



Neutral Citation Number: [2025] EWHC 372 (Ch)

Case No: CH-2024-000055

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

Royal Courts of Justice
The Rolls Building
Fetter Lane
LONDON
EC4A 1NL

Monday, 24 February 2025

Before :

MR JUSTICE FANCOURT

BETWEEN:

PRITI ODHAVJI

Appellant

- and -

(1) CAROLINE TIGHE
(2) SURANJAN (JOSEPH) COORAY
(3) K & C PROPERTIES LIMITED

Respondents

Mr Aejaz Mussa, Counsel (instructed by Russell Evans Rahaman) for the Appellant
The First and Second Respondents appeared in person.
The Third Respondent was not represented.

Hearing date: 5 February 2025

APPROVED JUDGMENT

Draft judgment sent to the parties on: 18 February 2025

Mr Justice Fancourt:

1. The main issue on this appeal is whether the judge in the lower court was wrong to conclude that the Appellant, Ms Odhavji, had not proved her case that the sale of 129 Long Elmes, Harrow, Middlesex (“the house”) by her and her husband to the First Respondent, Ms Tighe, on about 19 November 2014 and the grant by Ms Tighe to Ms Odhavji on 14 December 2014 of a tenancy of the house were unenforceable against her, as being a sale and rent back arrangement made in contravention of the general prohibition in section 19 of the Financial Services and Markets Act 2000 (“FSMA”).
2. There is a secondary issue of whether the Judge was wrong, having dismissed the claim of unenforceable sale and rent back arrangement, to fail to grant relief to Ms Odhavji on the basis that it was agreed that she and her husband were to retain £100,000 of equity in the house in any event.
3. His Honour Judge Parfitt, sitting in the County Court at Central London (“the Judge”), ordered on 6 February 2024 that Ms Tighe’s claim for possession of the house and Ms Odhavji’s counterclaim were dismissed and made no order as to costs (“the Order”). The Judge did not deal separately in his judgment with the counterclaim in relation to the share of equity.
4. The circumstances in which the claim to possession by Ms Tighe as landlord came to be dismissed are immaterial to the issues on this appeal. The consequences of the Order are, however, that Ms Odhavji and her husband have no continuing interest in the house save as periodic assured shorthold tenants, and are vulnerable to further possession claims in due course, whether brought by Ms Tighe or by her chargees.
5. The trial before the Judge was unusual in that, about 6 weeks before trial, Ms Odhavji served witness statements made by her and her son, ostensibly in support of the counterclaim, but her evidence did not support the pleaded case. The Respondents relied on this fact at the trial.
6. The pleaded case was essentially as follows.
 - i) First, that an arrangement had been made by Ms Odhavji in writing with the Second Respondent, Mr Cooray, acting by a company controlled by him, the Third Respondent (“R3”) on 19 August 2014 (“the Legal Defence Agreement”), that R3 (presumably acting by Mr Cooray) would deal with the existing mortgagee on Ms Odhavji’s behalf, and buy the house at a discounted price, enabling Ms Odhavji to pay off existing debt and avoid repossession, in return for a payment to Mr Cooray for his services. Ms Odhavji would retain equity to the value of £100,000 and would be granted a tenancy of the house at a rent, to cover mortgage interest payable by Ms Tighe.
 - ii) Second, that the Legal Defence Agreement was then novated orally into a sale and rent back agreement made with Ms Tighe (“the Amended Legal Defence Agreement”).
 - iii) Third, that the Amended Legal Defence Agreement was then carried into effect by the contract of sale and purchase made on 17 November 2014, and by the tenancy agreement signed on 14 December 2014.

7. However, Ms Odhavji's evidence in her witness statement and, as the Judge found, confirmed by her oral evidence, was to the effect that she at all times understood and intended that she was obtaining a loan from Mr Cooray, which would enable her to pay off her existing secured creditor, and that she would repay that by instalments and then in a lump sum at a later date. She understood that the Legal Defence Agreement and the contract of sale and purchase that she signed were to put in place a loan agreement, and that she was not selling the house to Ms Tighe, Mr Cooray or R3, or being granted a tenancy of her home.
8. At the start of the trial, there was argument about whether Ms Odhavji should be allowed to give evidence through an interpreter (her first language is Gujarati), given that she had made her witness statement in English. The Judge ruled that her evidence would be heard in English and the trial proceeded. The Respondents did not at that stage renew an application that they had previously unsuccessfully made for summary judgment, on the basis that Ms Odhavji had no evidence to support it, nor did they seek to exclude Ms Odhavji's evidence on the basis that it was advancing a different factual account from that pleaded in her Counterclaim, in which she had signed a statement of truth.
9. The Judge heard all the evidence on both sides (with Ms Tighe and Mr Cooray giving evidence first in support of their possession claim) and reached a conclusion against Ms Odhavji on the sale and rent back arrangement counterclaim, for essentially two reasons.
10. First, he said that he could not make any of the findings sought in the Counterclaim because they would be contradicted by Ms Odhavji's own evidence, and this would be unfair to the Respondents when "they had no reason to cross-examine her about a case that she was not putting forward". The case that Ms Odhavji advanced in evidence was contradictory to the pleaded case, he found, and so she could not succeed in making out the pleaded case. To allow her lawyers to try to do so with other evidence was unfair.
11. Second, the Judge held that there was insufficient evidence in any event for Ms Odhavji to prove that she made the pleaded sale and rent back arrangement with Ms Tighe. The pleaded case was based on further representations said to have been made orally by Mr Cooray to Ms Odhavji, leading to an orally agreed transaction between Ms Odhavji and Ms Tighe. There was no evidence of these essential components of the pleaded case: at most, there was the Legal Defence Agreement with R3, the documented sale of the house to Ms Tighe at an undervalue, and the later grant of a tenancy of it by Ms Tighe to Ms Odhavji (none of which were disputed). However, this was not the case that was pleaded, which depended on the agreed oral novation of the Legal Defence Agreement, based on the further representations of Mr Cooray; nor was it sufficient on its own, the Judge held, to prove a regulated sale and rent back agreement within the meaning of article 63J of The Financial Services and Markets Act 2000 ((Regulated Activities) Order 2001, as amended ("article 63J" and "the RA Order")).
12. Richards J gave Ms Odhavji permission to appeal the decision of the Judge on 5 grounds only, which he reformulated from 10 rather diffuse grounds appended to the Appellant's Notice:
 - "(1) The judge erred in law by concluding, at [11], [12] and elsewhere of the Judgment, that there could be a 'regulated sale and rent back agreement' as

defined in paragraph 63J of the Financial Services and Markets Act (Regulated Activities Order) 2001 only if the Appellant had a subjective intention to sell an interest in the Property and/or an understanding that she was doing so. The Judge should have concluded that what mattered is whether, looked at objectively, the arrangements had the features described in paragraph 63J of the Order.

(2) The judge erred in law in concluding, at [89] of the Judgment, that there was no pleaded allegation that a combination of the sale of the property and the Appellant's continued occupation indicated the presence of a 'regulated sale and rent back agreement'. This allegation was pleaded at, for example, [34(6)] of the Amended Defence and Counterclaim.

(3) In consequence of the errors forming part of Grounds 1 and 2 or otherwise, the Judge's conclusion that there was no sale and rent back agreement is vitiated by a failure to take into account the relevant considerations set out in paragraphs 11 and 12 of the Appellant's skeleton argument.

(4) The judge erred in law by failing to conclude whether or not any sale and rent back arrangement was carried on 'by way of business'.

(5) The judge erred in law by failing to address the Appellant's claim for a remedy based on the proposition that, under the arrangement with the First and Second Respondents, she and her husband were to retain £100,000 of equity in the Property."

The relevant statutory background

13. Section 19 FSMA states:

“(1) No person may carry on a regulated activity in the United Kingdom, or purport to do so, unless he is –
(a) an authorised person; or
(b) an exempt person.

(2) The prohibition is referred to in this Act as the general prohibition.”

14. Section 22(1) FSMA provides:

“An activity is a regulated activity for the purposes of this Act if it is an activity of a specified kind which is carried on by way of business and –
(a) relates to an investment of a specified kind; or
(b) in the case of an activity of a kind which is also specified for the purposes of this paragraph, is carried on in relation to property of any kind.”

Subsection (5) states that “specified” means specified in an order made by the Treasury.

15. Contravention of the general prohibition is a criminal offence, by section 23(1), and has consequences in civil law too, as section 26(1) states (so far as material to this case):

“(1) An agreement made by a person in the course of carrying on a regulated activity in contravention of the general prohibition is unenforceable against the other party.

(2) The other party is entitled to recover –
(a) any money or other property paid or transferred by him under the agreement and
(b) compensation for any loss sustained by him as a result of having parted with it.

(3) ‘Agreement’ means an agreement --
(a) made after this section comes into force; and
(b) the making or performance of which constitutes, or is part of, the regulated activity in question.....”

16. The Treasury made the RA Order pursuant to section 22(5) FSMA, and article 63J states (so far as material):

“(1) Entering into a regulated sale and rent back agreement as an agreement provider is a specified kind of activity.

.....

(3) In this Chapter –
(a) a ‘regulated sale and rent back agreement’ is an arrangement comprised in one or more instruments or agreements, in relation to which the following conditions are met at the time it is entered into –
(i) the arrangement is one under which a person (the agreement provider) buys all or part of the qualifying interest in land other than timeshare accommodation in the United Kingdom from an individual or trustees (the agreement seller); and
(ii) the agreement seller (if the agreement seller is an individual) or an individual who is the beneficiary of the trust (if the agreement seller is a trustee), or a related person, is entitled under the arrangement to occupy at least 40% of the land in question as or in connection with a dwelling, and intends to do so;

but such an arrangement is not a regulated sale and rent back agreement if it is a regulated home reversion plan;

(4) For the purposes of paragraph (3) –
(a) the reference to a qualifying interest in land –
(i) in relation to land in England and Wales, is to an estate in fee simple absolute or a term of years absolute, whether subsisting at law or in equity...

....

(6) In this Order –

(a) references to entering into a regulated sale and rent back agreement as agreement provider include acquiring any obligations or rights of the agreement provider, including the agreement provider's interest in land or interests under one or more of the instruments or agreements referred to in paragraph 3(a)

(7) Accordingly, references in this order to an agreement provider, other than in paragraph 6, include a person who acquires any such obligations or rights.”

17. The Financial Services and Markets Act 2000 (Carrying on Regulated Activities by Way of Business) Order 2001, as amended (“CRAWBO”), included the following articles:

“ 5. A person (“A”) who carries on an activity of the kind specified by article 63J(1) of the Regulated Activities Order (entering into a sale and rent back agreement) is to be regarded as carrying on that activity by way of business except where A is a related person in relation to the agreement seller within the meaning of article 63J(4)(c) of the Regulated Activities Order.

6. --(1) Article 5 ceases to have effect on 1st January 2015.
.....”

18. Article 5 of CRAWBO was inserted with effect from 15 September 2011 and so was in force at the time of the contract of sale of the house made between Ms Odhavji and Ms Tighe and at the date of the tenancy agreement made between Ms Tighe and Ms Odhavji. Its effect is that if any of the Respondents entered into a sale and rent back agreement as agreement provider, they are regarded as having done so by way of business, within the meaning of s.22(1) FSMA, since none of them is a related person of Ms Odhavji.
19. There is guidance published by the Financial Conduct Authority, known as the Perimeter Guidance Manual (“PERG”, as it is generally called). Its purpose is to give guidance about when authorisation is required, when exempt status is available, and on the activities which are regulated under FSMA and exclusions which are available (PERG, 1.1.2). Although statutory guidance (FSMA s.139A), it represents the views of the FCA and does not bind the courts. It can nevertheless be given some weight in construing the legislation.
20. PERG 14.4A concerns activities relating to regulated sale and rent back agreements. It includes the following content relevant to the issue in this appeal:

“Q37A. What is a regulated sale and rent back agreement?”

Broadly speaking, this is an arrangement under which, at the time it is entered into, a person (the “agreement provider”) buys all or part of an interest in land... in the *United Kingdom* from a homeowner (being an individual or a trustee whose beneficiary is an individual) (“the agreement seller”) on the basis that the individual or a related person is entitled under

the arrangement, and intends, to use at least 40% of the land as a dwelling....

As regards the requirement that the conditions need to be met ‘at the time the arrangement was entered into’, it should be noted that a *regulated sale and rent back agreement* is an arrangement that may actually comprise several agreements. For example, a *regulated sale and rent back agreement* may include an agreement for the sale of a freehold interest in land and a subsequent tenancy agreement relating to the occupation of that land. Just because the tenancy agreement was not completed at the same time as the sale of the freehold interest does not mean there is no *regulated sale and rent back agreement*.

.....

Q37C. When will I be carrying on the activity of entering into a regulated sale and rent back agreement?

This will occur when you enter into the agreement at the outset as the agreement provider even if you do so only once. It can also occur at a later stage if all or part of the rights or obligations of the agreement provider are transferred to you or if you acquire all or part of the interest in land bought by the agreement provider (where you become an ‘agreement transferee’). This is so, whether you are acquiring the rights or obligations from the agreement provider or from an existing agreement transferee.....”

21. Thus, the fact that the rental agreement is made later than the sale and purchase agreement does not preclude there being a sale and rent back arrangement. However, both statutory conditions (purchase of a qualifying interest and entitlement to occupy the property as a dwelling) must be satisfied at the time that the arrangement is entered into. It is therefore, at least arguably, insufficient only to point to two such agreements. The important questions are: what is the “arrangement” falling within article 63J, and when is it made? There is no guidance on whether the arrangement that is entered into must be a legally binding agreement, in whole or in part.
22. I was not referred by Mr Mussa to any authority addressing these questions apart from The Financial Conduct Authority v London Property Investments (UK) Ltd [2022] EWHC 2862 (Ch) (“*FCI v LPI*”), a decision of Mr Recorder Richard Smith, as he then was. He had to deal with multiple cases in which sale and rent back agreements were negotiated by a director of the defendant, with the sale ostensibly (but not in reality) being with vacant possession and the tenancy agreement apparently being entered into later, as a distinct transaction. The Recorder found that the director had agreed in advance with the occupier their right to remain in occupation:

“... by the time contracts were exchanged, the Moroneys were entitled, by reason of their prior (oral) agreement in May 2019, to continue to occupy the property as a dwelling following its sale and they intended to do so, albeit now as tenants. The sale and rental of the property agreed in May 2019 were inextricably linked and integral parts of the same ‘arrangement’. The second limb of article 63J(3)(a) was therefore also engaged such that the transaction was an SRA.”

23. In that case, the arrangement was concluded orally and the later sale and purchase contract and tenancy agreement gave effect to it. There is no equivalence here, because the Amended Legal Defence Agreement made between Ms Odhavji and Ms Tighe was not proved.

The first basis of the Judge's judgment

24. The Judge said, at [11] of his reserved judgment, that all the various defences and causes of action relied on in Ms Odhavji's statement of case were premised on her having *intended* to sell the house to Ms Tighe, pursuant to the alleged illegal agreements foisted on her by Mr Cooray, or based on his representations. He said at [12] that it "was a foundation of all these claims that Ms Odhavji intended to sell the Property". He said that the documents, including the Legal Defence Agreement, the contract of sale and the TR1 transfer, gave rise to a starting point that this was the case, but A's evidence:

"...was that at all material times Mr Cooray told her that he would lend her money and that in order to get that loan it was necessary that Ms Odhavji signed various documents which were about the loan and not about selling the Property. Every time that Ms Odhavji signed any document or spoke to Mr Cooray about such signings or anything related to the Property this only happened for the purpose of the loan transaction so that Ms Odhavji could pay off the pre-existing lender bringing the possession proceedings against her. In this way she would save the Property and protect [her son]."

25. The Judge then said that he accepted that evidence as genuine and as reflecting Ms Odhavji's understanding, and that it was fatal to the pleaded case. He held that it was not appropriate for Ms Odhavji's Counsel to ask the Court to make findings of fact incompatible with the instructions of Ms Odhavji, in the absence of an alternative pleaded case. In short, Ms Odhavji could not be heard in this case to say that she agreed to sell the house and rent it back when her evidence was that she intended to borrow money from Mr Cooray to pay off the existing debt and repay the loan later.
26. The Judge then made findings of fact about what happened between the end of 2013, by when the existing lender had brought possession proceedings against Ms Odhavji, and December 2014, when the tenancy agreement was signed. The Judge said at [74] that his impression of what actually happened was "a loan coupled with a sale with an oral promise to reconvey once the loan was repaid".
27. In the concluding section of his judgment, the Judge said that it seemed to him to be unfair to Mr Cooray to allow Counsel to put forward Ms Odhavji's pleaded case when her own evidence directly contradicted it, and so Mr Cooray had no reason to cross-examine Ms Odhavji about a case that she was not putting forward [83]. It amounted to asking for a finding against Ms Tighe and Mr Cooray on the basis of an evidential case that they had no reason to think was being put forward by Ms Odhavji, because it was not part of her evidence. The Respondents were entitled to expect that the pleaded case will fail if Ms Odhavji gave evidence "that those pleaded facts did not happen but others inconsistent with those factual allegations did happen" [84].

28. At [85] and [86], the Judge summarised his view by saying:

“It is not for the court or the Claimant's own lawyers to ignore the totality of the claimant's evidence and so find what might be an approximation of the truth.

I emphasise that this is an extreme situation: the claimants factual case is wholly inconsistent with the basis of the pleaded case.”

(The reference here to “the Claimant” is to Ms Odhavji, who was the Defendant and Part 20 Claimant.)

The second basis of the Judge’s judgment

29. In case he was wrong about that conclusion, the Judge explained why in any event there was insufficient evidence to establish that Ms Odhavji and Ms Tighe entered into an unlawful sale and rent back arrangement. This was because there was no evidence of an “arrangement”, which had to be a reciprocal arrangement that linked the sale to an entitlement to occupy the property sold, on his reading of *FCI v LPI*.

30. At [88] and [89] the Judge said:

The allegation in the [Counterclaim] is premised on (a) the transfer in some way of the LDA to Ms Tighe; and, (b) the existence and agreement to the pleaded ‘further representations’. There is no evidence upon which I can make any such findings. The best that Mr Mussa could do was to say that because the Property was sold at an undervalue and because shortly afterwards the lease agreement appears to have been signed (I ignore for present purposes the Claimant’s evidence that she did not intend to sign a lease and the pleading that the lease was not signed until 2018) then the most likely explanation on a balance of probabilities would be a sale and rent back arrangement.

There are two fundamental problems with that approach. The first is that those are not the relevant facts pleaded in the [Counterclaim] to support the alleged FSMA illegality, the second is that it involves a cherry picking of limited parts of the evidence to reach the pleaded conclusion. Those limited parts do not come close to bearing the weight that Mr Mussa is asking of them.”

31. One reason why the Judge said that the cherry picked evidence did not bear the required weight was because Ms Odhavji’s conveyancing file said nothing about a rent back arrangement. It did, initially, indicate that Ms Odhavji would be remaining in occupation, but when this was queried by Ms Tighe’s solicitors the documents were changed to record that vacant possession would be given up on completion. The Judge then explained why he felt that the fact that the sale was at an undervalue was equally consistent with a different arrangement, namely one of loan, the retention of equity in the property (which the LDA had in fact recorded) and a right to repurchase on repayment; or, indeed, Mr Cooray cheating Ms Odhavji out of the equity in the house, but not in the way alleged in the Counterclaim.

32. At [92] he concluded:

“While not, so far as I recall, expressly mentioned by Mr Mussa in closing, I have also considered whether Ms Odhavji can make good her case based on [Mr Cooray’s] evidence that there was a sale and rent back (he used those words). [Mr Cooray’s] evidence did not include facts that would support this conclusion or explain how that came about as a matter of an arrangement that created entitlements as between Ms Tighe and Ms Odhavji and Mr Odhavji. In short, Mr Cooray’s evidence can reliably amount to nothing more than his saying that we bought the property (which Ms Tighe did) and we rented it back (which at least he and Ms Tighe say that they did), but while that could be evidence in support of a finding that there was a relevant arrangement, it does not get Ms Odhavji home in this case where her own evidence is that no such arrangements were entered into.”

33. The Judge accordingly held that the case as pleaded was not proved, taking into account all the evidence that was before him, including that of Ms Odhavji.

Ground 1

34. This ground of appeal relates to the first basis of the Judge’s judgment, namely that Ms Odhavji’s own evidence was inconsistent with the pleaded case and so she should not be allowed to pursue that case, in fairness to the Respondents.
35. I have already explained the basis on which the claim was pleaded.
36. Ms Odhavji’s evidence was that, in her understanding, Mr Cooray was going to sort things out for her, and she placed complete trust in him. He did not discuss a sale of the house. She followed his instructions to get a power of attorney for her husband, and then she signed the Legal Defence Agreement, though she did not know what it said, or understand it.
37. Ms Odhavji said her understanding of the agreement with Mr Cooray was that he would lend the money to pay off the existing lender and charge a fee for his services, and eventually she would pay the loan back to Mr Cooray, either in monthly instalments or in a lump sum, if she could. She believed that Mr Cooray was stepping into the existing lender’s shoes. She later understood that she would have to pay £39,000 to Mr Cooray for his services.
38. Ms Odhavji said that Mr Cooray then instructed her to go to Vincents solicitors to finalise the paperwork, but told her not to mention anything about the case to them, just sign the paperwork and the property would be saved. When signing documents, Ms Odhavji understood that it was in relation to a loan that Mr Cooray was arranging and had no idea that the house was being transferred to anyone else (there was, however, no pleaded case of *non est factum*). She said nothing about Ms Tighe and knew nothing about her.
39. There was no dispute at trial about the existence of the Legal Defence Agreement, the contract of sale with Ms Tighe, the transfer to Ms Tighe of title to the house or the assured shorthold tenancy agreement made between Ms Tighe and Ms Odhavji, as pleaded. What was disputed was the allegations relating to the Amended Legal Defence Agreement, and Ms Odhavji gave no evidence at all about the representations allegedly made by Mr Cooray that Ms Tighe would take over the Legal Defence Agreement on

the same terms (essentially) and that this was agreed by her. Ms Odhavji's evidence that she knew nothing about Ms Tighe was inconsistent with any such case.

40. In explaining why the evidence of Ms Odhavji was so inconsistent with the pleaded case, the Judge focused particularly on Ms Odhavji's state of mind and intention to sell the house to Mr Cooray:

“both Ms Odhavji and [her son] denied any intention to sell the Property and Ms Odhavji, on the contrary, asserted that she only ever intended to enter into a loan transaction”.

41. It is obvious that the question of whether a sale and rent back arrangement was made is a matter to be determined objectively, on the basis of the pleaded case and the evidence, not on the basis of what the (putative) agreement seller considered that they were entering into or intended to agree. If it were otherwise, an unscrupulous agreement provider (of whom there are, regrettably, many) would only have to mislead the agreement seller, or conceal matters from her, in order to escape the regulatory control and powers that FSMA provides to protect vulnerable individuals. The Judge may not have considered sufficiently the scope that there is, even when dealing with agreement providers who do not set out to exploit or cheat, for vulnerable agreement sellers to fail to understand what they are entering into.
42. The fact that Ms Odhavji was unable to say in her evidence that she intended to enter into a sale and rent back arrangement or agreed to do so is therefore of no materiality, save that it means that a pleaded case alleging that there was such an arrangement needs to be proved by other evidence. The Judge, however, regarded Ms Odhavji's evidence that she believed that she was entering into a loan agreement with Mr Cooray as decisive, on the basis that her own evidence was inconsistent with her pleaded claim.
43. In this context, at least, I do not agree that it was unfair to the Respondents to allow Ms Odhavji's lawyers to pursue her pleaded case on her behalf. There was no attempt by them to deviate from the facts that were pleaded, and no contravention of the principles of fairness in meeting a pleaded case set out in Ali v Zinc [2022] EWCA Civ 34 at [19]-[25], to which the Judge referred. It was the pleaded case that the Respondents had to come to court to meet, and the allegation of a sale and rent back agreement was fully pleaded. As it transpired, not all the pleaded facts were proved, but that gives rise to a different question (see under Ground 3 below).
44. The Judge said that it was unfair that the Respondents had no reason to cross-examine Ms Odhavji on a case that she was not putting forward, but I cannot see the unfairness in that. There was no need for the Respondents to challenge what Ms Odhavji said in her evidence in chief, because none of it supported the pleaded case. If there was any matter related to the pleaded case on which the Respondents wished to elicit further evidence from Ms Odhavji (such as that Ms Odhavji had never had any discussion with Mr Cooray about Ms Tighe), they could have done so. As litigants in person, they were entitled to expect a degree of guidance from the court as to how the case against them stood. However, it is not correct that a party's pleaded case can only be substantiated at trial by the oral evidence of that party, or oral evidence called on her behalf. To the extent that any evidence positively given by Ms Odhavji was inconsistent with facts pleaded on her behalf, the court (in this context, at least) had to consider whether Ms

Odhavji's evidence might be mistaken, in view of what the contemporaneous documentary evidence established.

45. I agree with the Judge that this was an extreme situation, as he called it. It is unusual for no supportive oral evidence to be given by a claimant in support of the central allegations of their claim. In most cases, that is likely to mean that the claim will fail. But in the context of mis-selling of regulated products or entering into regulated transactions, it is all too common for vulnerable people to be confused, mistaken and misled. Indeed, the Judge said:

“It is reasonably likely that Ms Odhavji must have had insufficient understanding of what was going on at the time of the various transactions, in her dealings with her conveyancing solicitor (such as they were), and in her dealings with her lawyers at the time of the finalising of the statements of case, so that the incompatibility between the documents and her experience and/or recollections was not identified or resolved.”

46. I therefore do not consider that the dismissal of the Counterclaim can be upheld on the first basis of the Judge's decision.

Ground 2

47. The Judge rightly identified from the statements of case that Ms Odhavji's pleaded case comprised, essentially, the following steps (with my references to numbered paragraphs of the Counterclaim):
- i) The Legal Defence Agreement made between Ms Odhavji, her husband and R3 in August 2014 (paras 12, 13) (“step A”);
 - ii) Representations made by Mr Cooray to Ms Odhavji (“the Further Representations”) following agreement by Mr Cooray with Fincorp (the existing mortgagee) about settlement of its possession proceedings (para 16), which proposed that Ms Tighe would buy the house for £190,000 and that Ms Odhavji would pay £39,000 to Mr Cooray and rent to Ms Tighe sufficient to service the interest on the new mortgage on the house, with an arrangement to transfer the house back to Ms Odhavji at a future date (para 16) (“step B”);
 - iii) Agreement by Ms Odhavji to this proposal (“the Amended Legal Defence Agreement”) intended to have the effect of assigning R3's rights to Ms Tighe or alternatively novating the Legal Defence Agreement so that it was then made between Ms Odhavji, her husband and Ms Tighe (para 17) (“step C”)
 - iv) Purchase of the house by Ms Tighe and repayment of Fincorp (paras 23, 24) (“step D”); and
 - v) the grant by Ms Tighe to Ms Odhavji of the assured shorthold tenancy about a month later (para 26) (“step E”).

The unlawful sale and rent back agreement alleged is, therefore, an arrangement said to have been made between Ms Tighe and Ms Odhavji and her husband. These 5 steps and the satisfaction of the two statutory conditions in article 63J are pleaded at para 34(6) of the Counterclaim.

48. It was not in dispute that Ms Tighe did acquire the house in her own name, raising the money to pay off Fincorp by mortgaging other property that she owned because she could not obtain a mortgage of the house. What was disputed, formally on the statements of case and at trial, was step B, the making of the Further Representations, and step C, the making of the Amended Legal Defence Agreement. The Judge described the Further Representations as being the crux of the pleaded case.
49. It was not pleaded or alleged that R3 and Ms Tighe were simply acting as agents on behalf of Mr Cooray in entering into the relevant agreements. Although it is pleaded by Ms Odhavji that Mr Cooray was a shadow or de facto director of R3 (at times when he was not a de jure director) and that Ms Tighe was merely Mr Cooray's nominee in relation to the agreements, the allegation of Ms Tighe being only a nominee or agent was not (apparently) pursued at the trial, or before me on the appeal. The evidence of Ms Tighe that she raised the purchase money by mortgaging other properties in her name, and so used her own money to buy the house, is inconsistent with Ms Tighe being merely a nominee.
50. I have set out in [30] above para [89] of the Judge's judgment, which is the basis of this ground of appeal. The ground asserts that the Judge was wrong to conclude that there was no pleaded case of a combination of sale of the house and Ms Odhavji's continued occupation indicating the present of a regulated sale and rent back agreement, because it is pleaded in para 34(6) of the Counterclaim. However, that is not the point that is being made by the Judge in para [89] of the judgment: the point is that the case on which Ms Odhavji's Counsel was forced to rely at trial, shorn of steps B and C, was not the arrangement that was pleaded.
51. The pleaded case could not be proved as pleaded, as there was no evidence of the Further Representations or the making of the Amended Legal Defence Agreement, as the Judge records at [41]; further, as stated in [43], Mr Mussa did not put those allegations to Ms Tighe or Mr Cooray in cross-examination:

“None of the representations were put to Mr Cooray (and they could not have been given Ms Odhavji's witness statement – there was no likely evidential platform for Mr Mussa to put forward such a case to Mr Cooray)”.

52. The question that the Judge went on to consider was whether, against the background of the Legal Defence Agreement (step A), the sale of the house to Ms Tighe at an undervalue (Step D) and the later grant of a tenancy (Step E), Mr Mussa had proved Ms Odhavji's pleaded case. The Judge was not wrong to say that a case relying on these facts alone was not the case that was pleaded, and he did not say that no case of sale and rent back agreement was pleaded.
53. Accordingly, Ground 2 cannot succeed, but Ground 3 still needs to be addressed.

Ground 3

54. Without proof of the Further Representations and Amended Legal Defence Agreement, Mr Mussa relied on the undisputed Steps A, D and E. There was also material evidence given by Ms Tighe and Mr Cooray, which the Judge records, as follows:

- a) “Mr Cooray did say that he prepared the tenancy agreement (which came after the sale) and that this was in accordance with an agreement to sale and rent back until Ms Odhavji would buy back the Property.” ([43])
 - b) Ms Tighe said that Mr Cooray told her that the transaction would be profitable and that Ms Odhavji intended to rent the house back after the sale ([44])
 - c) “A defining characteristic of the evidence of both Ms Tighe and Mr Cooray is that one purpose of the transaction was that Ms Odhavji would not lose her home” ([46])
 - d) An admission of Mr Cooray that there was a sale and rent back ([92]) but which did not include any facts that would support a conclusion of a sale and rent back arrangement between Ms Odhavji and Ms Tighe. This does not add anything to (a) above, and may be another reference to the same evidence.
55. In reaching his conclusion that there was insufficient evidence of a sale and rent back arrangement concluded between Ms Odhavji and Ms Tighe, the Judge placed some reliance on the contents of Ms Odhavji’s solicitors’ conveyancing file, which had been disclosed. This revealed that Ms Tighe’s solicitors had challenged the suggestion that Ms Odhavji would remain in possession and that Ms Odhavji’s solicitors then replied, saying that the sale would be with vacant possession. This became a term of the contract. Ms Odhavji’s son signed the sale contract giving his consent and agreeing to vacate on or before completion. As the Judge commented, this was contrary to the existence of any entitlement of Ms Odhavji to remain in the house, even if Ms Tighe and Mr Cooray in fact allowed it to happen.
56. Ms Tighe’s solicitors’ conveyancing file was not disclosed, contrary to a case management order made by the Judge at a case management conference. The Judge was critical of Ms Odhavji for not pursuing this failure on the part of Ms Tighe, and was not inclined to draw any inference adverse to Ms Tighe from the failure to disclose it. He does not record any explanation for the failure being given by the Respondents.
57. If a pleaded case asserts that steps A, B, C, D and E resulted in an unlawful and unenforceable agreement, and steps B and C are irrelevant and unnecessary to establish the cause of action, then in principle there is no reason why a claimant is disentitled to rely on steps A, D and E to prove her case. The necessary facts have been pleaded and proved. It makes no difference whether steps B and C are proved. However, if later steps depend on the earlier unproved steps (for example, step D is taken “pursuant to the agreement made” at step C) then proving step D without the connection to step C may be insufficient.
58. What Ms Odhavji has to prove to establish her cause of action is that a sale and rent back arrangement was made between her and Ms Tighe (“the agreement provider”), under which arrangement, *at the time when it is entered into*, Ms Tighe buys or is to buy the house and Ms Odhavji has or will have the right to occupy it. By proving a sale and rent back arrangement made between Ms Odhavji and R3 (step A), Ms Odhavji has not proved a sale and rent back arrangement with the agreement provider, Ms Tighe. No connection between step A and steps D and E is proved by the documents. The

contract of sale and purchase (step D) is made with Ms Tighe, but the contract itself does not prove that it was made pursuant to a prior arrangement for sale and a right of occupation. Neither does the contract itself contain any right to occupation, so as to satisfy the second condition in article 63J: as the Judge observed, its terms are inconsistent with any right to occupation. The right to occupation is established by the later tenancy agreement (step E), but an arrangement for occupation made on that date is too late to satisfy the first condition in article 63J.

59. The documents themselves therefore do not prove Ms Odhavji's case. They are consistent with an arrangement between Ms Odhavji and Ms Tighe, but Ms Tighe gave evidence that she did not make any such arrangement with Ms Odhavji, and neither Ms Odhavji nor her son said that she had done so. The documents are equally consistent with an arrangement between Ms Odhavji and R3 (step A) and an *ad hoc* change to the arrangement with R3 that was not agreed with Ms Odhavji. The Judge considered that it was consistent with a transaction that was commonplace before 1926 but unheard of since, with transfer of title to a property as security for a loan, with provision for reconveyance on redemption.
60. In considering whether an arrangement for a sale and rent back agreement with Ms Tighe can be inferred from the documents in this way, it must be borne in mind that what is being sought is sufficient evidence of illegal conduct. Any allegation of that character must be distinctly alleged and distinctly proved. Although the standard of proof in these proceedings is the balance of probabilities, the evidence relied on to establish illegal conduct must be clear and cogent.
61. The Judge ultimately held that the admissions of Ms Tighe and Mr Cooray, which I have summarised in [54] above, were insufficient to prove illegal conduct by Ms Tighe. The admissions were evidence of some arrangement to sell and rent back that was made before the contract of sale and that Ms Tighe knew about it, but they do not prove an arrangement made with the agreement provider, Ms Tighe.
62. The Judge accepted Ms Tighe's evidence that she was told by Mr Cooray about the opportunity, that she did not negotiate anything, that Mr Cooray was really responsible for the terms of the deal, and that she knew nothing about the Legal Defence Agreement until this litigation.
63. I consider that the Judge was entitled to conclude that there was insufficient evidence to prove the case against Ms Tighe. Had a different case against Mr Cooray been pursued, his conclusion might have been different, but that case was not pleaded and was not explored at trial. Although another judge might have been willing to draw an inference adverse to the Respondents from non-compliance with the order to disclose the conveyancing file, the Judge had the distinct advantage of seeing both Respondents give evidence and was able to make an assessment of whether they were trying to conceal matters that would have been revealed by that file. The Judge was, in my judgment, also right to have in mind the potential unfairness to the Respondents in facing allegations of criminal conduct that were not adequately pinned down in terms of factual case or legal submissions. It was not put to Ms Tighe in cross-examination that she, either personally or using her husband as her agent, made any arrangement with Ms Odhavji, and the Judge was satisfied that she had not done so. He found her to be a reliable witness and found that she knew little about any arrangements. Reliance on the documents alone cannot adequately fill that gap.

64. The result may appear hard on Ms Odhavji, in that there was a sale of her home to Ms Tighe and a rent back, and there was at one time an arrangement between Ms Odhavji and R3 to that effect. However, the terms of article 63J require an arrangement with the buyer herself that, at the time that it is made, gives the seller the right to occupy. It was not Ms Odhavji's case that the contract of sale and purchase and the tenancy agreement themselves were such an arrangement, and the Judge was not asked to decide that question.
65. Ground 3 is therefore not established.

Ground 4

66. The fourth ground of appeal does not lead anywhere, first because it could not assist Ms Odhavji to argue that there was no finding that a sale and rent back agreement (if there was one) had been carried on by way of business; and, second, in any event, because the effect of article 5 of CRAWBO is that, unless the agreement provider is a related party, the agreement provider is deemed to provide a sale and rent back agreement falling within article 63J by way of business.

Ground 5

67. The fifth ground of appeal relates to an alternative case Ms Odhavji had, namely that, in the event that there was no sale and rent back agreement, there was nevertheless an agreement binding Ms Tighe that Ms Odhavji would retain £100,000 of equity in the house following its sale at an undervalue.
68. The figure of £100,000 is seen only in the Legal Defence Agreement, paragraph 5 of which stated:

“The Proprietors wherein agree to accept £100,000 (One Hundred Thousand Pounds) in cash or equity if the Company win the case against the proprietors”

And paragraph 11 of which states:

“If the Proprietors agree to leave the £100,000 of their share of the proceeds (in the event the Company win the case against the Proprietors) in equity in the property, then the Company agree that any appreciation in the value of the property thereon will be to the benefit of the proprietors.”

The “Proprietors” (with a capital P) are defined in this agreement as Ms Odhavji and her son, Bhavin; the “Company” is R3. The drafting in this homemade document is badly confused in failing to distinguish between the Odhavjis and Fincorp, as proprietors of the existing legal charge.

69. Nevertheless, it was broadly understood by Mr Cooray when the Legal Defence Agreement was made that the undervalue at which the house was to be sold reflected the fact that the remaining equity was to be retained by Ms Odhavji. There was no evidence that Ms Tighe knew about that.
70. The pleaded case was as follows, under the heading “PROPRIETARY ESTOPPEL AND/OR CONSTRUCTIVE TRUST”:

“42. Further or in the alternative, and without derogation to the Defendant’s aforementioned causes of action, in reliance upon the Representation and/or Further Representation, which, for the avoidance of doubt, it is averred were made by [Mr Cooray] on behalf of himself and/or [Ms Tighe] and/or [R3], the Defendant detrimentally relied upon the same by reason of:

- (i) her having transferred her interest in the Property to the Claimant; and/or
- (ii) paying £39,000 to [Mr Cooray] as aforesaid; and/or
- (iii) paying £9,080.00 by way of ‘rent’ payments to [Mr Cooray].”

43. Accordingly, the Defendant is entitled to a declaration that the Claimant holds the Property on trust for the Defendant and Mr Odhavji and a further order that the Claimant transfers the title to the Property back to the Defendant and Mr Odhavji.”

71. The problem with this is that the agreement or detrimental reliance needed to establish an estoppel or constructive trust is alleged to be based on the Further Representations, which were not proved. The “Representations”, as pleaded, do not address the question of retained equity. It is also impossible to say that Ms Odhavji detrimentally relied on the terms of the Legal Defence Agreement when she did not understand what was in it and believed that she was making a loan agreement or retaining only £100,000 of equity. It is likely that the Judge did not deal expressly with the alternative case because he understood that the basis for it fell with the primary case.
72. Ground 5 therefore cannot succeed. Even if the Judge had addressed it directly, the case would have been dismissed.
73. I should add, as a post script to this judgment, that Ms Odhavji’s ability to pursue the appeal was hampered somewhat by the absence of a transcript of the evidence given at the trial. It seems that no adequate recording was made, or could be transcribed. The absence of a suitable recording is obviously unsatisfactory. Mr Mussa’s solicitor had a note of the trial, which had been typed up and put into the appeal bundle, but it was rather sketchy and obviously incomplete. It was, regrettably, not sent by Ms Odhavji’s lawyers to the Judge for his comments, or sent to the Respondents for them to agree. Although I read the note, and it was of some help in understanding the way that the trial was conducted, it was not a reliable record of the evidence that was given.
74. Something clearly went wrong for Ms Odhavji and her husband in this matter at the point when she was referred by Mr Cooray to solicitors who would act for her on the transaction, Vincents. They were solicitors known to Mr Cooray. The Judge observed that she did not appear to have much understanding of the transaction on which her solicitors were acting or what they were doing for her. It may be that Vincents only had limited instructions. What those instructions were and who provided them is unclear. The Judge had sight of the conveyancing file and I have not had that advantage. It would be inappropriate therefore for me to say more than that there is an obvious concern about what happened.
75. For the reasons that I have given, however, I must dismiss the appeal.