



Neutral Citation Number: [2020] EWHC 3186 (Ch)

Case No: CH-2020-000028

**IN THE HIGH COURT OF JUSTICE**  
**IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**CHANCERY DIVISION**

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

Date: 24/11/2020

**Before :**

**Mr Justice Trower**

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**Between :**

**DELSIE THOMAS**  
**- and -**  
**DAPHNE VERONICA SMALLING**

**Appellant**

**Respondent**

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**THOMAS DUMONT QC and OWEN ROACH** (instructed by **Adam Bernard Solicitors**)  
for the **Appellant**  
**SAM PHILLIPS** (instructed by **Anthony Gold Solicitors**) for the **Respondent**

Hearing dates: 17<sup>th</sup> November 2020  
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**Approved Judgment**

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**MR JUSTICE TROWER**

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the representatives of the parties by email. The date and time for hand-down is deemed to be 24 November 2020 at 10:00**

**Mr Justice Trower:**

1. This is an application for permission to appeal an order made by His Honour Judge Luba QC sitting in the County Court at Central London on 16 December 2019. The hearing before Judge Luba QC was the trial of an action in which the claimant sought possession of 59 Upper Selsdon Rd, South Croydon, Surrey CR2 8DJ (“the property”).
2. By that order, Judge Luba QC dismissed the appellant’s applications for relief from sanctions and permission to amend her defence and counterclaim, refused her application for an adjournment of the trial and dismissed her application for summary judgment in respect of the claimant’s claim.
3. He also made an order for possession of the property on or before 30 December 2019 and entered a money judgment against the defendant in the sum of £67,528.99 for arrears of rent. He dismissed the defendant’s counterclaim
4. On 17 March 2020, Mr Justice Morgan gave permission to bring the appeal out of time and directed that the application for permission to appeal should come on for hearing with the appeal to follow if permission were to be granted. He also stayed the order appealed.
5. The claimant is the registered owner of the property. The defendant is in occupation of the property. As the judge explained, the claim is put on the basis that the defendant is the tenant of the property and the claimant is the landlord.
6. The defence advanced by the defendant is that the tenancy agreement, which takes the form of an assured shorthold tenancy agreement dated 7 September 2012 is a sham. She contends that the claim to possession should be dismissed because there is in reality no tenancy. Furthermore, by her counterclaim she seeks a declaration that the claimant holds the property on trust for her, and she asserts that she is the true owner of all or most of the beneficial interest in it.
7. The first matter dealt with by the judge was the defendant’s application for relief from sanctions. Relief was sought because the defendant had not complied with case management directions that had been given at a CCMC conducted by DDJ Grout on 22 July 2019. Those directions required the parties to exchange lists of documents by 19 August 2019, to supply copies of documents requested by the other by 2 September 2019 and to exchange signed witness statements of themselves and all witnesses on which they intend to rely by 4pm on 30 September 2019. There was a sanction attached to the third of these directions as it was provided that no oral evidence would be permitted from a witness unless a statement had been served in accordance with the order except with permission of the court.
8. A pre-trial review took place on 9 October 2019 before Judge Luba QC at which both parties were represented by counsel. As the judge explained in his judgment, counsel for the defendant accepted that his client was in breach of each of those three orders for directions made by DDJ Grout. The defendant’s counsel was left in no doubt at that hearing that urgent steps would need to be taken by the defendant to regularise the position in the light of her non-compliance with the court’s orders.

9. One of the orders made at the PTR was the setting down of the case for trial on 16 December 2019, together with certain further directions to facilitate the conduct of the trial such as the preparation of bundles and skeleton arguments. One of the principal reasons for the trial being listed in December 2019 was because Judge Luba QC was satisfied (as had been DDJ Grout in July) that it was urgent. The urgency arose out of the fact that the claimant had acquired the property on what she said was a buy-to-let basis and she sought possession of the property so that she could sell it in order to assist in funding the repayment of a mortgage that she had taken out on her own home.
10. Five days later on 14 October 2019, the defendant's newly instructed solicitors issued an application seeking relief from sanctions and sought permission to amend her defence. The application was supported by a witness statement from the defendant which deals with the underlying dispute between the parties in great detail but gave little information about the circumstances in which she had failed to comply with the case management orders made by DDJ Grout.
11. No steps were taken by the defendant's solicitors to obtain an urgent hearing of the application for relief from sanctions. The judge was very critical of this failure, and in my judgment he was entitled to be so, because it was plain that the application for relief needed to be heard as a matter of urgency in order to ensure that the hearing of the trial (which the judge had already concluded was itself urgent) was not put in jeopardy. The defendant said that part of the reason that no steps were taken was that the court only listed the application to be heard after the date listed for the trial. That is correct, but the judge did not accept that this provided any legitimate explanation for the failure of the defendant or her solicitors to take steps to bring the application before the court on an expedited basis. Having considered what occurred, I think that the judge was entitled to take that view.
12. Despite the fact that the court had recorded the urgent need for the trial to be heard on two occasions (once in the order made by DDJ Grout and then again in the order made by Judge Luba QC on 14 October 2019), it was only at the opening of the trial on 16 December 2020 that the defendant made her application for relief from sanctions. It was dismissed by the judge, who approached the application by applying the test articulated by the Court of Appeal in *Denton v. TH White Ltd* [2014] EWCA 906. He considered first whether the departures from the court's orders were serious and significant, secondly the reasons for those departures and thirdly whether in all the circumstances of the case it was appropriate to grant the relief sought.
13. As to the first stage of the *Denton* test the judge was satisfied that the breaches of the court orders were significant and serious. On this appeal, Mr Thomas Dumont QC who appeared for the defendant accepted that this was a conclusion that the judge was entitled to reach. It is plain to me that he was right to do so. It had been said at the hearing that the delay was relatively minimal because the witness statement of 14 October 2019 contained details of the defendant's case and it was made and filed at court together with the application notice in support of the application for relief from sanction which was only two weeks late. This was no real answer because there was obvious urgency in relation to the trial, such that any non-compliance with the tight timetable for service of evidence was likely to be serious and significant. In any event, there was no indication that the defendant intended this witness statement to be

treated as her evidence for the trial; indeed, and as I shall explain shortly, quite the contrary was the case.

14. As to the second stage of the *Denton* test, the judge considered why the default had occurred and held that there was no good reason for it. The defendant submitted that the judge was wrong to reach that conclusion.
15. The defendant said that the explanation was that her previous solicitors had come off the record and that new solicitors had been appointed only six days before the deadline. They were unable to put a witness statement together in that period as they could not obtain the file. However, the defendant provided no detail as to what had occurred in the relationship between her and her solicitors between the time of the order made by DDJ Grout and the time at which she instructed new solicitors shortly before the PTR before Judge Luba. Furthermore, even after the default on 30 September 2019, the judge said that there was no proper explanation for what had happened between then and the beginning of the trial at which the application for relief from sanctions was made. He also pointed out that the defendant had disclosed no documents in accordance with the order that had been made by DDJ Grout.
16. Strictly speaking, these last two points arise for consideration at the third stage in the *Denton* test, because the second stage is concerned with the reasons why there was non-compliance on or before 30 September 2019. Looking at the position as at that date, it is in my view clear that the judge gave full consideration to the very limited information that he himself was given about the circumstances of the breakdown in the defendant's relationship between the defendant and her solicitors and the engagement of new solicitors. In my judgment, the judge's conclusion that there was no good reason for the defendant's failure to comply with the order made by DDJ Grout was a decision to which he was entitled to come. Indeed, in the absence of a proper explanation as to why so much time passed before the new solicitors were in place, it is difficult to see how he could have come to any other conclusion. It is plain to me that there is no basis on which an appeal court could interfere.
17. The third stage of the *Denton* test is whether, in all the circumstances of the case, it is appropriate for relief to be granted so as to enable the defendant to put in her witness statements late. The judge proceeded on the basis, which all parties accepted at the hearing before him, that if that were to happen the trial would have to be adjourned. The judge was influenced by the fact that it had been made clear in more than one court order that the listing of the trial was urgent, and he placed great weight on the fact that, if the relief sought were to be granted, the trial would have to be adjourned. He reached the conclusion that (as he put it in paragraph 18 of his judgment):

“this is the clearest possible case where the application of the three stage Denton approach leads to the conclusion that the applications must be dismissed, and the trial must proceed. I am not satisfied that it would do justice in this case either as between the present parties or having regard for the interests of other court users, to adjourn this trial and allow the applications.”
18. In his oral submissions in support of the application for permission to appeal, Mr Dumont QC submitted that there was no reason why the witness statement dated 14 October 2019 and made in support of the application for relief from sanctions could not have stood as the claimant's evidence for the trial, thereby allowing the trial to

proceed on 16 December. He said that the judge himself could have suggested that this was an appropriate way forward and he relied on the fact that, as the judge himself recognised when criticising the absence of evidence by way of explanation for the default, this witness statement “descends into a great deal of detail as to the underlying dispute between the parties”.

19. The difficulty with this submission is that it is clear from the transcript of the hearing before Judge Luba QC that Mr Owen Roach, who then appeared on his own as counsel for the defendant, made it quite clear that the evidence the defendant wished to adduce at trial was not yet ready. This was apparent from much of what Mr Roach had to say in support of the defendant’s application for relief from sanction (and also from his submissions on an application for the adjournment of the trial that was also before Judge Luba QC). The defendant’s position was most clearly expressed in the following exchange:

JUDGE LUBA: Where are the actual witness statements for the trial?

MR ROACH: Well, your Honour, the defendant's position was that they would await until the relief from sanction application has been heard and then they would take it from there.

JUDGE LUBA: Right. So if I allow this application notice now and permit you to rely on your witness statements at trial have you got them?

MR ROACH: We don't have a witness statement at present your Honour.

20. It was against this background that the judge recited in his judgment, that if relief from sanctions were to be granted so as to give the defendant an opportunity to put in evidence in support of her case, the trial would have to be adjourned. In my view, it is clear that this was the only basis on which he could proceed when determining whether or not to grant the relief sought.
21. There was also a debate about the very short period of adjournment which would be required in order to finalise the defendant’s evidence and it was suggested on the defendant’s behalf that that this meant that the trial could then take place within a matter of days. This seems to me to have been a wholly unrealistic suggestion and reflected a failure to appreciate the other demands on the time of a busy County Court and the interests of other court users.
22. In her grounds of appeal the defendant also contended that the judge’s decision was disproportionate because it effectively deprived the defendant of the ability to defend the claim for possession of her own home. It is said that it also made it effectively impossible for her to defend the claim to a monetary judgment on facts which the judge himself described as extraordinary. It is said that it prevented the defendant from being able to put her case in accordance with the pleadings.
23. Mr Dumont QC further amplified this point in his skeleton argument. He submitted that:

“even if the trial date did risk being jeopardised, it was with respect crucial that Ms Thomas’s evidence should be heard on so important a matter. This was not

simply a commercial dispute about money, it involved Ms Thomas's home, into which she had poured her life savings and where she had lived, paying the mortgage (via the Claimant) for 5 years. There was on any footing an arrangement between the parties, under which the property was purchased. Each side asked the court to adjudicate on the respective beneficial interests. That could not properly and justly be done without the evidence of Ms Thomas."

24. I do not accept that it was necessary for the judge to give the overwhelming weight to this consideration which is suggested by the defendant. It remained open to the defendant's counsel to cross examine the claimant and to advance her case at trial, and that is what he did. Of course, it was a consequence of the judge's order that the judge did not have the advantage of the defendant's evidence against which he would have been able to test the credibility of the claimant's account. But it nonetheless remained the case that the claimant was required to prove her case in circumstances in which it remained open to the court to reach a conclusion that she had not done so.
25. Mr Dumont QC also submitted that there was no indication that the judge balanced this consideration in carrying out the exercise that he was required to carry out in accordance with the *Denton* principles. I do not agree. It was self-evident that the judge would be faced with a trial at which the defendant would not be in a position to adduce evidence in support of her case. That was at the core of the application for relief from sanctions. Furthermore, the judge clearly stated that he had had regard to Mr Roach's submissions on this point, during the course of which Mr Roach had submitted that the principal factor that went into the balancing exercise in favour of his client was the importance of the issues that were at stake between the parties and that the consequence of relief not being granted was that the court would be hearing only one side of the story.
26. In considering the way in which Judge Luba QC carried out his balancing of all the circumstances of the case to determine whether relief from sanctions should be granted, I bear in mind that an appeal court will not interfere lightly with the exercise of judicial discretion in a case management decision of which this is one. As the Master of the Rolls said in *Clearway Drainage Systems Ltd v Miles Smith Limited* [2016] EWCA Civ 1258 at paragraph 68:

"it must be remembered that this is a case management decision with which the court should not lightly interfere. The fact that different judges might give different weight to the various factors does not make the decision one which can be overturned the must be something in the nature of an error in principle or something wholly omitted or wrongly taken into account or a balancing of factors which is obviously untenable"
27. In my view it is clear that the judge took into account the fact that his overriding duty was to exercise his discretionary case management powers in a manner which did justice between the parties fairly and proportionately. He then gave very considerable weight to the fact that, if relief from sanctions were to be granted, the trial would have to be adjourned. He also gave weight to the fact that the defendant and her solicitors had taken no positive steps to expedite the hearing of the application for relief from sanctions so that it could be heard and determined without prejudicing the date of the trial, a trial which the court had made clear on more than one occasion needed to be

dealt with as a matter of urgency. I am also satisfied that he had regard to the impact which the refusal of relief would have on the defendant's case.

28. In all these circumstances, I do not consider that it is arguable that the judge went wrong in taking the course that he did. It was a robust case management decision, but there were good reasons for him to reach the conclusion he did. It is very far from a case in which the balancing exercise that the judge carried out was "obviously untenable". Indeed, in my judgment, it is plain that he was entitled to reach the conclusion that he did, and I am satisfied that any argument to the contrary had no real prospect of success. It follows from this that, in accordance with normal principles, permission to appeal the judge's decision to refuse relief from sanctions should itself be refused.
29. I now turn to the appeal against the substantive issues which were determined at the trial.
30. The undisputed background to the proceedings was that the claimant and the defendant were work colleagues. The defendant had a capital sum of £50,000 to put towards the purchase of a home of her own, but she did not have a sufficient credit rating to obtain a mortgage. There were discussions between the claimant and the defendant on the question of whether the claimant might be able to assist the defendant in purchasing her own home.
31. There was a divergence of accounts between the claimant and the defendant as to the nature and content of those discussions and the subsequent agreement that was reached between them. However it is not in issue that contracts for the purchase of the property by the claimant were exchanged on 5 March 2012 with completion on 16 March 2012 since which time the defendant has lived in the property as her home.
32. The judge explained the arrangements for funding the purchase of the property in paragraphs 24 and 25 his judgment as follows:

"The acknowledged upshot was that the claimant became the legal owner when the property was bought, and the completion achieved, in March 2012. The purchase transaction was arranged by a mortgage broker, a Mr Le. He had previously been a mortgage broker known to the defendant, and it was he who contacted the claimant and put her in touch with solicitors. Those solicitors were then to deal with the mortgage lending and the purchase of the property. The purchase price was financed mainly through a buy to let mortgage, obtained from the mortgage lender, Mortgage Works. The mortgage was taken in the claimant's sole name.

"Apart from the mortgage monies the balance of the purchase price was physically paid by the claimant. She paid two sums to solicitors totalling £110,000. The money she paid over included £58,000 drawn from her own savings. (Money which she had set aside to meet her own mortgage liability), £2000 from her other financial resources, and £50,000 from the defendant. From its inception, the claimant has paid the mortgage instalments as they fell due, and she has also paid the building's insurance for the house."

33. The competing cases as to the purchase arrangements were pleaded in the parties' statements of case. The claimant contended that it was agreed that the defendant would contribute £50,000, that the claimant would put in £60,000 (as to £50,000 from her savings and £10,000 as a personal loan taken out by the claimant) and that the balance would come from a buy-to-let mortgage. The property would be purchased in the claimant's name but that, when the defendant had obtained a sufficiently good credit score to be able to buy the property from the claimant for its full market value, it would be sold to her discounted in price to the extent of the £50,000 which the claimant advanced. It was agreed that the claimant would be entitled to sell the property at any time after 12 months had expired. It was also agreed that, until such time as the property was sold by the claimant to the defendant in accordance with this arrangement, the relationship between the parties would be landlord and tenant pursuant to an assured shorthold tenancy.
34. The defendant's case was very different. She alleged that the parties agreed, prior to the purchase of the property, that any money advanced by the claimant would simply be reimbursed later when the house and the mortgage were transferred to the defendant. In short summary the defendant contended that the property was always to be her own home and that the arrangements reached between her and the claimant were simply a temporary device that needed to be entered into in order to achieve the purchase of the property with the assistance of the claimant's money. It was intended that in due course the defendant would take over the ownership and the mortgage liability, and the defendant would then repay the claimant for the investment she had made. It was at the core of the defendant's case that she would be in a position to purchase the property from the claimant in due course. In fact that has not happened.
35. The claimant's account was supported by two documents which were signed by the defendant. The first in point of time was a gifted deposit declaration form which she signed on 31 January 2012 as a necessary part of enabling the claimant to obtain a mortgage. It was required by Mortgage Works in light of the fact that part of the deposit for the purchase of the property derived from the defendant who was not the mortgagor. It recited (wrongly) that the donor (i.e. the defendant) was the niece of the borrower and that the amount of the gift was £110,000 (when the defendant had in fact only provided £50,000). It went on in the following terms:

"I wish to make the above gift to the borrower to assist in the purchase of the above property. I declare that this is a non-returnable and unconditional gift and there will be no charge registered against the property, no express or implied trust arrangements which might give me any rights in the property and I do not intend to acquire any beneficial interest in the property or reside in the property".

PLEASE NOTE: if the money is not intended as a true gift and your intention is to protect your financial interests then please advise us immediately. We would also erect strongly recommend that you seek independent legal advice before signing this declaration.

The 'us' referred to in the declaration and the person to whom it was addressed were the claimant's solicitors, Grindeys LLP who had been recommended by Mortgage Works.



36. The second document was an assured shorthold tenancy agreement of the property that was signed by the claimant as landlord and the defendant as tenant on 7 September 2012. It was for a one-year term (renewable) commencing on 15 March 2012 at a rent of £1700 per calendar month. It was the claimant's evidence that this tenancy agreement formalised the oral agreement that was entered into prior to completion of the purchase of the property.
37. Although the defendant did not deny that it was her signature on both of these two documents, she submitted that they were both shams. The parties' intent was not, so she said, reflected in the terms of either the gifted deposit declaration form or the tenancy agreement neither of which were ever intended to have legal effect. The intent was a simple agreement in the terms that I have already described above.
38. In support of this argument, Mr Dumont QC pointed to evidence that, although the obligation to pay rent under the terms of the tenancy agreement was £1700 per month, from 2012 onwards, the regular payments that were made by the defendant were limited to £1200 per month, which Mr Dumont QC said reflected the amount required to be paid under the mortgage and the insurance. He said that this reflected the fact that the property was always intended to be the defendant's and that her continuing obligation was to put the claimant in funds to pay the mortgage until such time as she took over the legal ownership of the property and the mortgage.
39. As to the gifted deposit declaration form, he relied on the fact that the contribution to the purchase price made by the defendant cannot have been a gift, because the arrangement between the parties included an entitlement given to the defendant to purchase the property from the claimant when she was in a position to do so at a discount of £50,000. To that extent the gifted deposit declaration form did not reflect the true agreement between the parties. He also relied on the fact that the defendant was described as the claimant's niece which was plainly wrong and that the amount of the gifted deposit was mis-described as being £110,000 rather than £50,000.
40. Judge Luba QC concluded that the claimant's account as to what occurred in relation to the tenancy agreement was correct. In paragraph 48 of his judgment he said as follows:

“As I have indicated the case for the defendant as advanced by Mr Roach, was that this tenancy agreement - although made in writing and entered into between the parties and signed by both of them - was not a proper tenancy agreement at all, but was a sham to misrepresent the position to 3<sup>rd</sup> parties. That was on the basis that the oral agreement between the parties was that as explained by his client, rather than as explained by the claimant. I have however preferred the claimant's account; I find that this was a genuine tenancy agreement. Its terms bound both parties.”
41. The judge then dealt with the question of whether the requisite statutory notices had been given to enable the claimant to claim possession based on the terms of the tenancy agreement. He was satisfied that they had and that, in those circumstances, he was bound to make an order for possession. He also expressed himself satisfied that the amount of the money judgment claimed (£67,528.99) was justified. On this aspect of the case if, as the judge held to be the case, the defendant was liable for rent in the amount prescribed in the tenancy agreement, there is no doubt that she was very

substantially in arrears. Not only had she regularly been paying £500 per month less than the amount of the prescribed rent, she also had missed a number of monthly payments altogether.

42. The judge then considered the counterclaim pursuant to which the defendant sought a declaration as to her beneficial interest in the property. Having directed himself that the starting point was the legal title in the name of the claimant, the judge said that the defendant needed to be able to demonstrate that she had made a contribution to the purchase price “which sounds to give her beneficial interest”. I did not understand that the defendant challenged this approach as a matter of principle.
43. The challenge mounted by the defendant was as to the judge’s conclusion that the defendant was unable to establish that that was the case because of the existence of the gifted deposit declaration form. The way he expressed that conclusion was as follows:

“As I say, it is not in dispute that the signature on the document is [the defendant’s]. In those circumstances, I am not satisfied that she has made out any case for a beneficial interest in the property. The burden is on her and it is one which she has failed to discharge. I do not find that she did advance £50,000, pursuant to the agreement made with the claimant. That I find is a sum that she is entitled to obtain the benefit of by enforcement of the contract made with the claimant, by specific performances if necessary. To put that into plain English, if she does want to buy the property and is able to meet the current market price, then she is able to enforce a discount of some £50,000 against that price, reflecting the money that she put towards the original purchase. No such injunction order for specific performance will be required, because Ms Smalling told me from the witness box that if that situation arose, she would in any event provide that sum by way of discount.”

44. The first ground of appeal was that the judge erred in law and on the facts by coming to the conclusion that the gift deposit declaration was valid on the basis that the defendant signed the document. He failed to take into consideration sufficiently or at all the fact that the contents of the document were demonstrably incorrect in the respects I have identified. Those inaccuracies reflected the fact that the gifted deposit declaration form did not record the true intention of the parties as to the nature of the relationship.
45. In effect the defendant’s case on this appeal was that, even though the judge himself accepted that on the claimant’s own account it was a most curious arrangement and was inaccurate in a number of respects, he failed to draw the logical conclusion which flowed from that; namely that it was a sham.
46. In support of the defendant’s argument on sham I was referred to *Snook v London and West Riding Investments* [1967] 2 QB 786, in which Diplock LJ in a well-known passage at p.802 described the concept as follows:

“it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the " sham" which are intended by them to give to third parties or to the court the appearance

of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.”

47. The difficulty with the defendant’s submission on sham is that the judge made very clear findings of fact that the gift deposit declaration, insofar as it disavowed an intention to acquire a beneficial interest in the property did indeed reflect what the parties had agreed. He was satisfied on the evidence that the nature of the arrangement between them was that the consideration which the defendant received for her provision of £50,000 towards the purchase of the property was the rights that she acquired under the terms of the tenancy agreement together with the right to a reduction of £50,000 in the event that she was in a position to take over ownership of the property from the claimant.
48. Mr Dumont QC then submitted that the judge took the wrong approach to the significance of the gifted deposit declaration form in any event. He said that the judge was wrong to conclude that what Lord Briggs said in *Gany Holdings (PTC) SA v Khan* [2018] UKPC 21 at [17] (“if either the transferor or the transferee makes a written declaration as to those beneficial interests ... that will generally be decisive, regardless of the subject subjective intentions of either of them”) precisely covered the instant case. This was because Lord Briggs was there dealing with the more conventional situation in which a declaration as to beneficial interests is made in the contract for sale or conveyance.
49. He then submitted that, even if the gifted deposit declaration form was not a sham it could not be treated as decisive because it was signed some time before the sale was completed and he referred to *Whitlock v Moree* [2017] UKPC 44 at [23] - [27] and *Goodman v Gallant* [1986] Fam 106, 117C/E. It was necessary to look at the terms of the original agreement as pleaded by the claimant which, so Mr Dumont QC submitted, demonstrated that the defendant acquired a beneficial interest in the property. In particular, he relied on the term of the agreement as pleaded by the defendant that the claimant would sell the property to the defendant at a discount of £50,000 if the defendant was able to obtain finance for the same.
50. Mr Phillips for the claimant said that this submission was clearly wrong, because on the judge’s own findings there was no beneficial interest, whether or not there was a sham. The reason for this was that the agreement to sell the property to the defendant at a discount if she was able to obtain finance for it was a simple contractual arrangement. It did not give the defendant any beneficial interest in the property itself. This was a finding which the judge made on the evidence and with which an appeal court should not interfere.
51. I do not agree that Mr Dumont QC was correct to distinguish what Lord Briggs said in *Gany* in the way that he did. In my view Mr Phillips for the claimant was correct to submit that what the defendant declared in signing the gifted deed declaration form was all part of the documentation put together for the purposes of purchasing the property. It fell fairly and squarely within the category of “a written declaration as to those beneficial interests” contemplated by Lord Briggs. The judge in my view was right to conclude that it was the sort of document that would (as Lord Briggs put it) “generally be decisive”.

52. In any event, in circumstances in which it is clear that the basis on which the mortgage provider was prepared to advance the money necessary to acquire the property in 2012 was that the defendant should have no beneficial interest in it, the conclusion which the judge reached was one that was plainly open to him on the evidence.
53. I have reached a similar conclusion in relation to the ground of appeal that the judge was wrong to hold that the assured shorthold tenancy entered into in September 2012 was not a sham. It appears from the judge's findings that there was an agreement from the outset that a tenancy would be entered into in due course and it is not contended by the defendants that she did not sign the relevant document when it was put before her. It reflected the agreement which the judge was satisfied on the evidence was entered into orally between the claimant and the defendant in relation to how the property was to be held.
54. In my view, this finding, like the finding in relation to the gift deposit declaration form was open to the judge on the evidence. It was a finding on the facts which is only susceptible to appeal in circumstances in which it is plain that the judge reached a conclusion that no reasonable judge could have reached or which was clearly against the weight of the evidence. In my judgment the defendant has not satisfied the burden of establishing that that is the case.
55. In all these circumstances, I do not consider that there is a real prospect of success on any of the grounds advanced by the defendant in her appellant's notice. I shall therefore refuse permission to appeal.