APPEAL NO: BM10054CH

Neutral Citation Number: [2021] EWHC 3184 (Ch).

Case No: 0014 of 2020

IN THE HIGH COURT OF JUSTICE
ON APPEAL FROM
THE COUNTY COURT AT BIRMINGHAM
BUSINESS AND PROPERTY WORK
BANKRUPTCY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 25 November 2021

Before :

HHJ RICHARD WILLIAMS
(sitting as a judge of the High Court)

- -

Between :

Karen Marie Williams	**Appellant**
- and –	
(1) Ann Nilsson **(2) Edward Thomas** **(as Joint Trustees In Bankruptcy of Christopher Alan williams)**	**Respondents**

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Richard Power (Direct Public Access) for the Appellant
Andrew Brown (instructed by Irwin Mitchell LLP) for the Respondents

Hearing date: 14 September 2021

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(draft judgment circulated to the parties by email sent on 23 November 2021)

HHJ Richard Williams:

Introduction and background

1. This is my judgment on an application by Mrs Karen Marie Williams ("***the Appellant***") for permission to (i) appeal and (ii) rely upon new evidence in support of that appeal against the order of District Judge Malek ("***the District Judge***") dated 25 March 2021.

2. The Appellant was married to Mr Christopher Alan Williams ("***the Bankrupt***") and they have a child together. On 2 July 2004, they were registered as joint proprietors of the family home at 39 Horseshoe Drive, Cannock, Staffordshire, WS12 0FR ("***the Property***"), which was subject to charges in favour of UCB Home Loans Corp Ltd and Kensington Mortgage Co Ltd. Based upon a drive-by valuation of £245,000 to £260,000 as at December 2017, it is estimated that there is equity in the Property of some £55,000 after allowing for costs of sale/redemption of the charges,.

3. In September 2011, the Appellant and the Bankrupt separated with the Bankrupt moving out of the Property in January 2012. The Appellant remained living at the Property with their child, who was then aged 13. Having moved out the Bankrupt made no contributions towards the Property including towards the mortgage payments.

4. On 17 June 2016, the Bankrupt petitioned for divorce.

5. On 5 September 2016, the Bankrupt was declared bankrupt on his own petition.

6. On 19 December 2016, financial remedy proceedings were issued. A final hearing was listed before District Judge Taylor on 18 May 2017 ("***the FR Hearing***"), which was not effective as a result of the Official Receiver not being in attendance or represented at that hearing such that the court was unable to make any Property adjustment order in favour of the Appellant.

7. On 3 August 2017, a final order was made by consent in the financial remedy proceedings and which provided that there be a clean break in life and death with no order for costs.

8. On 11 January 2018, the Respondents were appointed as trustees in bankruptcy of the Bankrupt.

9. On 16 July 2019, the Respondents applied for orders for possession and sale of the Property in order to realise the Bankrupt's 50% interest in the Property valued at some £28,000. The total sum estimated to clear the Bankrupt's estate, including costs and expenses, was some £140,000 with the Bankrupt's interest in the Property being the only significant asset in his estate. The application was opposed by the Appellant. In her skeleton argument dated 24 March 2021, the Appellant set out her grounds of opposition as follows:

> "[3.]d. There was no dispute over our home and it was a simple agreement of beneficial interest when [the Bankrupt] moved out, as he made it clear

that he would not be contributing anything to the [P]roperty and I was going to have sole responsibility for the home and all payments then we both agreed it was only fair that I retain 100% beneficial interest from that point on. The house at that time did not warrant a sale as it had very little, if any, equity in it.

e. I cannot understand why [the Bankrupt], 5 years later, decided he would go bankrupt and use my home as an asset in his bankruptcy and misled the Insolvency [Service] by, for want of a better word, lying.

……

i. [The Bankrupt] misled the Insolvency [Service] with his claim for a 50% share in the [P]roperty with his bankruptcy application.

j. His deafening silence is a contradiction to his Barrister's acknowledgment of our agreement in the Financial remedy hearing in May 2017. I have been unable to obtain a transcript of this in time for the hearing today but if the Judge will allow and thinks this is beneficial I would like to get permission to obtain this.

k. Judge Taylors' last words to [the Bankrupt] were "I hope it weighs heavy on you the position you have left your family in."

……..

[28] In May 2017 during the Final Hearing of our Divorce/Financial Remedy with Judge Taylor, the Judge asks Ms Wilcox, Mr Williams barrister if Mr Williams remembers any agreement. To which she replied "yes, he remember[s] some conversation regarding an agreement". If the court has access to recorded hearings, I wonder if it is possible to listen to this."

10. The Respondents' application was heard fully remotely by the District Judge on 25 March 2021. In attendance at the hearing were counsel for the Respondents, the Appellant, who represented herself, and the Bankrupt, who did not actively participate in the hearing but only attended as an observer. Having heard oral evidence from the Appellant and closing submissions by counsel for the Respondents and by the Appellant, the District Judge gave an ex tempore judgment. The consequential order provided for:

i) A declaration that the Appellant and the Respondents each have a 50% beneficial interest in the Property;

ii) The Property to be sold

iii) The Appellant/Bankrupt to deliver up vacant possession of the Property; and

iv) The Appellant to pay the Respondents' costs of their application summarily assessed in the sum of £18,000 with such sum to be deducted from her share of the net proceeds of sale of the Property.

11. On 14 April 2021, the Appellant applied for:

i) Permission to appeal the order of the District Judge on the following grounds –

a) The District Judge erred in finding as a fact that there was no agreement made in 2011 between the Appellant and the Bankrupt sufficient to establish either a common intention trust or a proprietary estoppel ("***Ground 1***"),

b) Further or alternatively, the District Judge erred in failing to take into account the principles to be applied on an equitable account when exercising his discretion under section 335A of the Insolvency Act 1996 ("***Ground 2***"),

c) The decision to order possession and sale of the Property was manifestly wrong ("***Ground 3***"); and

ii) Permission to rely upon the transcript of the FR Hearing ("***the Transcript***") to prove that there was an agreement made in 2011 between the Appellant and the Bankrupt.

12. On 2 August 2021, it was ordered that the Appellant's application for permission to rely upon new evidence be heard immediately before the hearing of the application for permission to appeal and the hearing of the appeal (if permission is granted).

Findings of fact made by the District Judge

13. In his consideration of the evidence, the District Judge referred to:

> "15. It is common ground that (a) Mr Williams left the Property in January 2012 following the breakdown of the marriage and that Mrs Williams has continued to reside in the Property with their daughter, (b) Mr Williams made no contributions to the outgoings relating to the Property (including mortgage payments), and (c) that the bankrupt, Mr Williams, has not engaged or participated in these proceedings other than to attend today, but only for the purposes of observing what is going on.
>
> 16. After considering the evidence before me and in particular, the witness statements provided by Mrs Williams, and having heard her give evidence, and answered the questions that were asked of her…….
>
> 17. Mrs Williams says that there was an agreement between her and Mr. Williams in 2012, whereby the value of Mr Williams' equity in the property would crystalise at that time. Mrs Williams says that it was an oral agreement. However, it is clear from the email exchange between her and Mr Williams in 2016, that he does not accept that to be the position. In fact, Mr Williams makes a declaration on his bankruptcy application form in 2016, which is supported by a statement of truth, that he has a 50% share in

the property. He does not provide a statement in these proceedings, or indeed any form of written letter or communication.

18. It was accepted by Mrs Williams, during the course of cross-examination, that there was no attempt to sell the Property in 2011 or otherwise split up any of the other significant assets belonging to her and Mr Williams.

19. In summary, the only evidence in relation to the existence of an agreement offered today by Mrs Williams is that of her memory of events over 10 years ago. The documentary evidence, such as it is, either does not help her or contradicts her claim."

14. The District Judge then noted that:

> "18. A common intention constructive trust can occur where there is, firstly, a common intention between the parties that there should be a change to the beneficial interest at a later date, and two; one party has acted to his or her detriment in reliance upon that agreement. The onus of proof pursuant to ***Stack v Dowden*** [2007] UKHL 17 is on the person alleging that the beneficial split is anything other than 50/50. It is, further, trite law that where a property is held in joint names, the legal presumption is that the beneficial interest coincides with the legal estate."

15. The District Judge concluded that the Appellant was unable on the evidence to establish on the balance of probabilities "a common intention trust, such that Mr Williams' interest in the Property crystallised in 2011". The District Judge reached that conclusion "chiefly for the following reasons":

> "24. Firstly, there is no objective or contemporaneous eviden[ce] that would tend to show that there was ever an agreement between the [Appellant and the Bankrupt] that could lead to a common intention constructive trust.
>
> 25. Secondly, Mr Williams has clearly stated in his bankruptcy questionnaire, telephone interview and his bankruptcy application form, that he had a 50% share in the Property. He has declined to provide any evidence in support of the contention of a shared intention in these proceedings.
>
> 26. Thirdly, Mrs Williams' own evidence indicates that she remained in the property and paid the mortgage on her understanding that the bankrupt would have no greater interest in the value of the property. This is clearly a unilateral intention and not one that is shared.
>
> 27. Fourthly, Mr Williams singularly failed in the exchange of the emails in 2016 to confirm the alleged agreement when pressed to do so. There is then, in the words of Mr Brown, a deafening silence as to any agreement from the contemporaneous documents or from Mr Williams. All that exists is Mrs Williams' recollection of events over 10 years ago. That, in my view, is not sufficient to meet the burden upon her and to displace the presumption that the [Appellant and the bankrupt] held the Property in equal shares.

28. Whilst Mrs Williams argues that there was no reason for her to continue to pay the mortgage and meet the costs after Mr Williams had left if he intended to assert a right to part of the property at a later date, that I am afraid, only speaks to Mrs Williams' intention and not those of Mr Williams. It is entirely unilateral."

Appeals on fact

16. Any appellant must overcome a high hurdle in order successfully to appeal findings of fact made by a trial judge and for the reasons as explained by Lewison LJ in ***Staechelin & Ors v ACLBDD Holdings Ltd & Ors*** [2019] EWCA Civ 817:

> "29. If I may repeat something I have said before (***Fage UK Ltd v Chobani UK Ltd*** [2014] EWCA Civ 5, [2014] FSR 29 at [114]):
>
> > "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. …The reasons for this approach are many. They include
> >
> > i. The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.
> >
> > ii. The trial is not a dress rehearsal. It is the first and last night of the show.
> >
> > iii. Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.
> >
> > iv. In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
> >
> > v. The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).
> >
> > vi. Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."
>
> 30. Thus, it is a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong: ***McGraddie v McGraddie*** [2013] UKSC 58, [2013] 1 WLR 2477. What does "plainly wrong" mean? The Supreme Court explained in ***Henderson v Foxworth Investments Ltd*** [2014] UKSC 41, [2014] 1 WLR 2600 at [62]:

> "Given that the Extra Division correctly identified that an appellate court can interfere where it is satisfied that the trial judge has gone "plainly wrong," and considered that that criterion was met in the present case, there may be some value in considering the meaning of that phrase. There is a risk that it may be misunderstood. The adverb "plainly" does not refer to the degree of confidence felt by the appellate court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

31. The mere fact that a trial judge has not expressly mentioned some piece of evidence does not lead to the conclusion that he overlooked it. That point, too, was made in ***Henderson*** at [48]:

> "An appellate court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration."

32. At [57] Lord Reed added:

> "I would add that, in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration *only if the judge's conclusion was rationally insupportable*." (Emphasis added)

33. More recently, in ***Perry v Raleys Solicitors*** [2019] UKSC 5, [2019] 2 WLR 636 the Supreme Court summarised the constraints on interfering with findings of fact at [52]:

> "They may be summarised as requiring a conclusion either that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached.""

17. In the present case and in reaching his decision that there was no agreement in 2011 as alleged by the Appellant, the District Judge placed particular reliance upon the fact that the Bankrupt "clearly stated in his bankruptcy questionnaire, telephone interview and his bankruptcy application form, that he had a 50% share in the Property." It is submitted on behalf of the Appellant that the District Judge's decision was wrong in that he attached too much weight to the bankruptcy application form, which the District Judge said was supported by "a

statement of truth" when in fact it merely contained an online declaration, which would not qualify as a statement of truth under the Civil Procedure Rules.

18. In my judgement, and based upon the evidence actually before the District Judge at the trial, I do not consider that the Appellant has any realistic prospect of succeeding on Ground 1 of the appeal for the following reasons:

    i) The weight to be attached to the documentary evidence was ultimately a matter for the District Judge; and

    ii) It cannot be said that, in weighing up this documentary evidence as against the absence of any contemporaneous documents evidencing any agreement and coupled with the reliability of the Appellant's memory of events 10 years ago, the District Judge's finding was "one that no reasonable judge could have reached" or was "rationally insupportable".

19. However, it is fair to say that the Appellant's primary submission in relation to Ground 1 of the appeal is that had the Transcript been before the District Judge this evidence would probably have been conclusive in favour of the Appellant's case, which now leads me on to consider the question of whether or not the Appellant should be allowed to rely upon the Transcript in support of her appeal.

Admitting new evidence

Legal Framework

20. By virtue of CPR 52.21(2)(b) the appeal court has a discretion whether or not to receive evidence which was not before the lower court. In deciding whether or not to admit new evidence it was held by Mummery LJ in ***Transview Properties Limited v City Site Properties Limited*** [2009] EWCA Civ 1255 that:

> "22. …….permission should only be granted if, in accordance with the overriding objective, it is just to admit evidence on appeal which was not produced at trial. The party bringing forward more evidence on an appeal must have a very good reason for not having obtained it in time to use at the trial. It is usually too late, after the trial is over, to produce evidence to an appellate court, which is not itself equipped to try or to re-try cases.
>
> 23. In the exercise of its discretion to admit fresh evidence the court has to consider carefully all the relevant factors, such as whether the evidence could, by reasonable efforts, have been obtained for use at the trial; whether the fresh evidence is apparently credible; and whether, if given, it would probably have an important influence on the outcome of the case. The interests of the parties and of the public in fostering finality in litigation are significant. The parties have suffered the considerable stress and expense of one trial. The reception of new evidence on appeal usually leads to a re-trial, which should only be allowed if imperative in the interests of justice. As Hale LJ said in ***Hertfordshire Investments Ltd v. Bubb*** [2000] 1 WLR 2318 at 2324C

> "….It is in the interests of every litigant and the system as a whole that there should be an end to litigation. People should put their full case before the court at trial and should not be allowed to have a second bite at the cherry without a very good reason indeed.""

21. Further, in ***The National Guild of Removers & Storers Ltd v Bee Moved Ltd & Ors*** **[2018] EWCA Civ 1302,** Asplin LJ held that:

> "18. It is well known that this court will not receive evidence which was not before the court below unless it orders otherwise: CPR 52.21(2). When determining whether to do so, the court must seek to give effect to the overriding objective of doing justice and, in doing so, attempt to strike a fair balance between the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. The principles in ***Ladd v Marshall*** [1954] 1 WLR 1489 remain not only relevant to the exercise of the discretion but are powerfully persuasive: ***Sharab v Al-Saud*** [2009] EWCA Civ 353: [2009] 2 LlR 160. They are: whether the evidence could have been obtained with reasonable diligence for use at the trial; whether the new evidence would have had an important influence on the result; and whether the evidence is apparently credible.

Reasons for not obtaining the Transcript for use at the trial

22. In her witness statement dated 8 July 2021 in support of her application for permission to rely upon the Transcript on this appeal, the Appellant stated that

> "2. I have not been able to afford legal advice and I have had to rely on free advice from a number of helpful solicitors and the Citizens Advice Bureau. I was told in October 2020 that I was not eligible for Legal Aid, but in December 2020 1 was told by 'Civil Legal Advice' that I was and was referred to Watson Woodhouse solicitors. I was then told that I was outside the scope for any help with them.
>
> 3. The following is a list of some of the solicitors I contacted for legal advice prior to the hearing before DJ Malek: LDJ Solicitors, Enoch Evans, Eric Bowes & Co., Community Law Partnership, Duncan Lewis, Hopkins Solicitors, the Law Society, Wright Hassall, Pickering Butters, Hand Morgan and Owen, RC Solicitors, Nelsons Law, Family Law, Lawtec Solicitors, Ashfords, Farleys, Clarke Willmott, Blandy, Glanvilles. I have also contacted an insolvency practitioner, Chris Purnell on purnells.co.uk, and a barrister's clerk at Serle Court Chambers. The Citizens Advice Bureau have given me some advice and so has 'Support Through Court', a charity run by volunteers,
>
> 4. The solicitors and other lawyers I have contacted were either unable to help me under the Legal Aid Scheme, or insolvency was not their area of expertise. I also applied to 'Advocate' in 2020 but was unable to obtain the services of a barrister before the hearing on the 25th March 2021.

5. I was searching on my computer and old files to find something to confirm the agreement in 2011 with my ex-husband concerning 39 Horseshoe Drive and I remembered that my ex-husband's barrister had accepted that there was an agreement in 2011. I said in my witness statement dated the 7th October 2019 that my ex-husband's barrister had acknowledged to the Judge that he remembered the agreement. I did not know though that I could obtain a transcript of the hearing. I referred in my skeleton which I prepared for a hearing on the 23rd November 2020 to the possibility that the Judge might be able to listen to recordings of the hearing before District Judge Taylor on the 18th May 2017. I did not know when I prepared that skeleton that I could obtain a transcript of the hearing.

6. The skeleton that I used for the hearing before DJ Malek was updated to include further information and my comments on various cases.

7. I first learned that I could obtain a transcript in about December 2020 or January 2021. I then telephoned Walsall Court several times and I was told conflicting information by different people. I was told I would need the permission of a Judge before I could obtain a transcript and that help with fees was normally only issued in criminal cases and it was unlikely that I would get help regarding this. I was a little confused and had thought I needed the permission from the Judge at the hearing. In addition to this, as far as I could remember, the hearing on the 18th May 2017 had lasted for most of the day. I telephoned a few of the transcribers and their prices ranged from £144 to £240 per hour. I had asked if I could just have a specific section of the hearing transcribed but they told me they could not do this and that they have to transcribe the whole hearing. I could not remember how long the hearing lasted, only that I had been at court most of the day, and I thought I would have to pay between £600 - £700 for the transcript. I could not afford to pay that. I caught Covid in March 2020 and have had long-term Covid since then. I have been off work on sick pay and I could not justify asking my Mum for help with the cost, or not paying the mortgage. I was also not sure how much the transcript would help, because I could not remember exactly what the barrister had said. As it happens, the transcript is better than I had hoped. I also hoped that the judge would believe me. That is why I did not obtain the transcript before the hearing before District Judge Malek."

23. It is submitted on behalf of the Appellant that:

i) It has been an unfortunate feature of this case that the Appellant has never been able to afford legal advice and has attempted to rely on free advice provided along the way by solicitors. She has tried 18 different firms of solicitors under the Legal Aid scheme but without success. As a result, the Appellant has had to represent herself throughout both these proceedings and the financial remedy proceedings;

ii) The Appellant, or indeed any other litigant-in-person, should not be judged by the standards of what might reasonably be expected from a qualified lawyer in professional practice;

iii) The Appellant misunderstood what court staff said about the requirement to obtain the permission of a judge to obtain a transcript. That is not a mistake that a lawyer in professional practice would have made, but it is an understandable mistake for someone who is completely unfamiliar with court procedure; and

iv) The Appellant's doubts about the benefits of obtaining the Transcript, which may have contributed to her baulking at the cost, is also understandable in a litigant-in-person whereas it may not be a judgment that a lawyer in professional practice may have made.

24. It is submitted on behalf of the Respondents that:

i) The Appellant raised the existence of the Transcript and what it might say 17 months before the trial;

ii) There were multiple directions hearings in these proceedings and in which the Appellant raised the issue of the Transcript;

iii) In her own supporting witness statement, the Appellant states that she learned in December 2020 that she could seek a copy of the Transcript, and indeed was able to obtain a copy within 17 days of the trial for attempted use on this appeal;

iv) The Appellant has failed to provide sufficient reasons for not obtaining the Transcript for trial –

a) the cost of £700, which is not a significant sum when compared to the amount in dispute;

b) she wasn't sure it would be helpful and back her memory of events; and

c) she hoped the District Judge would believe her; and

v) The Appellant was the author of her own misfortune in not seeking and obtaining the Transcript prior to the trial.

25. It is not disputed that the Appellant knew well before the trial of the potential importance of the Transcript in support of her case. In her position statement dated 7 October 2019 and filed at court for the directions hearing on 8 October 2019, the Appellant stated:

> "…I feel that the bankruptcy was not thoroughly investigated and our intention of the split of beneficial interest has been ignored at every turn.
>
> Mr Williams' bankruptcy application also contained a lot of untrue and misleading information….
>
> As the financial remedy was happening at the same time, the judge was unable to award any property transfer due to the fact the bankruptcy was in

place. His Barrister did however acknowledge to the judge that Mr Williams did remember our agreement."

26. The case management order dated 23 June 2020 provides that the Appellant "has permission to file further evidence no later than 4pm on 11 September 2020." The fact that a person is unrepresented will generally not amount to a good reason for non-compliance with court orders – ***Barton v Wright Hassall LLP*** [2018] UKSC 12 at [18] Lord Sumption JSC. That said, it is all the more important that "When the court is exercising any powers of case management, it must have regard to the fact that at least one party is unrepresented." – Civil Procedure Rule 3.1A(2).

27. The Equal Treatment Bench Book helpfully explains the difficulties faced by litigants in person and how the court ought usefully to assist them particularly by giving appropriate guidance/assistance at case management hearings upon the importance/use of documentary evidence:

> **"The courts' duty to LIPs**
>
> 10. Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may well be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party.
>
> 11. The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation.
>
> 12. Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal which is concerned to adjudicate in proceedings in which that person is a party. But in general, those who exercise this personal right find that they are operating in what feels like an alien environment.
>
> • 'All too often the litigant in person is regarded as a problem for judges and for the court system rather than a person for whom the system of civil justice exists'. (Lord Woolf, Access to Justice, Interim Report June 1995.)
>
> • 'It is curious that lay litigants have been regarded … as problems, almost as nuisances for the court system. This has meant that the focus has generally been upon the difficulties that litigants in person pose for the courts rather than the other way around'. (Prof. John Baldwin, 'Monitoring the Rise of the Small Claims Limit'.)
>
> 13. In 2013, a judicial working party chaired by Mr Justice Hickinbottom summed up the position as follows:

‘Providing access to justice for litigants in person within the constraints of a system that has been developed on the basis that most litigants will be legally represented poses considerable and unique challenges for the judiciary. Cases will inevitably take more time, during a period of severe pressure on judicial time. However, litigants in person are not in themselves ‘a problem’; the problem lies with a system which has not developed with a focus on unrepresented litigants. We consider it vital that, despite the enormous challenge presented, judges are enabled and empowered to adapt the system to the needs of litigants in person, rather than vice versa.’

Difficulties faced by LIPs

14. There is no typical litigant in person, and they will come from a diverse range of social and educational backgrounds. Some may be very skilled at representing themselves. A litigant in person’s knowledge, aptitude and general attitude towards the proceedings are largely unknown quantities at the outset of the hearing. Having said that, the issues identified in this chapter are encountered with some frequency when litigants represent themselves.

15. The difficulties faced by LIPs stem from their lack of knowledge of the law and court or tribunal procedure. The procedure is so familiar to lawyers and judges, that they often do not realise the extent of a LIP’s misunderstanding. For many LIPs, their perception of the court or tribunal environment will be based on what they have seen on the television and in films. They tend to:

• Be unfamiliar with the language and specialist vocabulary of legal proceedings.

• Have little knowledge of the procedures involved, and find it difficult to apply the rules even when they do read them up.

• Be ill-informed about ways of presenting evidence.

• Be unskilled in advocacy, and so unable to undertake cross-examination or test the evidence of an opponent.

• Be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.

• Be unable to understand the concept of a cause of action.

• Lack objectivity and emotional distance from their case.

16. All these factors have an adverse effect on the preparation and presentation of their case.

……..

Understanding the importance of documentary evidence

39. Litigants in person may not understand the importance of documentary evidence. Experience shows that they:

• Tend not to make sufficient use of documentary or photographic evidence in their cases.

• Fail to appreciate the need for maps and plans of any location relevant to the case.

• Often do not bring all relevant documents with them to the hearing. The court or tribunal is often faced with the comment: 'I can produce it – it is at home', but it is then too late. An adjournment is unlikely to be granted at that stage because of the costs and delays involved.

• Conversely, some LIPs file all their evidence 'up front', without realising that preparation happens in stages. It can help to explain there will be opportunity in the case timetable for them to file evidence later, when it becomes clear exactly what is needed.

40. The LIP should have been warned in advance not only to disclose disclosable documents to the other side (having explained what these are), but to ensure that important and relevant documents are included in the trial bundle, and (where necessary, eg because the document's authenticity is disputed or because the copy in the trial bundle is illegible,) to bring the originals to the hearing. Case management hearings represent an opportunity to give guidance on these matters."

28. In my judgment, it is unfortunate to say the least that, having been identified by the Appellant at an early stage in these proceedings as a relevant document, the court failed at the multiple case management hearings to provide any guidance/assistance as to what steps the Appellant needed to take to ensure that the Transcript was available for the trial.

29. It is also regrettable that the Appellant, upon learning in December 2020 or January 2021 that she could obtain the Transcript, was then told by court staff that she required the permission of the judge to do so. As the Transcript related to private proceedings in the Family Court, it is likely that the court staff believed that the permission of a judge in the Family Court was required in order for the Transcript to be used in evidence in these proceedings. However, it is perfectly understandable that the Appellant proceeded under the mistaken belief that the permission of the District Judge was required.

30. In my judgment a clear illustration of the lack of assistance/guidance that the Appellant as a litigant in person ought properly to have received is the fact that after:

i) almost 2 years since these proceedings were issued;

ii) the Appellant had flagged to the court from early on in these proceedings and repeatedly thereafter the potential importance of the Transcript to her case; and

iii) multiple case management hearings;

still in her skeleton argument for trial, the Appellant was asking "if the Judge will allow and thinks this is beneficial I would like to get permission to obtain" the Transcript.

31. In response to that written request, there were the following exchanges at the beginning of the trial:

> "DISTRICT JUDGE: I have seen from your skeleton argument that you have referred to transcripts of hearings that took place earlier. I think you have suggested that I might have access to them. I am afraid I do not. The way it works with the court system is that any transcripts would need to be obtained by the parties, and then presented to the judge on the day. I can only look at documents that are in front of me. That means if the hearing now goes ahead I will not see those earlier transcripts and will not take them into account. In those circumstances, it is open to you to make an application to adjourn today's hearing. Before you make the application, I should just set out that the matters that I have to take into account when deciding whether or not to adjourn a hearing. Of course, there is the potential injustice to the parties that might result if there is not an adjournment and not all relevant evidence is before me, but in the balance there is also the injustice to the parties that results from delay, and the fact that there is likely to be wasted costs. It would be rare for a court to adjourn on the day of the final hearing following such an application and an adjournment is very much regarded as an option of last resort….I understand that you are a litigant in person. That is something that I can have regard to, but I am afraid it does not carry a great deal of weight in these sort of circumstances, because I have to weigh up the injustice to the other parties as well…..
>
> APPELLANT: No, I don't [want] to waste time – adjourning today, no. It's just a shame that I haven't been able to, sort of, get the transcript for the hearing. That was all I was asking, whether, you know, you would allow me to present that at a later date, I don't know. But no, I don't want to adjourn to be honest.
>
> DISTRICT JUDGE: So, today's hearing, just so you understand, is going to be a final hearing. That means that after today there is not going to be any further opportunity for you to make any further submissions or to re-open the matter, other than by way of an appeal and you need to understand that before you make your decision.
>
> APPELLANT: Okay, Can I just ask you what weight of that would be, if I could get a transcript that would, sort of, obviously prove –
>
> DISTRICT JUDGE: I am afraid that is one of the questions that I cannot answer as a judge in this hearing. That is something that if you had legal representation, you might have been able to get some guidance on. Okay?

APPELLANT: Okay. Could I just ask another question, sorry? Is it possible today for me to ask Mr Williams any questions or not?

DISTRICT JUDGE: No, Mr Williams, has not provided a witness statement. He is here attending simply to observe. He is taking no other part in these proceedings, so I am afraid not."

32. It is unsurprising, in my judgment, that the Appellant chose not to make an application to adjourn the trial to obtain the Transcript when told that:

i) any such application was unlikely to succeed, but if granted would give rise to a wasted costs order; and

ii) the District Judge was in any event unwilling to give any indication as to the weight that might ultimately be attached to the Transcript, if obtained, whilst making it clear that any contradictions arising from the Transcript could not be put to the Bankrupt in cross examination as he was taking no active part in the proceedings.

33. It was submitted on behalf of the Respondents on this appeal that nothing stopped the Appellant from seeking to compel the Bankrupt to give evidence by seeking to witness summons him in advance of the trial so that he could be questioned under oath. I have to say that such criticism of the Appellant, who was wholly unfamiliar with court procedure, is entirely fanciful.

Credibility and importance of the new evidence

34. The relevant extracts from the Transcript are as follows:

JUDGE TAYLOR:…….What is your client's position in that regard? Does he say, "Yes, we did have an agreement but then there's the bankruptcy?"

MS WILCOCK: He says it was discussed in 2011, however, it was on the basis that any increase in the price of the property from 2011 to when the property was eventually sold, he would still retain his 50 per cent at the point in 2011. But any increase in the value of the property would go to Mrs Williams. And that was discussed.

JUDGE TAYLOR: Well, why was that?

MS WILCOCK: Because he was moving out in 2012 and she was retaining the property. Although it's clear that she — and it's accepted that although she's been paying the mortgage, that was on an interest only basis.

JUDGE TAYLOR: But the increase in value of the property is something that could be taken into account.

MS WILCOCK: It is. It is if the bankruptcy order had have been made. And because the bankruptcy order has been made, it's for Mrs Williams to be raising with the trustee in the bankruptcy.

JUDGE TAYLOR: Yes and I— I agree. Oh dear, oh dear, oh dear. Have you made this point to the trustee in bankruptcy?

RESPONDENT: Yes, I have. I was in quite — I had quite a few calls with the insolvency practitioner at Leeds initially, but it's now been passed on to Ipswich.

JUDGE TAYLOR: And what's been her response?

RESPONDENT: She — she told me that it's something they could possibly take into account and I needed to send them an email regarding it, which now it's gone to Ipswich, I have done that and I've listed---

JUDGE TAYLOR: When did you do that?

RESPONDENT: About a week and a half ago. And I've got they wrote back to me. I've wrote down the proper wording because I haven't got a copy of the thing. They wrote back and said, "The valuation amount will be based as the date we complete the equity calculation. Not what property valued at in 2011." And I then emailed back to say, "Can I just clarify definitely won't honour our agreement or consider it?" No, they won't. So, although I've told them all the information, what went on, they're not interested.

……..

RESPONDENT: I did say, why, if Mr Williams has acknowledged now the 2011 agreement took place, why did he and his solicitor not acknowledge that fact in May 2016, because I emailed him to remind him of it, and he said to me, "Can we have proof of it? My solicitor wants proof." And, I said, "Well, it was verbal." I heard nothing again, and the next thing I know he's gone bankrupt. So, they obviously knew about it and didn't address it, and he's hasn't told his insolvency – his practitioner, but Ms Wilcox said that Mr Williams said he had told the insolvency practitioner, but I've been in quite close contact with Anthea Merrick, who was initially dealing with it – the bankruptcy – and I've just managed, luckily to get hold of her, and she's checked the file for me. There's no note of it regarding the 2011 agreement. So, you could say – you know, I just wanted to double check that.

MS WILCOX: I'm not sure how much further it takes the court, but my client is clear that he did speak with Andre Merrick about it, and her clear instructions to him were that unless there was any capital contribution – so, by way of the mortgage payments – the insolvency service are not interested.

……

JUDGE TAYLOR: …….but the trouble is there, is we've got this other 2011 agreement hanging over our ears, to which your client apparently agrees was the situation.

MS WILCOX: Sir the position in law in terms of the Matrimonial Causes Act, is that the court, regardless of any sort of agreement, the court cannot order a property adjustment order or can't adjust the shares in a matrimonial home where there is a bankruptcy order.

JUDGE TAYLOR: That is not, I'm afraid – the position is, that if the insolvency service haven't taken into account a previous agreement in reaching their conclusion it can be put to them that there is an alternative arrangement…..They can, of course take that into account, but at the moment I'm unsure as to whether they've reached a conclusional position in that regard."

35. It is submitted on behalf of the Appellant that what counsel (Ms Wilcox) on behalf of the Bankrupt said at the hearing before Judge Taylor is an acknowledgment on behalf of the Bankrupt that there was indeed an oral agreement in 2011 as the Appellant had claimed, and that the terms of that agreement were as the Appellant had said they were.

36. It is submitted on behalf of the Respondent that the Transcript does not tip the balance in the Appellant's favour or affect the case greatly since:

i) The Transcript does not record sworn evidence given by the Bankrupt, merely submissions made by his counsel, who herself could not give evidence;

ii) The Transcript merely records that the Bankrupt's counsel acknowledged that "discussions" occurred. There is no acknowledgment of an agreement reached between the parties, and the Appellant's counsel is wrong to assert the Transcript is clear evidence of an agreement as no such wording is used or intimated. At its highest, the Transcript merely reiterates what was said by the Appellant in her statements, that she said she would pay the mortgage but expected the Bankrupt's share to not appreciate with an increased value to the property. The District Judge found as fact that this was a unilateral intention, but not an agreement; and

iii) In contrast, the District judge was presented with email exchanges in 2016 wherein the Bankrupt demonstrated no knowledge of any agreement (being two-years prior to the financial remedy proceedings). In addition, the Bankrupt's statement of affairs signed with a declaration it was true indicated a 50% ownership of the Property. Finally, there are no contemporaneous emails, texts or other documents from 2011 recording any agreement

37. In my judgement, and for the following reasons, the above quoted extracts from the Transcript are highly credible and indeed compelling evidence that there was an oral agreement made in 2011 as alleged by the Appellant:

i) The hearing in the Family Court before Judge Taylor was in the context of financial remedy proceedings where the parties were under an ongoing duty to provide full, frank and clear financial disclosure, since

otherwise the court would be unable lawfully to exercise its powers under the Matrimonial Causes Act 1973 to achieve a fair result. In ***Lykiardopulo v Lykiardopulo*** [2011] 1 FLR 1427, CA Thorpe LJ stated:

> "[36] However ancillary relief proceedings are marked by features absent in other civil proceedings:
>
> > i) The proceedings are quasi-inquisitorial. The judge must be satisfied that he has, or at least that he has sought, all the information he needs to discharge the duty imposed on him to find the fairest solution.
> >
> > ii) The parties owe the court a duty, a duty of full, frank and clear disclosure. The duty is absolute."

As a result, the Bankrupt was obliged voluntarily to disclose, whether through his counsel or otherwise, any information that was relevant to the outcome of those financial remedy proceedings;

ii) It is evident from the Transcript that it was indeed voluntarily disclosed on behalf of the Bankrupt in the financial remedy proceedings that there were discussions in 2011 that any increase in value of the Property from 2011 would go to the Appellant. When asked specifically by Judge Taylor why that was, Ms Wilcox explained on behalf of the Bankrupt that it was because he was moving out in 2012 and the Appellant would be retaining the Property whilst paying the mortgage albeit on an interest only basis. That explanation is entirely consistent with the Appellant's evidence in these proceedings that the agreement was made because the Appellant was taking over financial responsibility for the Property to provide a home for her and their child without any contribution from the Bankrupt after he moved out;

iii) Later during the FR Hearing, the Appellant questioned why it was that the Bankrupt was now acknowledging the 2011 agreement when he had declined previously to notify the Insolvency Service of that agreement. It is striking that Ms Wilcox immediately responded on behalf of the Bankrupt to confirm that he had in fact spoken to the Insolvency Service about the agreement, but their "clear instructions" to him were that unless the Appellant had paid capital contributions towards the mortgage they were not interested in that agreement. The Bankrupt was therefore not challenging the existence of the agreement but rather its legal effect; and

iv) Finally, it is clear from the Transcript that Judge Taylor felt powerless to act in circumstances where the Insolvency Service was not in attendance/represented at the FR Hearing and he was faced with the 2011 agreement, which, in the view of Judge Taylor, the Bankrupt "apparently agrees was the situation." Again, it is striking that Ms Wilcox, on behalf of the Bankrupt, did not then seek to dissuade Judge

Taylor of that view, but rather responded by submitting that the court had no power to make a property adjustment order reflecting such an agreement where there was a bankruptcy order in place.

Other relevant factors

38. In pure monetary terms, the amount in issue is relatively modest and any recovery is unlikely significantly to benefit the Bankrupt's creditors after payment of the costs/expenses of the bankruptcy. However, if the Property is sold the Appellant will lose her home of some 17 years. After payment of the Respondents' costs from her share of the equity, she will be left with very little and will not be able to afford to buy a new home on her limited salary.

39. Significant time (including court time) and expense have been incurred on the trial. It is in the interests of every litigant and the system as a whole that there should be finality in litigation.

Exercise of discretion

40. On balance and notwithstanding the significant interests in fostering finality in litigation, I consider that it is just that permission be granted to the Appellant to rely upon the Transcript in accordance with the overriding objective and for the following primary reasons:

    i) The importance of the case to the Appellant;

    ii) The lack of assistance/guidance given to the Appellant as a litigant in person by the court at the multiple case management hearings as to what the Appellant needed to do to ensure that the Transcript was put in evidence and despite the Appellant having flagged at an early stage of the proceedings and repeatedly thereafter the potential importance of the Transcript to her case;

    iii) The Appellant having very good reason for not producing the Transcript at trial in circumstances where she as a litigant in person was reasonably led to believe by court staff that she required, and indeed sought as a preliminary issue at trial, the permission of the District Judge to obtain the Transcript;

    iv) The Transcript containing credible evidence that would have had an important influence on the central issue of whether or not there was an agreement in 2011 as alleged by the Appellant; and

    v) The reception of new evidence on appeal usually leads to a re-trial, which would necessarily result in further delay and expense, and so should usually only be allowed if imperative in the interests of justice. However, for the reasons given below, I consider that this is one of those rare cases where the appeal court can properly reverse a trial judge's finding of primary fact without the need of a re-trial and having regard to the pressing need for a proportionate solution to these proceedings.

Ground 1

41. In ***Transview Properties Limited v City Site Properties Limited*** Mummery LJ observed that "[17]…an appellate court will, as a general rule, leave alone the trial judge's assessment of the credibility of the witnesses and his findings of primary fact when they are based on, or significantly influenced, by the oral evidence."

42. The Bankrupt did not give evidence at trial having chosen to play no active part in the proceedings. Therefore, the only witness, who was seen and heard by the District Judge, as to the alleged 2011 oral agreement was the Appellant. The District Judge apparently found the Appellant to be a credible witness in that he accepted her evidence that she intended the 2011 agreement as evidenced by her continuing to pay the mortgage/outgoings on the Property after the Bankrupt had moved out. The District Judge's finding of the Appellant's intention is not challenged.

43. However, the District Judge found that the Appellant had failed to establish that her intention was shared by the Bankrupt. That particular finding was not based upon any oral evidence from the Bankrupt but rather upon an evaluation of what the Bankrupt had or had not said in the then available printed evidence being:

    i) The Bankrupt's statement of affairs ("***Statement of Affairs***") in support of his bankruptcy application and the record of his subsequent telephone interview ("***Interview Record***") with the Insolvency Service; and

    ii) In the exchange of emails with the Appellant in 2016.

44. In these circumstances, I consider that I can properly undertake that evaluation exercise afresh to include consideration of the Transcript that was not available to the District Judge. It cannot be suggested that in doing so the District Judge had any advantage over this appellate court. Indeed, the District Judge was at a distinct disadvantage, since not all the relevant printed evidence was before him. In undertaking that evaluation, I have regard to the following matters:

    i) Having received a letter from the Bankrupt's divorce solicitor in May 2016 regarding the sale of the Property, there was the following email exchanges on 27 May 2016 ("***the Emails***") –

        APPELLANT: It says on the letter the house is valued approx. £225. When you moved out it was approx. £212 and we agreed as you were not going to be paying any of the mortgage that you would have any proceeds from a sale from the value in 2011. I have saved all the details on my computer.

        BANKRUPT: Can you let me have a copy of this for the solicitor

        APPELLANT: It was actually worth less than I said – it varies between sites [the Appellant then pasted screenshots of historic estimated valuations from Zoopla/rightmove]

BANKRUPT: Thanks for that, but the solicitor wants the email

APPELLANT: what email

BANKRUPT: The agreement as you said in the email…or was it verbal

APPELLANT: verbal – you wanted to sell the house and said if I kept it you would not pay any of the mortgage, I said ok but obviously as I am paying the mortgage on my own any price increase from 2011 you would not benefit from. You agreed to this.

Whilst the Bankrupt does not expressly acknowledge the 2011 agreement in the Emails, neither does he deny that there was any such oral agreement once it was specifically raised by the Appellant.

ii) The Statement of Affairs is electronically signed by the Bankrupt with confirmation that the information provided therein is "accurate to the best of my knowledge". The Statement of Affairs states that the Property is jointly owned and the Bankrupt's percentage share is 50%. The Appellant does not dispute that the Bankrupt has a 50% beneficial interest in the Property, although she claims that it was agreed that the value of that interest crystallised in 2011. The Transcript confirms that during the FR Hearing it was volunteered and acknowledged on behalf of the Bankrupt that on separation he and the Appellant discussed him retaining his 50% beneficial interest in the Property, but with any increase in the equity from 2011 until the Property was sold going to the Appellant because he was moving out and she would be solely responsible thereafter for paying the mortgage;

iii) If made, the alleged 2011 agreement was entirely sensible, reasonable and understandable in order to preserve a home for their child whilst a minor and recognising the unmatched financial contribution that would be made by the Appellant towards the welfare of the family post separation. As stated in the Telephone Record, "At the moment my wife is living in the house….The mortgage has been paid by my wife since I left, I have not contributed…….I am currently in the process of getting divorced……..I separated from my wife in 2011….. I did not go bankrupt initially, as I did not want to unsettle our daughter from her home, however, she is now going to university, so will not live at home, so I have decided to apply now." In her position statement dated 8 October 2019, the Appellant stated that "In January 2012 [the Bankrupt] moved in with his partner, who he currently lives with. As I wanted to stay in the property with my daughter, who was 13 at the time, and not to have to disrupt her or her schooling, during an already difficult time, I said I would try and stay in the property and pay the mortgage";

iv) Whilst the Bankrupt does not expressly acknowledge the 2011 agreement in the Statement of Affairs or Telephone Record, the Transcript confirms that the Bankrupt chose to speak to the Insolvency Service about the 2011 agreement, but was told that they were not

interested in the agreement, since the Appellant had not made any capital mortgage repayments in reliance upon it. If there was no such agreement then why did the Bankrupt ever consider it necessary to raise it with the Insolvency Service and obtain their "clear instructions" upon its importance; and

v) The Transcript confirms that Judge Taylor expressed his frustration at being faced at the final hearing with the 2011 agreement, which the Bankrupt "apparently agrees was the situation". If, however, there was no agreement then again why did neither the Bankrupt nor his counsel say so and in direct response to Judge Taylor.

45. On balance, I find that in 2011 there was an agreement made between the Appellant and the Bankrupt that any appreciation in the value of the Property after he moved out and before the Property was sold would belong to the Appellant. In making that finding, I attach significant weight to the Transcript. It is important to note that, unlike in these proceedings, the Bankrupt actively engaged with and participated in the Family Court proceedings and in which he was under an absolute duty to provide full, frank and clear financial disclosure. The Transcript fully corroborates the Appellant's claim of such an agreement being made with the Bankrupt in 2011. Further, such an agreement is entirely consistent with:

i) The Appellant's and the Bankrupt's expressed and shared intention not to "disrupt" or "unsettle" their daughter after they separated and whilst she was still at school; and

ii) The Appellant's and the Bankrupt's undisputed dealings with the Property post separation – the Appellant remained living in the Property with their young child and paid the mortgage instalments/outgoings without the Bankrupt making any financial contribution or taking any steps for the Property to be sold whilst their child was still at school.

46. Finally, I find that the Appellant acted to her detriment (assuming sole responsibility for paying the mortgage instalments/outgoings) sufficient to give rise to a common intention constructive trust.

Conclusion

47. I grant permission for the Appellant to rely upon the Transcript.

48. I grant permission to appeal and allow the appeal on Ground 1.

49. Having allowed the appeal on Ground 1, I do not consider it necessary to deal with Ground 2 and Ground 3.