had been owned by Diane's husband, Michael Ball or, possibly, by Diane and Michael Ball jointly. Michael Ball died on 11 April 2013 and on 20 January 2014 Diane obtained probate of an apparent will dated 14 October 2011 whereby Michael Ball left all of his property (including the Spanish properties) to Diane. Diane then sold the properties and the proceeds of the sales included the sum of £135,000 referred to above.

19. Before the trial in this case, Sonny and Leahann alleged that the apparent will of 14 October 2011 was a forgery by Diane. They put forward this allegation primarily to impeach the credibility of Diane and to support their case that the House Purchase Agreement was also a forgery by Diane. In her witness statements disclosed before the trial, and in the correspondence from her solicitors before the trial, Diane steadfastly maintained that the will was genuine. At some point before the trial, it must have become clear to Diane that Sonny and Leahann had a very powerful point which tended to show that the apparent will could not have been executed on 14 October 2011.

20. Diane was the first witness to give evidence at the trial. At the beginning of her evidence in chief, instead of confirming the truth of her witness statements, she disclosed that the apparent will was indeed a forgery. She had not given any advance warning to Sonny and Leahann of this change in her evidence.

21. The consequence of Diane's admission about the will was that Michael Ball had died intestate. The grant of probate in favour of Diane has, since the trial, been revoked. At present, there is no representative of the estate of Michael Ball. The parties did not make submissions to me as to who would be entitled to take under his intestacy and, in particular, how the proceeds of sale of the Spanish properties, including the £135,000 referred to above, would be dealt with.

22. The position in relation to Michael Ball's immediate family is as follows. He had married twice. Diane was his second wife. He had two children by his first marriage. These two children were Sonny and Sophie. Then Michael Ball and Diane had three children together. These three children were Stevie, Jasmine and Charlie. It may be the case that the position in relation to the Spanish properties would be governed by the Spanish law of intestacy and the potential beneficiaries would be (not necessarily all in the same way) Diane and the five children of Michael Ball.

23. The consequence of the above facts would seem to be that all or part of the £135,000 from the proceeds of sale of the Spanish properties which Diane provided towards the purchase of the Property was money owned by the estate of Michael Ball. If the Spanish properties had been solely owned by him, then all of the proceeds of sale would belong

to his estate. It was suggested that the Spanish properties were owned jointly by him and Diane and that half of the proceeds of sale belonged to Diane and the other half belonged to the estate. The judge had not made any finding in relation to that possibility and it was not suggested that I had the material to make any relevant finding on that.

24. Although Diane obtained the sum of £135,000 when purporting to act as the executrix of Michael Ball's estate, the estate would be entitled to trace its ownership of (all or half of) the Spanish properties into the sum of £135,000 and from there into the 3/8 share in the Property (as found by the judge) and, indeed, into the proceeds of sale of the Property when it is sold pursuant to the judge's order for sale.

25. The ability of the estate to trace its assets in the way described above was referred to in the course of argument before the judge. However, he did not feel it was necessary to decide the matter although he recognised that it might well be possible that the estate could trace the monies derived from the sale of the Spanish properties. However, on the hearing of the appeal, I suggested to Ms Mattsson who appeared for Sonny and Leahann that it was indeed the position that the estate could trace its assets into the 3/8 share which the judge held was held by Diane. Ms Mattsson appeared to accept that that would be the position. Mr Hill who appeared for Diane positively submitted that this was the position. Mr Hill pointed out, however, that it was not possible for the appeal court to make specific findings as to how much of the £135,000 was the property of the estate. He submitted that the facts needed to be investigated because of the possibility to which I have referred that some or all of the Spanish properties which were sold were owned jointly by Diane and Michael Ball so that some of the £135,000 was Diane's own money. Nonetheless, in advance of a further investigation of that kind, I will proceed on the basis that it appears that some (or possibly all) of the £135,000 was not Diane's own money but was money she had wrongly taken from the estate and that the estate could trace its money into the 3/8 share in the Property as found by the judge. On the basis of, and to the extent of, the estate's right to trace into that share, Diane would hold that share on a constructive trust for the estate.

The second ground of appeal

26. It is convenient to deal with the second ground of appeal before the first ground of appeal. The second ground of appeal was that the judge was wrong to hold that Diane's claim for equitable relief succeeded in circumstances where the funds used to purchase the Property did not belong to her, but to the estate of Michael Ball.

27. I have discussed the position in relation to the source of the £135,000 which was part of the sum of £149,049 contributed by Diane to the purchase of the Property. It does not seem to be the case that all of the £149,049 contributed by Diane belonged to the estate as the second ground of appeal suggests. However, it does seem to be the case that part of that sum did belong to the estate and not to Diane.

28. In relation to the money belonging to the estate which Diane used as a contribution to the purchase of the Property, Diane was guilty of wrongly taking and using money which did not belong to her but belonged to the estate. The victim of that wrongdoing was the estate. Equity's response to that state of affairs is, as I have explained, to allow the estate to trace into the 3/8 share which the judge held that Diane had in the Property to the appropriate extent to reflect the estate's ownership of some of the £149,049 used as a contribution towards the purchase of the Property. To that extent, Diane holds the

appropriate part of the 3/8 share as a constructive trustee for the estate. To the extent that part of the £149,049 was Diane's money, then the appropriate part of the 3/8 share is owned by her.

29. Based on the above reasoning, it follows that the judge was right to hold that as between the parties in this case, Diane had a 3/8 share in the Property. However, as between Diane and the estate, it is now clear that she holds some part of the 3/8 share on a constructive trust for the estate. That does not however contradict the order made by the judge. The estate was not a party to these proceedings and was not represented at the trial or on this appeal. One course would be simply to leave the judge's order in its present terms and leave all questions between Diane and the estate to be raised and decided in other proceedings. However, in view of the fact that it is no longer in dispute that Diane holds some part of the 3/8 share in the Property on a constructive trust for the estate and the further fact that it seems that both Diane and Sonny are interested in the estate, I consider that it would be helpful to add to the order made by the judge a declaration to that effect. I recognise that the utility of such a declaration is reduced because it is not at present possible to identity the relevant part of the 3/8 share which is subject to a constructive trust but, nonetheless, a declaration of the kind I have referred to will be useful to establish the principle which applies.

30. Ms Mattsson did not accept the above reasoning. She continued to submit, in accordance with the appellant's notice, that the fact that some of the estate's money had been used as a contribution to the purchase price should lead to Diane's claim being dismissed in its entirety. She submitted that as to part of the 3/8 share, Diane was a trustee but she had not claimed as a trustee but as the beneficial owner of a 3/8 share. It was then submitted that it was incumbent on Diane to have pleaded that she was claiming as a trustee and she had not done so, in breach of the rules as to pleading. It was submitted that Diane would have to apply to amend her claim and that I should refuse permission to amend. However, Ms Mattsson was unable to identify any rule which required Diane to plead that she brought her claim in circumstances where some part of the interest she claimed was the subject of a trust in favour of third parties. I do not consider that there is any need for Diane to amend her claim.

31. Ms Mattsson contended that the right result would be to dismiss Diane's claim and to leave Sonny and Leahann to negotiate with the estate as to whether the estate had any claim to a share in the property and if that matter could not be agreed then the estate could bring appropriate proceedings. It was not clear to me whether Sonny and Leahann would wish to run for a second time the defences which they ran in this case and which were rejected by the judge.

32. I consider that Ms Mattsson's proposal as to what should happen in this case to be most undesirable. I do not see any reason why I should produce that result. There was no requirement in the rules as to pleadings for Diane to plead specifically the capacity in which she brought the claim. It is true that it was implicit in her case, as revealed in her witness statements, that she was claiming that she was the beneficial owner of a 3/8 share but her admission that the will was forged necessarily involved a change in her case. Sonny and Leahann cannot complain about the change in her evidence as it accorded with the case they were themselves putting forward to the effect that the will had been forged. It may be that they were putting forward that case primarily to attach the credibility of Diane and they may not have thought through the consequences of successfully showing that the will had been forged.

33. At the trial, the judge recognised that the estate might be able to trace into the 3/8 share but he still made his order as to that share. On the appeal, it has become clear that the estate can trace into that share to an appropriate extent. If the judge's order adds the declaration on that point to which I have referred, I consider that justice will be done to the parties and that will avoid the undesirable alternative contended for by Ms Mattsson. In any case, Ms Mattsson's submission plainly goes too far as it asks for Diane's claim to be dismissed when it appears on the material before me that some of the £149,090 was Diane's money.

34. Ms Mattsson also submitted that Diane's claim should be dismissed because it was necessary for her to show she had suffered detriment by reason of her reliance on the arrangement she had made with Sonny and Leahann and that she could not show detriment because the money she had contributed to the purchase did not belong to her. First, I do not think that this is a case where Diane has to show she suffered detriment by reason of reliance on the arrangement she had made. The House Purchase Agreement was an express declaration of trust. Secondly, in any event, Diane had suffered detriment. She contributed some of her own money and other money in respect of which she was a constructive trustee for the estate and for which she is answerable to the estate.

35. Accordingly, I dismiss the second ground of appeal.

The first ground of appeal

36. The first ground of appeal is that the judge should have dismissed Diane's claim in its entirety because Diane did not come to court with clean hands and/or on account of illegality. This ground of appeal proceeded on the basis that the sums contributed by Diane to the purchase of the Property all came from the sale of the Spanish properties and it was said it had only been possible for Diane to make a contribution to the purchase of the Property because she had forged the will of Michael Ball. This ground of appeal relies on both the equitable maxim as to clean hands and, in the alternative, on the principles as to illegality. It was submitted that the equitable maxim was not the same as the principles as to illegality as established by the majority decision of the Supreme Court in *Patel v Mirza* [2017] AC 467. In his reserved judgment, the judge had applied the principles in *Patel v Mirza* and rejected the defence of illegality. He did not separately consider the equitable maxim as to clean hands.

37. On the appeal, counsel for both parties accepted that the equitable maxim as to clean hands was correctly stated by Aikens LJ in *Royal Bank of Scotland plc v Highland Financial Partners LP* [2013] EWCA Civ 328 at [158]-[159] where he said):

> "158. There is no dispute that there exists in English law a defence to a claim for equitable relief, such as an injunction, which is based on the concept encapsulated in the equitable maxim 'he who comes into equity must come with clean hands'. [1]…
>
> 159. It was common ground that the scope of the application of the 'unclean hands' doctrine is limited. To paraphrase the words

[1] *Snell's Equity* (32nd edn, 2010) at 15–15 (page 98–9).

> of Lord Chief Baron Eyre in *Dering v Earl of Winchelsea* [2] the misconduct or impropriety of the claimant must have 'an immediate and necessary relation to the equity sued for'. That limitation has been expressed in different ways over the years in cases and textbooks. Recently in *Fiona Trust & Holding Corp v Privalov* [3]Andrew Smith J noted that there are some authorities [4] in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief, not only where the purpose is to create a false case but also where it is to bolster the truth with fabricated evidence. But the cases noted by him were ones where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief. [5] *Spry: Principles of Equitable Remedies* [6] suggests that it must be shown that the claimant is seeking 'to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief'. Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought."

38. At [163], Aikens LJ added:

> "In my view it is vital to identify carefully the two elements with which we are concerned; that is 'the equity sued for' and 'the misconduct' said to make RBS's hands unclean."

39. I also note that in the *Royal Bank of Scotland* case at [164], Aikens LJ considered the possibility that party who acted with unclean hands could "wash them" before seeking the relevant equitable relief.

40. Ms Mattsson relied on two of the cases cited by Aikens LJ in the footnotes to the passages I have quoted, namely, *J Willis & Son v Willis* [1986] 1 EGLR 62; *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873. In *Willis v Willis*, the parties seeking to rely on an equitable estoppel, which required them to show that they had relied to their detriment on the basis of a promise made to them, were denied equitable relief when they put forward a knowingly false document purporting to show they had incurred relevant expenditure. *Gonthier* was a similar case. In both these cases, a distinction was drawn between a case where there was a pre-existing equity which was arguably lost by reason of subsequent inequitable conduct and a case where a party came to court to assert an equity and in the course of doing so was guilty of inequitable conduct. Both of these cases were in the second category. It was said that it would be more difficult to hold that subsequent inequitable conduct should result in the court holding that a pre-existing equitable right had been lost. *Williams v Staite* [1979] Ch

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[2] (1787) Cox Eq Cas 318 at 319.

[3] [2008] EWHC 1748 (Comm).

[4] *Armstrong v Sheppard & Short Ltd [1959] 2 QB 384*; *J Willis & Son v Willis [1986] 1 EGLR 62*; *Gonthier v Orange Contract Scaffolding Ltd [2003] EWCA Civ 873*.

[5] Andrew Smith J at [20]. He said that in those cases the connection between the misconduct and the claim to equitable relief was far more immediate than in the case before him.

[6] 8th edn. 2010.

291 was cited as an example of a case within the first category. Ms Mattsson also relied on *Murphy v Rayner* [2011] EWHC 1 (Ch) which applied *Willis* and *Gonthier*.

41. Ms Mattsson submitted in her skeleton argument that Diane's claim should fail in its entirety by reason of the equitable maxim as to clean hands. She did not distinguish between the contribution which Diane made to the purchase price from her own money and the contribution which came from money belonging to the estate. However, I consider that it is appropriate to consider separately the two sources of money.

42. As regards the money which belonged to the estate, as I explained earlier, the position in equity is that Diane holds her 3/8 share on trust for the estate to the extent the money belonging to the estate was used as a contribution to the purchase price. This is on the basis that Diane is a wrongdoer, the estate is the victim of the wrongdoing and the response of equity is to hold that Diane is a constructive trustee in the way described. Ms Mattsson's submission is that the equitable doctrine as to clean hands should produce the result that Diane does not have a 3/8 share of the property and so she will not hold anything as constructive trustee for the estate. In that way, the victims of the wrongdoing would lose out and Sonny and Leahann who were not the victims of the wrongdoing would gain a windfall by being declared to be the beneficial owners of the Property. I consider that equitable principles should produce the result that the victims of the wrongdoing are protected rather than a result where the victims are not protected and Sonny and Leahann receive a windfall.

43. It does not matter that Sonny might be interested in the estate as well as interested in the Property. His interest in the estate is in a different capacity from his interest in the Property. It would not be equitable to allow him to receive a windfall as joint owner of the property at the expense of the estate even though he may also be interested in the estate.

44. Further, it is nothing to the point that Ms Mattsson suggested that Sonny and Leahann might be prepared to discuss with the estate what rights they might acknowledge that the estate has in relation to the Property. That is not as satisfactory so far as the estate is concerned as a determination that Diane holds some part of her 3/8 share on trust for the estate.

45. Ms Mattsson submitted that even if I reached the above conclusion in relation to the part of the contribution to the purchase which came from the money of the estate, I should hold that Diane could not claim a beneficial interest by reference to the contribution to the purchase which she made from her own monies. It was submitted that Diane's wrongdoing bore an immediate and necessary relation to the equity sued for.

46. In relation to this submission, it should be remembered that it relates to the contribution by Diane of her own money. The contribution of that money did not involve any wrongdoing or inequitable conduct by Diane. The contribution of that money is distinct from the contribution of the estate's money and, further, the contribution of the estate's money has not led to Diane being refused a declaration that she has a 3/8 share. Accordingly, I consider that Diane's wrongdoing is not related to her seeking the part of the 3/8 share which is referable to the contribution of Diane's own money.

47. Further, the claim put forward by Diane is to enforce the House Purchase Agreement. That Agreement amounted to an express declaration of trust in favour of Diane. The Agreement stated correctly that Diane had contributed £150,000 to the purchase. The efficacy of the Agreement did not, and does not, depend on the £150,000 being Diane's own money. This case is quite different from cases like *Willis* and *Gonthier* where the parties claiming the equity could only succeed if they established that they had incurred expenditure in reliance on the relevant promise or arrangement and the wrongdoing consisted of fraudulent evidence to the court as to the existence of, or the extent of, such expenditure.

48. Accordingly, I conclude that the equitable doctrine as to clean hands does not lead to the conclusion that the court should deny to Diane a declaration that she has the benefit of the express declaration of trust contained in the House Purchase Agreement.

49. This conclusion makes it unnecessary to consider whether I should take the view that Diane had "washed" her unclean hands by admitting at the beginning of her evidence that she had forged the purported will of Michael Ball.

50. Ms Mattsson relied, in the alternative, on the principles as to illegality as established in *Patel v Mirza*. The judge applied the principles stated by Lord Toulson in that case at [101] and [120]-[121]. At [120], Lord Toulson had said:

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

51. In view of my conclusions in relation to the equitable maxim of unclean hands, applying the principles in *Patel v Mirza*, I consider that Diane's wrongdoing in relation to the forgery of the will, having regard to the purpose of the prohibition on forgery, should lead to the response, as matter of public policy, that the estate should be able to trace into Diane's 3/8 share to the appropriate extent and that it would be contrary to public policy to deny Diane's claim (so far as her contribution to the purchase came from the

money of the estate) and that it would be disproportionate to deny Diane's claim (so far as her contribution to the purchase came from her own money).

52. My conclusions as to the equitable maxim as to clean hands and as to illegality make it unnecessary to consider Ms Mattsson's submission that the equitable principles are different from the common law principles as to illegality and that *Patel v Mirza* has nothing to say about the equitable maxim. That is not how matters are described in Snell's Equity, 33rd edn. para. 5-010, where the equitable maxim is said to be "closely related to" and "equivalent" to the common law maxim *ex turpi causa non oritur actio*. Further, it is not obvious why the public policy considerations relied on in *Patel v Mirza* should not equally apply to the equitable maxim. However, as the matter was not fully argued and as the point does not strictly arise, I will say no more about it.

53. Accordingly, I dismiss the first ground of appeal.

The third ground of appeal

54. The third ground of appeal challenges the judge's finding, at the hearing on 7 March 2019, as to the way in which the gross proceeds of sale of the Property were to be divided between the parties. I have referred above to the judge's directions on that matter. His directions provided that the costs and expenses of the sale should be paid out of the gross proceeds of sale. As to the balance, 3/8 would belong to Diane and 5/8 would belong to Sonny and Leahann. Sonny and Leahann had borrowed to obtain their 5/8 share and would have to repay the loan. The loan was secured on the Property and (I assume) the mortgage had priority over the 3/8 share held by Diane. However, the judge nonetheless directed that Sonny and Leahann would be responsible for the repayment of the loan and no part of Diane's 3/8 share was to be used to repay the loan. Of course, the loan would have to be repaid and the mortgage redeemed to enable the Property to be sold free from incumbrances to a purchaser but that did not affect the state of the account between the parties.

55. Ms Mattsson submitted that the judge was wrong to give those directions. She contended that the right result was that the mortgage should be repaid out of the gross proceeds of sale and that the net proceeds of sale (after repayment of the mortgage) would be divided as to 3/8 to Diane and as to 5/8 to Sonny and Leahann.

56. The result for which Ms Mattsson contended can be illustrated by an example. Assume that the Property had been sold shortly after it had been acquired by these parties. Assume that the property was sold for £400,000 (which was the total cost of buying it, including fees, charges and tax) and that the sums due under the mortgage were £250,000. In such a case, the net proceeds of sale (ignoring the costs of sale) would be £150,000. On the basis contended for, Diane would receive 3/8 of £150,000 and Sonny and Leahann would receive 5/8 of £150,000 as well as having their debt of £250,000 repaid for them.

57. Like the judge, I consider that the result contended for by Ms Mattsson is obviously wrong. That result does not reflect the arrangement made as recorded in the House Purchase Agreement.

58. At the date of the House Purchase Agreement the parties were using the figure of £400,000 for the cost of buying the Property. That appears from their agreement that

Diane's contribution of £150,000 would give her a 3/8 share. The parties also knew that the contribution being made by Sonny and Leahann was money which they were borrowing, a sum of approximately £250,000. If repayment of that sum had been unsecured, then it would be obvious that Sonny and Leahann's liability to repay that sum was a matter for them and that Diane was not liable for any part of that sum. On that basis, when the Property was sold, Diane would receive 3/8 of the proceeds of sale after payment of the costs of sale and Sonny and Leahann would receive 5/8 of those proceeds from which they would repay the money which they had borrowed. The fact that, as was routine, repayment of the loan to Sonny and Leahann was secured on the Property does not change the arrangement. The secured loan was agreed to be Sonny and Leahann's contribution to the purchase of the Property in return for which they would have a 5/8 share of the Property but not a 5/8 share of the net proceeds of sale after their loan was paid out of the gross proceeds of sale.

59. I consider that the above reasoning all flows from the terms of the House Purchase Agreement and, in particular, the agreement that Sonny and Leahann's liability under the mortgage was the reason that they were to have a 5/8 share of the Property.

60. Ms Mattsson's argument to the contrary appeared to be that the judge had decided in his reserved judgment that Diane had a 3/8 interest in the Property and that meant a 3/8 interest in the net proceeds of sale after repayment of the mortgage. It was submitted that Diane had not pleaded any other case and should not have been allowed to advance such a case. It was argued that the judge's findings on 7 March 2019 were impermissible because they were inconsistent with his earlier findings and/or would have required specific evidence and there had not been any such evidence. Although the third ground of appeal appeared to suggest, at times, that there had to be further evidence on this issue, Ms Mattsson did not ask me to remit the matter for further evidence and argument. Instead she submitted that the right answer on the facts as found in the original reserved judgment provided the answer for which she contended.

61. As the judge explained on 7 March 2019, the parties had not addressed this issue at the original trial and nothing in his reserved judgment was directed to it. Before the judge at the hearing on 7 March 2019 and again on this appeal, Ms Mattsson relied upon an email of 13 January 2015 to a Ms Eaton, a solicitor who was acting for the parties. The email asked the solicitor to prepare a declaration of trust to set out the terms which were being discussed between the parties. The email referred to the event of a subsequent sale of the Property when (to quote from the email) "the property and any equity to be split" as to 3/8 to Diane and 5/8 to Sonny and Leahann. The email also stated: "[m]ortgage repayments are the sole responsibility of [Sonny and Leahann]". Ms Mattsson submitted that the reference to "any equity" being split must mean what "the equity" normally means which is the value remaining in a property after payment of any mortgage over the property. She also submitted that the reference to mortgage repayments meant the monthly repayments. She accepted that the monthly repayments in this case would include repayments of capital but could not include the sum needed to repay whatever was the sum due on the mortgage in order to redeem the mortgage on a sale of the property.

62. In his reserved judgment, the judge referred to the email of 13 January 2015 in the part of the judgment where he recited the chronology and the documents which he said fortified his conclusion that the parties were bound by the House Purchase Agreement. Having referred to the email, the judge found that there was an agreement that there

should be a declaration of trust in the shares set out in that email and that it was intended that Diane should indeed have a share in the Property. At the hearing on 7 March 2019, the judge obviously regarded the email of 7 March 2019 as consistent with the House Purchase Agreement and supportive of his conclusions on how the proceeds of sale were to be split and not contradicting those conclusions. So do I.

63. The reference in the email to "any equity" being split is in a phrase which refers to "the property and any equity". That phrase is not entirely clear and read in context it certainly does not have the clarity contended for by Ms Mattsson to the effect that the email was specifically referring to the value of the property after the mortgage was repaid. In any event, the phrase has to be construed in the context of the arrangements being discussed. Read in that context, the meaning contended for by Ms Mattsson is a wholly improbable and uncommercial one. I also consider that the terms of the email which refer to Sonny and Leahann having sole responsibility for the mortgage repayments are entirely consistent with the conclusion I reach as to the effect of the House Purchase Agreement and as to the meaning of this email. It is improbable that the parties would have agreed that whereas Sonny and Leahann would be responsible for capital repayments when made on a monthly basis, possibly over a period of years, they would not be responsible for a capital repayment when made to redeem the mortgage. I see no warrant for reading into the email the word "monthly" which is not there.

64. Accordingly, I dismiss the third ground of appeal.

The fourth ground of appeal

65. The fourth ground of appeal challenged the judge's order that Sonny and Leahann were to pay 70% of Diane's costs to be assessed on the indemnity basis. The ground of appeal was that no reasonable judge could have made such an order.

66. The judge heard full argument in relation to costs and gave a separate judgment setting out the reasons for his decision in relation to costs. The judge made a large number of points and took account of a large number of considerations. He considered whether he should make an order for costs in favour of Sonny and Leahann and he rejected that possibility, giving his reasons. He then considered whether to make no order as to costs and he rejected that possibility, giving his reasons. He held that it would be right to order that Scott and Leahann pay part of, but not all of, Diane's costs. He held that it was right to make an order for costs against Scott and Leahann because they had lost on the central issue in the case as to the House Purchase Agreement in circumstances where their defence was knowingly untruthful. His reasons for disallowing 30% of Diane's costs were:

    i) Diane had been dishonest in relation to the forged will; this dishonesty was the forgery itself but also her lies about the will in the witness statements and the solicitors' correspondence;

    ii) Diane failed in relation to some of the claims and allegations she had made; and

    iii) Diane had changed her case in the course of the proceedings.

67. The judge gave separate reasons as to why Diane's recoverable costs (as to 70%) should be assessed on the indemnity basis. He held that Sonny and Leahann's defence in

relation to the House Purchase Agreement involved persisting in a knowingly dishonest case and that circumstance took the case out of the norm.

68. In support of the fourth ground of appeal, Ms Mattson submitted that in view of Diane's forgery of the will and her lies in her witness statements, it was simply not possible for a reasonable judge to make an order for costs in her favour. Ms Mattson submitted that an order for costs in favour of Sonny and Leahann or even no order as to costs could be justified as within the range of possible orders that a reasonable judge could make but any order for costs in any amount against Sonny and Leahann could not possibly be justified. Ms Mattson did not seek to identify any specific error of principle made by the judge. She accepted that every factor which the judge took into account was a permissible factor. She accepted that the judge had given reasons for his decision and that there was no logical flaw in the judge's reasons. It is also the case that the judge took a very serious view of Diane's conduct in relation to the forgery of the will and her lies in her witness statements. In his reserved judgment, he directed that the matter be referred to the Attorney General to consider whether criminal proceedings and proceedings for contempt of court should be brought against Diane. In his judgment in relation to costs, he said that Diane's wrongdoing had been very serious and he took that into account.

69. I consider that it was open to the judge to make the order for costs which he made. I am not able to say that no reasonable judge could have made that order. The judge gave reasons why he made the order he did. Each reason was a proper reason considered in isolation and it was open to the judge to hold that the combination of those reasons led to his conclusion as to costs. The judge recognised that he had to evaluate a large number of competing factors in reaching his overall conclusion but it is not said that he omitted any relevant factor. Given the number of factors in play, it is obvious that different judges might make different assessments of the overall impact of those factors but I am not persuaded that this judge reached a conclusion that was not open to him. Once the judge decided that Diane should have some of her costs, but not all of them, I do not think that it can be said that a percentage of 70% was an impermissible percentage to award.

70. As to the decision to award costs on an indemnity basis, many judges who were deciding to disallow a part of a litigant's costs might have taken the view that the right course would be to start with costs on the standard basis and disallow an appropriate percentage of costs on that basis. Nonetheless, the course taken by the judge was open to him and he gave clear reasons for the decision which he made.

71. Accordingly, I dismiss the fourth ground of appeal.

The result of the appeal

72. The result is that the appeal will be dismissed, save that I will vary the judge's order to include a declaration as to Diane being a constructive trustee of the 3/8 share in the Property for the estate to the extent described earlier in this judgment. It may help the parties when they come to consider what applications they should make in relation to costs if I indicate that I do not regard the inclusion of this declaration as a measure of success on the part of Sonny and Leahann. They did not seek this relief and they have failed to obtain the relief which they did seek. The declaration is in accordance with the position taken on behalf of Diane in Mr Hill's skeleton argument for the appeal.

73. It was agreed that the parties need not attend the hand down of this judgment. It was also agreed that if the parties do not agree on any matters consequential on this judgment (in particular, costs) I would deal with the matter on the basis of written submissions and without an oral hearing. I therefore direct that if matters cannot be agreed, the parties may make written submissions on such matters. Any submissions are to be sent by email to my clerk by 1 July 2019 and any submissions in reply are similarly to be sent to my clerk by 8 July 2019.