Neutral Citation Number: [2019] EWCA Civ 1662

Case No: B6/2018/3000

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM HIGH COURT, FAMILY DIVISION
Mr Justice Parker
ZC15D00585

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2019

Before:

LADY JUSTICE KING
LORD JUSTICE MOYLAN
and
LORD JUSTICE LEGGATT

- -

Between:

ANNE READ	**Appellant**
- and -	
(1) **MELANIE PANZONE**	**Respondents**
(2) **JONATHON READ**	

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- -

Mr Michael Horton (instructed by **Advocate (Bar Pro Bono Unit)**) for the **Appellant**
Mr Christopher Hames QC and Mr Harry Nosworthy (instructed by **Ms Panzone**) for the **1st Respondent**
Mr Jonathan Evans (instructed by **Mr Read**) for the **2nd Respondent**

Hearing date: 10th July 2019

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Approved Judgment

LADY JUSTICE KING:

1. This is yet another case where a highly educated couple with young children has engaged in lengthy, destructive and disproportionate legal proceedings. These disputes have continued for over five years with emotionally bruising and expensive litigation in relation to both money and the children of the marriage. The present appeal is a second appeal in the financial remedy proceedings. The costs to date are in excess of £500,000. The only substantial asset in the case, a flat in Panama ("the Panama property"), has a net value of only £298,377. As a consequence, as the District Judge said in his first instance judgment: "There is no way that the parties' comfortable lifestyle can be maintained. Much of this has been caused by the intolerable burden of costs".

2. The 1st Respondent in this appeal ("the wife") Melanie Panzone married Jonathon Read, the 1st Respondent at first instance, ("the husband") in 2002. They separated at the end of 2014. There are two children of the marriage who are now respectively 13 and 9 years of age. In the early 2000s, each of the parties had high earning careers, the wife as a solicitor and the husband in the City. They lived in rented property throughout the marriage. In about 2008 the husband was made redundant and at the time of the proceedings before the District Judge on 6 January 2017, was earning something under £50,000pa. The wife was earning closer to £100,000 as a solicitor but, by the time the first appeal came on before Mrs Justice Parker on 2 February 2018, the strain of the proceedings was such that the wife was working as a support lawyer.

3. Upon the parties' marriage breaking down, it quickly became apparent that, as the District Judge subsequently put it [10], "the dispute over the ownership of the Panama property is fundamental to the analysis of what assets are available to the parties". By the time the matter came to trial, the Panama property was, to all intents and purposes, the only asset potentially available for distribution between the parties at the end of this twelve-year marriage.

4. The Panama property was only "potentially available" for distribution between the parties because although the funds for the purchase of the property had come exclusively from the husband during the course of the marriage, the legal ownership of the property was vested in a company called the Kensington Realty Co. SA ("the Company"). The sole shareholder of the Company was the husband's mother Anne Read, the 2nd Respondent at first instance and the Appellant in these proceedings ("Mrs Read").

5. The critical part of the order against which Mrs Read now appeals is as follows:

> **Declaration**
>
> 4. The Court hereby declares that at all material times the First Respondent is the sole beneficial owner of the Panama Property.

It is Ordered (with effect from Decree Absolute) that:

1. Avoidance of Disposition Order

The purported transfer by the First Respondent *(the husband)* to the Company dated on or about 26 June 2010 is hereby set aside; if some other disposition of the Panama property to the Second Respondent *(Mrs Read)* occurred after 26 June 2010 that disposition is hereby set aside.

2. Lump Sum Order

(i) By no later than 4pm 6 June 2017, the First Respondent*)* shall pay or cause to be paid to the Applicant, a lump sum of £150,000.

6. Parker J dismissed Mrs Read's appeal against the order and she now, supported by the husband, appeals the totality of the order arguing there was a serious procedural irregularity inherent in the making of the order. She submits that (i) at no time prior to judgment had any party applied for or considered an avoidance of disposition order, (ii) the judge had been wrong in law to make such an order and further, (iii) the judge had been wrong in law to make a declaration that the husband is and was at all material times the sole beneficial owner of the Panama property.

7. Permission to appeal was granted by me on 26 February 2019 on the basis that the second appeals test was satisfied as not only was there a real prospect of success but also because the matter raised an important point of principle, namely the alleged procedural irregularity in the way in which the order under section 37(2) of the Matrimonial Causes Act 1973 ("MCA") came to be made. .

The purchase of the Panama property and the incorporation of Kensington Realty Co. S.A.

8. On 25 September 2007 the husband signed a contract for the purchase of the Panama property, an off-plan property now known as Apartment 18B, East Tower, Rio Mar Beach Community, Rio Mar, Panama. A first instalment of $38,000 was paid by the husband towards the purchase price of $385,000.

9. The contract terms provided, inter alia, that in the event the "Promising Purchaser" assigned the rights under the contract to a person or entity other than "a stock corporation owned by the Promising Purchaser and/or his immediate family and/or an entity established for their benefit", there would be a penalty fee payable to the developer of 5% of the purchase price. The husband, in his capacity as the "Promising Purchaser", was therefore entitled to transfer his rights under the contract to a company owned by a member of his immediate family without incurring a penalty. In addition, the husband was entitled to "subscribe the Public Deed of Sale for the purchase of (the property) using a stock corporation". The "Public Deed" was the means by which the vendor would transfer ownership of the property once the property had been completed.

10. Between 2007 and 2010, the husband and wife visited Panama from time to time together with Mrs Read to see the progress of the building work at the holiday resort in which the apartment was to be located. On 15 May 2008 and the 11 December 2008, the husband paid further instalments of $38,500.

11. In the pleadings, the husband merely said that the Panama property had been conveyed directly to the Company (para 2) and that Mrs Read was the sole legal and beneficial owner of the Company "as recorded in the Share Register" after "board resolution" (para 4).

12. It was only during the course of trial that any clarity was achieved as to how this situation had come about. Following questioning by the District Judge, the husband produced several key documents for the first time. The documents established that on 4 February 2010 the Company was incorporated with share capital of one hundred shares each with a nominal value of $100. According to a set of minutes entitled "Recordings of the meeting of the extraordinary assembly of shareholders of the corporation Kensington Realty Co. S.A.", a meeting had taken place in Panama on 19 February 2010. Present at the meeting, the minutes recorded, were the husband and wife each with the respective designated roles of chairman and secretary. The minutes record the authorisation of the Company to acquire the Panama property for $385,000 and for Morgan and Morgan (Solicitors) to act on behalf of the Company. The wife disputed having attended any such meeting. The Company was registered the same day.

13. The documents disclosed at trial by the husband included three documents, all dated 26 February 2010. Each is in identical terms and records "board resolutions" which: (i) authorise the issue of all the one hundred shares in the Company to Mrs Read; (ii) appoint the husband, wife and Mrs Read as corporate officers; and (iii) authorise the Company to acquire the Panama property and the husband to "take delivery of the above property and sign the deed and other associated paperwork".

14. The resolutions appear to be signed by all three directors, although the wife disputed whether she had signed them. The husband accepted at trial that the signatures, including that of the wife, may have been scanned onto the documents but "his recollection was that there were discussions about this".

15. These "Board Resolutions" were attached to an email dated 2 March 2010 sent to the developer vendors in Panama who duly acted upon them.

16. On 19 April 2010, the title to the property was created and registered in the name of the developers. The following month, the husband paid a further instalment towards the purchase price.

17. A share certificate dated 28 May 2010, signed by the husband and Mrs Read, shows Mrs Read as holding all the shares in the Company. This document was produced by Mrs Read in a witness statement dated 27 May 2016.

18. The District Judge unsurprisingly commented in his judgment that:

> "30. I find it extremely curious that these important and relevant documents were only disclosed in the way they were"

19. The wife, during the course of her oral evidence, had accepted the validity of this share certificate. However, before the end of that court day, the wife had reflected upon her concession and told the District Judge, in the presence of both the husband and Mrs Read, that she was having second thoughts about her evidence having now had more time to consider the documents relating to the so called "Board Resolutions" produced during the course of the trial.

20. That night, the wife prepared a document which became known as the "conspiracy statement" in which she expressed her grave reservations about the authenticity of the documents produced by the husband.

21. On 24 June 2010 the property was conveyed directly from the developers to the Company, the husband having paid the final instalment of the purchase price. The following week, on 30 June, the title to the property was registered in the name of the Company. In August 2010 the parties "moved in" to the property.

The Proceedings

22. The wife issued financial remedy proceedings. Following a failed financial dispute remedy resolution hearing, directions for trial were given on 1 September 2015 by District Judge Simmonds

23. The order of District Judge Simmonds contained the following recital:

> "Recital- Kensington Realty Co. S.A.
>
> 2. The beneficial ownership of the property…is not agreed by the parties. In the absence of such agreement, this matter will need to be resolved by the court… "
>
> Both parties however agree that this matter should not widen to include a Panamanian company law dispute.
>
> Therefore, without prejudice to any of the applicant's contentions within these proceedings, it is accepted by the applicant, for the purposes of these proceedings only, that the position of Kensington Realty Co. S.A. can be determined by Mrs Anne Read and Kensington Realty Co. S.A. can be represented Mrs Anne Read's solicitors.
>
> For the avoidance of doubt, this concession by the wife in no way alters her case that Kensington Realty Co. S.A., alternatively Apartment 18B East Tower, Rio Mar Beach Community, is beneficially owned by the respondent and/or the applicant and is therefore a matrimonial asset."

24. This recital was followed by directions for the trial which included the joining of Mrs Read to the proceedings and an order that the wife was to file detailed points of claim in relation to the alleged beneficial ownership of the property. Responses were to be filed by both the husband and Mrs Read.

25. The wife filed her points of claim on 25 January 2016. That document is largely in narrative form which is unsurprising given that the wife was acting in person. In her document, the wife asserts that at no point had there been any suggestion that the

property would be a gift for Mrs Read and, she explained, the parties were not in any event in a financial position to make such a gift. The wife described the involvement of the husband and herself in the purchase of the property, including choosing furniture and planning decoration, as well as their subsequent use of the property as a family holiday home.

26. The wife's points of claim note a complete absence of documentary evidence to support the husband's claim that the property had been a gift to Mrs Read and further observed that, in a Children Act statement dated 6 July 2015 in which Mrs Read set out her full financial position, no mention was made by her of owning, or having any interest via her shareholding in the Company, in the Panama property.

27. The husband's detailed points of defence were filed on 2 June 2016; his case was that Mrs Read was the sole legal and beneficial owner of the Company and therefore the Panama property, and that the beneficial title "presumptively flows" from the legal title.

28. He goes on:.

> "7. **No Resulting Trust**
>
> Funds used to purchase the property were gifted to Ann Read under the express knowledge, understanding and common intention of all the parties. There is evidence of "intention inconsistent with such a trust" over a significant period of time that rebuts any such assertion."

(The husband in a footnote refers to the case of *Westdeutsche Landesbank Girozentrale v London Borough of Islington* [1996] AC 669).

29. The husband went on:

> "3…..[R]espondent denies that there is any ambiguity. Kensington Reality Co.S.A. was incorporated in 2010 when the property was delivered but funds had been allocated and hypothecated since 2007".

30. The husband filed no documents in support of this part of his case and the district judge did not accept the assertion that, whilst the husband had not actually given money to Mrs Read in 2007, it had been "allocated and hypothocated" finding as he did that :

> "31(b) There is no evidence of an intention to make this gift in 2007. No contemporary record at all. I think there would have been and I think that when he initially purchased the property he did so in his own name for himself"

31. Mrs Read filed a statement in support of the husband in which she acknowledged that the husband took responsibility for everything to do with the property but said that he did so as part of his role as chairman of the Company as opposed to as owner of the property.

32. At trial the wife's case remained that there had been no suggestion made during the course of the marriage that the Panama property was to be a gift to Mrs Read. The wife claimed that the beneficial ownership was held jointly by her husband and herself.

33. The husband's case as pleaded (see above) had been that he had given his mother, by way of a gift, the funds which she had used to buy the Panama property although the funds had not in fact been transferred to her in advance of the purchase of the property. The husband's case on paper was that, as a consequence the Company, and therefore Mrs Read as the sole shareholder, did not hold the property on resulting trust for him. During the trial it became clear that at no time had the husband given Mrs Read any money and that the entire transaction, including payment, had been conducted by him as had been accepted by Mrs Read in her statement. (see para 31 above).

34. The trial commenced on 18 July 2016. The husband and wife appeared as litigants in person. Mrs Read was represented and attended on 18 and 19 July. Upon attending on the 20 July 2016, Mrs Read was told through the District Judge's clerk, that her attendance was unnecessary, and she therefore left the building.

35. The District Judge was, in addition to hearing the financial remedy proceedings, also hearing the wife's application that she should be permitted to relocate to the United States with the children of the marriage. The main basis of that application was the difficult financial position the parties found themselves in, particularly the high cost of living in London. The wife's application to relocate was in due course refused and has no relevance to the matters before this court.

36. Because of delays in the hearing of the relocation application, the District Judge did not give judgment in the financial remedy proceedings until 29 November 2016 when he gave an oral judgment from notes. Following judgment, no submissions were made by the parties, either about the judgment itself or any consequential orders. The matter was set down for 6 January 2017 for a further hearing designed to work out the order. Mrs Read was unwell and did not attend that hearing and she filed a medical certificate. The court declined her request to adjourn the hearing.

37. On 5 January 2017, the day before the resumed proceedings, the wife's counsel in the relocation proceedings, Mr Christopher Hames QC, provided a draft financial remedy order designed to assist the court by endeavouring to give effect to the oral judgment given at a time when both the husband and wife had been unrepresented. This court has a transcript of the hearing which took place on 6 January 2017. Submissions were to the District Judge first as to the terms and structure of the order which awarded a lump sum of £150,000 to the wife. Further submissions were made as to costs. A costs judgment was delivered by the District Judge on 27 February 2017.

The trial and the judge's findings

38. In reality the trial was a single issue finding of fact hearing designed to determine who owned the beneficial interest in the Panama property. If the Panama property was a matrimonial asset, the sharing principle would apply, and it was hard to see how there could be other than an equal division of its net value. If it was not a matrimonial

asset, because Mrs Read was the sole beneficial and legal owner of the property, the wife's application for a lump sum order would necessarily have been dismissed.

39. It follows that the evidence given by each of the three protagonists was of critical importance as were the judge's conclusions in relation to each of them; this was the case particularly given the judge's findings (set out below) as to the highly unsatisfactory nature of the documentary evidence produced during the trial which purported to support Mrs Read and the husband's case, documents which went, directly, only to the legal ownership of the Panama property.

40. The District Judge set out with care his impressions of the parties before moving on to make his findings of fact. The wife, he found to be a mixture of "careful preparation and attention to detail" on the one hand and "anxiety and indecision" on the other. The District Judge was:

> "[25]…absolutely clear that the wife was completely genuine when she said, with some force, that she had no conception that the flat, through the company, was in the name of Mrs Read ….I also accept that her correspondence and the children's belief that this was a family asset".

41. So far as the husband was concerned, the judge described him as "obviously capable, organised and skilled at managing his affairs". The judge said:

> "I gained the impression that he was enjoying the court process, his ability to demonstrate his abilities, and also to be able to wind the wife up."

42. Having pointed out that the husband's own correspondence referred to the Panama property as "his", the District Judge went on:

> "I thought that the husband was less than clear about when and how the gift took place. He accepted that there was no written record of the gift, or the intention to make it, in 2007. He accepted that the vendors did not know who the vendors were selling it to, if it was not him. However, he believed the wife was aware of the gift from 2007. It was at this point that I noted my impression that he came across as 'playing a game'. He seemed very pleased with himself."

43. So far as Mrs Read was concerned, the judge regarded her as being "a decent person and very loyal to her son". In respect of the issue as to whether the wife had been aware of her alleged ownership of the property, Mrs Read said there had been an informal discussion in London in 2010. The judge was of the view that her answers in this regard were "most unconvincing".

44. Before moving on to his findings, the judge expressed his disapprobation at the late production by the husband of the email of 2 March 2010 which had been sent to the vendors in Panama attaching the three board resolutions referred to at [12] – [14] above, and that relevant documents were "only disclosed in the way they were".

45. The judge went on to make the following findings before moving on to the Section 25 exercise:

> "31. Finding: I summarise my findings on a number of points:
>
> (a) On balance I prefer the evidence of the wife. I accept she was not aware of any gift to Mrs Read in 2007 or 2010, or subsequently. I think that the evidence to the contrary of Mrs Read is so thin as to have little weight and I reject the evidence of the husband that he made it clear all along.
>
> (b) There is no evidence of an intention to make this gift in 2007. No contemporary record at all. I think there would have been and I think that when he initially purchased the property he did so in his own name for himself.
>
> (c) There is the evidence of the company records and the board meetings said to have taken place on 26 February 2010, supported by the email on 2 March 2010. I find that the wife's signatures were scanned in and do not show that she was aware of the transaction on that day. I am astonished that such important documents were only provided in the way they are if they are genuine. Mr Read must have been aware of the relevance of the fundamental issue of ownership.
>
> (d) There is no evidence, however, that the husband held the property on behalf of himself and the wife jointly. At most it is his property which is subject to the exercise of my powers under Section 23 of the Matrimonial Clauses Act.
>
> (e) Either the husband and Mrs Read are making up, or backdating a contemporary intention that the property should be held by Mrs Read, or the husband was gifting matrimonial assets to his mother without the knowledge of his wife at some time since 2010.
>
> 32. The test is the civil balance of probability. I do not think that the board meeting in 2010 actually happened or that the wife was aware of it. However, I do find that this was his property and it is at least possible that he subsequently formed the intention to give it to his mother and caused this to be entered into the share register. It may well be, in fact I think it is the case, that he prefers his mother to have it than for his wife to have a share. If so he has behaved in an underhand way".

46. It might be thought that these findings would have been enough to dispose of the issue before the District Judge, however having made the findings, the judge went on in this way:

> 32…There is no application before me under section 37 of the Matrimonial Causes Act but if there were, this would be a case for the avoidance of the disposition. I think that the test in section 37(2)(b) of the Matrimonial Causes Act is made out.

> "If it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition was set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition."

> It matters not that this was more than three years ago. That merely deals with the presumption. I do not think Mrs Read acquired the property for valuable consideration. I had my doubts as to whether she received it without notice of the intention to defeat the application for financial relief and whether in fact she was acting in good faith, but I do not need to make findings on that. Whether I need to deem an application to be made, or an application is made at this stage, my intention is that this disposition should be set aside so that the property shall be treated as being in the ownership of Mr Read."

47. At the hearing on 6 January 2017, the husband sought clarification in relation to a number of matters within the judgment. The transcript of the hearing casts some light on what Mrs Read and the husband suggest is a grey area in the judgment, namely whether the judge did or did not intend to make a finding that, at a time on or after 26 June 2010, the husband, having bought the property for himself, thereafter disposed of it to his mother by way of a gift.

48. The relevant part of the transcript demonstrates Mr Hames seeking clarity from the District Judge as to his finding in respect of the beneficial interest in the property and in relation to any disposal of the property subsequent to its purchase. In so far as the making of the wholly unexpected section 37 "Avoidance of Disposition Order" in the absence of Mrs Read is concerned, the judge said:

> "…I recognise that my decision to consider section 37 was something that was not argued in front of her and it is something that I realise appeared to me to be appropriate as I was preparing my judgment. I make no secret about that. I consider that I had all of the information before me that was necessary for me to do so."

49. Later the judge says:

> "In my judgment I go on to say that it is possible that there may have been some subsequent intention to transfer, but I think that what this needs to refer to is actually the legal transfer and I think that it is fair to seek clarification of that."

50. Mr Hames expressed his concern to the judge that he (Mr Hames) was unclear as to whether the judge was considering more than one transaction on the part of the husband. The District Judge replied:

> "And neither am I and that is my point and I will make it clear that as far as I am concerned it is any transaction during the

> relevant period that is intended to have this effect. My judgment, I think, is quite clear as to what I think a) about the beneficial interest and in so far as the beneficial interest was subsequently transferred at any point by gift, then it should be set aside."

51. And further:

> "…my point is that, and I make it very clear, so that Mr Read can understand, my view is that this was his property, that the company was used as a means of holding it, that beneficially, whether it was in the company's name or otherwise it was owned by Mr Read. Insofar as he at some point formed an intention to give it to his mother, that is the transaction that is set aside, if he did so. Does that make it clear?"

52. In relation to the possibility of a disposition having taken place during what was referred to as the relevant period, the judge went on to say:

> "What I want to be very clear, and this is what I am going to say to Mr Read, is that I do not consider it is necessary for me to be legally specific to the extent of being exact as to which transaction I am talking about. Plainly, if this is the transaction which principally we are looking at, that is covered, but insofar as I am wrong about that it was transferred by some other transaction, that would be covered too. That is the simple answer."

The First Appeal

53. The husband and Mrs Read each appealed the judge's order. The appeal was heard by Mrs Justice Parker on 2 February 2018. Unfortunately, for reasons which are unclear, the order was neither drawn nor sealed until 25 November 2018 where upon Mrs Read promptly filed her notice of appeal.

54. Parker J dismissed the appeal having concluded that the District Judge had been entitled to make an order under section 37(2) of the MCA and that the court had had power to make the order absent an application having been made. Parker J said that there was "nothing in reality" for Mrs Read to add to the information already before the court and accordingly, she had not been prejudiced either by the fact that she was not at court (when the avoidance of disposition order was made) or by the absence of an application.

55. Permission to appeal was given by me as referred to above.

Legal Context

56. The wife's application was for a lump sum order for an amount equal to half the net value of the Panama property. This was, she submitted, a case where the Panama property was effectively the sole matrimonial asset and was subject to the sharing principle having been acquired during the course of a twelve-year marriage.

57. Reverting for a moment to first principles; the Matrimonial Causes Act 1973 (MCA) section 23(1)(c) allows the court to make an order that one party to the marriage pays to the other a lump sum. Where the court has made a lump sum order, the court can pursuant to MCA, section 24A(1) at the time, or at any time thereafter, make an order:

> "[f]or the sale of such property as may be specified in the order, being property in which, or the proceeds of sale of which either or both of the parties has or have a beneficial interest, either in possession or reversion".

58. Before deciding how to exercise its powers under either section, the court has, by MCA section 25, to have regard to all the circumstances of the case, the first consideration being given to the welfare of any minor child; the court then has to have particular regard to matters set out at MCA section 25(2)(a)-(h). In the present case the outcome of the case turned almost in its entirety on a determination by the judge in respect of section 25(2)(a), namely his assessment of the:

> "income, earning capacity, *property and other financial resources,* which each of the parties to the marriage has or is likely to have in the foreseeable future…" (my emphasis)

59. Often, contested cases revolve around the identification of the financial resources which one party is likely to have in the foreseeable future. Many of the reported cases centre on the question of likely access to capital by a party to the proceedings where that party is a beneficiary under a trust. The MCA however specifically provides for the rather different case where a party who owns assets endeavours to put those assets out of the reach of his or her spouse or civil partner by transferring them to a third party.

60. MCA section 37 provides for the "Avoidance of transactions intended to prevent or reduce financial relief". So far as is relevant, the section provides:

> "(1) For the purposes of this section "financial relief" means relief under any of the provisions of sections 22, 23, 24, 24B, 27, 31 (except subsection (6)) and 35 above, and any reference in this section to defeating a person's claim for financial relief is a reference to preventing financial relief from being granted to that person, or to that person for the benefit of a child of the family, or reducing the amount of any financial relief which might be so granted, or frustrating or impeding the enforcement of any order which might be or has been made at his instance under any of those provisions...
>
> (2) Where proceedings for financial relief are brought by one person against another, the court may, on the application of the first-mentioned person—
>
> > (a)if it is satisfied that the other party to the proceedings is, with the intention of defeating the claim for financial relief, about to make any disposition or to transfer out of the jurisdiction or otherwise deal with any property,

> make such order as it thinks fit for restraining the other party from so doing or otherwise for protecting the claim;
>
> (b)if it is satisfied that the other party has, with that intention, made a reviewable disposition and that if the disposition were set aside financial relief or different financial relief would be granted to the applicant, make an order setting aside the disposition;
>
> (c)if it is satisfied, in a case where an order has been obtained under any of the provisions mentioned in subsection (1) above by the applicant against the other party, that the other party has, with that intention, made a reviewable disposition, make an order setting aside the disposition;

and an application for the purposes of paragraph (b) above shall be made in the proceedings for the financial relief in question.

(3) …

(4) Any disposition made by the other party to the proceedings for financial relief in question (whether before or after the commencement of those proceedings) as is reviewable disposition for the purposes of subsection (2)(b) and (c) above unless it was made for valuable consideration (other than marriage) to a person who, at the time of the disposition, acted in relation to it in good faith and without notice of any intention on the part of the other party to defeat the applicant's claim for financial relief.

(5) Where an application is made under this section with respect to a disposition which took place less than three years before the date of the application or with respect to a disposition or other dealing with property which is about to take place and the court is satisfied—

> (a)in a case falling within subsection (2)(a) or (b) above, that the disposition or other dealing would (apart from this section) have the consequence, or
>
> (b)in a case falling within subsection (2)(c) above, that the disposition has had the consequence,

of defeating the applicant's claim for financial relief, it shall be presumed, unless the contrary is shown, that the person who disposed of or is about to dispose of or deal with the property did so or, as the case may be, is about to do so, with the intention of defeating the applicant's claim for financial relief."

61. In brief summary: section 37 requires an application to be made. If the suspect transaction took place within three years of the application there is a presumption that the transfer was intended to defeat the applicant's claim. If the transaction predates three years, then the court has to be satisfied to the civil standard of proof, that the transferor had the necessary hostile intention and that the transfer had not been made to a third party without notice for valuable consideration. In every case the court must be satisfied that if the disposition were set aside, financial relief or "different financial relief" would be granted.

62. It was against this conventional legal backdrop that the District Judge had to decide whether the Panama property was a matrimonial asset. In order to reach this decision, it was necessary for him first to make findings of fact in relation to the purchase and present ownership of the Panama property.

63. In the present case a number of different findings might have been open to the District Judge (for the purpose of this analysis I refer, by way of shorthand, to Mrs Read as 'owning' the Panama property albeit the property is undoubtedly owned by the Company of which Mrs Read is the sole shareholder and the relevant legal and beneficial interests are therefore, strictly, in the shares of the Company rather than the property itself):

    i) Mrs Read was the sole legal and beneficial owner of the Panama property; the husband having given the funds used to buy the property or the property to Mrs Read as a bona fide gift. This is the outcome sought by the husband and would result in no lump sum order being made in the financial remedy proceedings.

    ii) Mrs Read was the legal and beneficial owner of the property, but the beneficial interest in the property had been transferred to her by the husband, with the intention of defeating the wife's claims in the financial remedy case. Mrs Read had provided no "valuable consideration" and the disposition would therefore be susceptible to being avoided pursuant to section 37 MCA.

    iii) Mrs Read was the legal owner of the Panama property but the husband, had at all times retained, and continues to retain the beneficial interest in the property. This would make the husband the sole beneficial owner of the property. This might be the outcome if for example, Mrs Read held the beneficial interest by way of a resulting trust for the husband, he having paid for the property. The husband, although acting as a litigant in person has some legal knowledge, and (it will be recollected) he had attempted to sidestep any suggestion that his mother held the property on a resulting trust by saying (untruthfully) in his defence to the wife's points of claim, that he had given/allocated to his mother the "Funds used to purchase the Property". The reality was that the husband had paid for the Panama property directly to the developers from his own funds.

    iv) Mrs Read was the legal owner of the property, but the beneficial interest was and is held jointly by the husband and wife, the wife's case at trial.

64. As referred to above, the judge heard no submissions in relation to (ii), section 37 MCA (avoidance of disposition orders). The judge decided (option iv) that the wife

had herself no beneficial interest in the property; a finding in respect of which there is no appeal.

65. There was, and is, no dispute that Mrs Read is the legal owner of the Panama property. The question outstanding was, therefore, which of the remaining possible alternatives in respect of the beneficial interest the District Judge found on the facts of the case. In particular, did he find, as Mr Hames on behalf of the wife submits, that option (iii) had been established and the husband retained the beneficial ownership when the property was purchased in the name of the Company? If Mr Hames is correct and the husband is the sole owner of the beneficial interest in the Panama property, it becomes a "financial resource" of the husband and the court was entitled to make a lump sum order in the wife's favour by reference to the net value of the Panama property.

66. Mr Hames submits that on analysis the District Judge held:

    i) That the husband has and retained the beneficial ownership of the property at all times.

    ii) If however the husband had purported to transfer the beneficial ownership subsequently at some unidentifiable date then, the District Judge found, that was a disposition which falls foul of section 37 MCA and it was therefore appropriate to make a section 37 MCA avoidance of disposition order to cover that eventuality.

Grounds of Appeal

67. The three grounds of appeal can be summarised shortly:

    1. The judge was wrong in law to find that the decision of the District Judge was not unjust because of serious procedural irregularity in the proceedings.

    2. The judge was wrong in law to find that the order made by the District Judge declaring that the husband is and was at all material times the sole beneficial owner of the Panama property was one he was entitled to make.

    3. The judge was wrong in law to find that the avoidance of disposition order made by the District Judge was one he was entitled to make.

Approach to the Appeal

68. In my judgment, the appeal is best approached in the following way:

    i) Was there a serious procedural irregularity in the way in which the judge came to make the section 37 avoidance of disposition order? If so, did it lead to an unjust outcome?

    ii) In the event that the section 37 order must be set aside due to the alleged procedural irregularity, had the District Judge, nevertheless, made a secure finding that the husband had, and continues to hold, the beneficial interest in

the Panama property which the District Judge could properly regard as a resource for the purposes of satisfying a lump sum order.

iii) In order to determine this second question, the court must consider what may appear to be, and what is put at the centre of Mrs Read's appeal, an inconsistency as between the declaration in the order to the effect that the husband has and had retained the beneficial interest, as against the section 37 avoidance of disposition order which inevitably depends upon there having been a disposal.

69. Before embarking upon this exercise, I remind myself of Sir James Munby P's observations in *Re F (Children)* [2016] EWCA Civ 546:

> "Like any judgment, the judgment of the Deputy Judge has to be read as a whole, and having regard to its context and structure. The task facing a judge is not to pass an examination, or to prepare a detailed legal or factual analysis of all the evidence and submissions he has heard. Essentially, the judicial task is twofold: to enable the parties to understand why they have won or lost; and to provide sufficient detail and analysis to enable an appellate court to decide whether or not the judgment is sustainable. The judge need not slavishly restate either the facts, the arguments or the law. To adopt the striking metaphor of Mostyn J in *SP v EB and KP* [2014] EWHC 3964 (Fam), [2016] 1 FLR 228, para 29, there is no need for the judge to "incant mechanically" passages from the authorities, the evidence or the submissions, as if he were "a pilot going through the pre-flight checklist."
>
> The task of this court is to decide the appeal applying the principles set out in the classic speech of Lord Hoffmann in *Piglowska v Piglowski* [1999] 1 WLR 1360. I confine myself to one short passage (at 1372):
>
> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case … These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2) [of the Matrimonial Causes Act 1973]. An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

> It is not the function of an appellate court to strive by tortuous mental gymnastics to find error in the decision under review when in truth there has been none. The concern of the court ought to be substance not semantics. To adopt Lord Hoffmann's phrase, the court must be wary of becoming embroiled in "narrow textual analysis".

Procedural Irregularity

70. Pursuant to CPR 1998 r52.21(3)(b):

> "(3) The appeal court will allow an appeal where the decision of the lower court was:
>
> (a) Wrong
>
> (b) Unjust because of serious procedural or other irregularity in the proceedings in the lower court."

71. *Labrouche v Frey* [2012] EWCA Civ 881; [2012] 1 WLR 3160, CA ("*Labrouche")* and *Dunbar Assets Plc v Dorcas Holdings Ltd* [2013] EWCA Civ 864 ("*Dunbar Assets Plc")* were each cases where the Court of Appeal set aside orders on grounds of serious procedural irregularity in circumstances where defendants had not been given the opportunity of responding to applications to strike out their respective applications made for the first time before the judge. In the present case, not only did neither Mrs Read nor the husband have an opportunity to address the court in respect of the making of an avoidance of disposition order, but the issue was not before the court, whether late or otherwise.

72. *L v F (Relocation: Second Appeal)* [2017] EWCA Civ 21 concerned an appeal from a court's refusal to grant a mother's application for permission to relocate with the children of the marriage to Italy. That order had been the subject of an appeal to the High Court. In allowing the appeal against the High Court Judge's decision, Peter Jackson LJ said:

> "4. In the present case, my conclusion is that the decision of HHJ Owens was not wrong or unjust in any way. Instead, the decision on appeal was regrettably both wrong and unjust because of serious procedural irregularity. The main basis on which the appeal was allowed by [….] J arose from a legal argument that had not been raised in the grounds of appeal, had not been addressed by either party, and was in any event incorrect. Her other criticisms of the approach of the trial judge cannot be sustained, and in certain respects she went beyond the proper reviewing role of an appeal court."

73. Mr Horton, on behalf of Mrs Read, sensibly accepts that the absence of a formal application would not inevitably have been fatal to the District Judge's order. In appropriate circumstances a court may, in the exercise of its case management powers, permit an oral application or even deem an application to have been made.

74. I agree. By analogy, in *Dunbar Assets Plc,* the court held that there was nothing procedurally irregular about a trial judge entertaining at the beginning of a trial, a submission that the defendant's pleadings disclosed no defence to the claim even if no formal application to strike out has been made. Such an approach might be appropriate if, on the judge's pre-reading of the papers, it appeared there would be a properly arguable case to strike out which, if established, would save substantial time and expense. But Briggs LJ (as he then was) said:

> "15. Before entertaining such an application, the Judge would have to be satisfied that the defendants had a fair opportunity to respond to it. Before deciding such an application, it is an elementary and fundamental principle of fair procedure that he should first hear submissions on it from the defendants."

75. The serious irregularity stems, Mr Horton submits, from the fact that not only was no application for an avoidance of disposition order made, but it was not at any stage in the contemplation of any of the parties. As a consequence, he says, no evidence was led relevant to the matters set out in section 37 and, in particular, none of the parties gave evidence or were cross-examined as to the critical issue of whether or not there was an intention on the husband's part to defeat the wife's claim, a matter Mr Horton says which was simply "brushed over" in the exchanges set out above at the hearing on 6 January 2017.

76. Mr Horton, supported by Mr Evans, who represents the husband in the appeal, submits that Mrs Read was particularly disadvantaged by the fact that she was not present at either the final day of the hearing, the delivery of the oral judgment or the hearing on 6 January.

77. At the hearing of the first appeal, Parker J held that "the judge's reliance on Section 37 to achieve the objective of making the lump sum available to the wife for the benefit of for herself and her children was obvious". Mr Evans respectfully submits that, the possibility of a section 37 order was not remotely obvious to Mrs Read who conducted proceedings as a litigant in person and was not present or represented for the whole of the hearing. Indeed, he said it had not been obvious to this experienced District Judge during the course of the hearing, as on his own account, it had only occurred to him as a possibility after the conclusion of the trial and as he was drafting his judgment.

78. For my part, I am in no doubt that the way in which the avoidance of disposition order came to be made, amounted to a serious procedural irregularity. Not only was there no application at any stage, but the issue was not raised at trial and through no fault of her own, Mrs Read was not present when judgment was delivered nor, crucially, was she present at the hearing on 6 January.

79. CPR 1998 r52.21(3)(b) requires the decision reached consequent upon serious procedural irregularity to be "unjust". In both *Labrouche* and *Dunbar Assets Plc* it was argued that as the judge had notwithstanding any irregularity reached the right decision, a rehearing would be a self-evident waste of time. Briggs LJ having considered *Labrouche* and submissions from Counsel as to the merits of the defence in *Dunbar Assets Plc* concluded:

> "26. … I have concluded that it would not be right to dismiss this appeal, based as it is on a fundamental denial of fair procedure to the defendants, upon the analysis that the judge was obviously right, so that the remission of the case would serve no useful purpose. I have two reasons for that conclusion.
>
> 27.The first is that I am not quite persuaded that the claimant's case, namely that there is no pleaded defence to its claim for possession sufficient to warrant a trial, has the quality described in the *Labrouche* case as being "overwhelming". Mr. Paget's qualifying principle may perhaps have some application in the present context, albeit far removed from the context from which it has emerged in the authorities.
>
> 28.Perhaps more importantly, it is not every case in which a conclusion that a judge's decision was right prevents a serious procedural irregularity from amounting to an injustice. As the *Labrouche* case makes clear, the denial to a party of any opportunity to make submissions in support (or defence) of its case is a fundamental denial of procedural justice in its own right, regardless of the consequences. While there will be many cases in which, ….the absence of any adverse consequences flowing from a serious procedural irregularity will mean that an appeal based upon on it will fail, there is a residue of cases of grave procedural irregularity, and the present case is one of them, where the absence of consequences does not displace the injustice constituted by the inappropriate treatment of the complaining party".

80. That the procedural irregularity in this case led to an unjust outcome cannot in my view be doubted. Mrs Read, it must be recollected, is the sole shareholder of the Company which, indisputably, owns the legal title to the property in Panama. Mrs Read has, therefore held the legal estate in the property, via the Company, for nine years. Further, the parties did not separate until December 2014, over four years after the property was placed in the Company's name and therefore, as was noted by the judge, the statutory presumption that a disposition has been made with the intention of defeating the wife's claim found at section 37(5) MCA does not bite.

81. As a consequence of the failure to raise the matter during the course of the trial, not only was there no focus on each of the elements which must be satisfied prior to making a section 37 order, but no evidence was led as to the essential ingredients in respect of the husband's intention at the date of any transfer, whenever that may have been.

82. Whether or not, as I discuss later in this judgment, there was in fact any jurisdictional basis for making the order, does not alter the fact that the order was made and Mrs Read was deprived of the opportunity, at least, of dealing with the issue of the husband's intention. In my judgment therefore, the appeal must be allowed on Ground 1 and the avoidance of disposition order set aside.

83. By his Ground 3, Mr Horton submits that regardless of any procedural irregularity, the court would have been wrong in law to have made the order. Whilst having allowed Ground 1, it is not strictly necessary to consider Ground 3, I do so briefly as it was argued in full in the hearing as an alternative to Ground 1.

84. In his submissions, Mr Horton focused on the lack of analysis and evidence as to intention. Mr Evans, on behalf of the husband spread his net wider, rightly pointing out that the judge had been unclear as to when the alleged disposal took place, having referred (during the January hearing) to "any transaction during the relevant period" and "insofar as the beneficial interest was subsequently transferred at any point by gift, then it should be set aside" and "if I am wrong about that and it was transferred by some other transaction, that would be covered too". Mr Evans submits that for the court to make an order avoiding a disposition there must be a specific transaction identified as having been made to the third party in question.

85. There is undoubtedly merit in each of these submissions: Where the allegation is that there has been a "reviewable disposition" under section 37 (2)(b) MCA the applicant must prove that there has in fact been such a "reviewable disposition". In my view this will require the identification and proof of a specific transaction or series of transactions. Further, section 37(2)(b) MCA contains a statutory requirement that the disposition or transfer has been made "with the intention of defeating the claim for financial relief". Where the alleged disposition took place outside the period of the three-year statutory presumption, "intention" has therefore to be proven to the civil standard of proof.

86. Whilst these matters would in themselves result in the appeal against the order made by the District Judge being allowed, there is, in my judgment, a more fundamental flaw; if Mr Hames is right (and in my judgment for the reasons set out below, he is) that the District Judge had found, on a proper evidential basis, that the husband had at all times retained the beneficial interest in the property, then there was simply no jurisdiction to make the avoidance of disposition order given the basic requirement that there has to be a reviewable disposition. The husband has, at no time, held the legal interest in the property which, it will be recalled, was transferred directly from the developers to the Company at the husband's direction. There has thus been no disposal of either the legal or beneficial interests capable of being set aside.

87. It follows that even setting aside for a moment the submissions made as to the validity of the order raised by Mr Evans and Mr Horton, there was simply no basis upon which the court could, as provided at paragraph 1 of the order, set aside "the purported transfer by the First Respondent to the company" given that neither the legal nor beneficial interest of the Panama property had been the subject of a disposal by the husband to the Company.

88. In my judgment it follows that Ground 3 of the Grounds of Appeal also succeeds on the basis that the District Judge was wrong in law to find that he had jurisdiction to make an avoidance of disposition order.

89. The question is now, where does that leave the court, the avoidance of disposition order having been set aside? Can the declaration as to the beneficial interest survive or, as is submitted in support of Ground 2 of the Grounds of Appeal, is there an inconsistency as between the declaration and the overall findings made by the judge

such that the declaration in relation to the beneficial interest in the property must also be set aside leaving the court with no basis upon which to order the payment of a lump sum.

90. It should be noted that whilst there is no formal appeal against the lump sum itself, Mr Evans submits that the absence of a ground of appeal directed to the lump sum matters not as the inconsistencies within the judgment overall require the totality of the order to be set aside.

The Beneficial Interest

91. The District Judge found at [31b] that there was no intention on the husband's part to make a gift to Mrs Read in 2007. He went on to make the clear finding that when he initially purchased the property the husband had done so "for himself". Further, at the hearing on 6 January 2017, the judge also found that the company was "used as a means of holding" the property beneficially for the husband (para 51 above).

92. It follows that the judge, having seen and heard the witnesses, made what would seem to be unequivocal findings that the husband was and remained the beneficial owner of the property.

93. Such a finding may seem to have been almost inevitable:

i) The husband had conducted all the dealings directly and indirectly with the developers and he had paid the entire purchase price directly to the developers.

ii) The District Judge held that at no time, whether in 2007 or 2010 or any time in between, had the wife been aware of any intention that this, the only piece of real property ever owned by either of them, should be given to Mrs Read as a gift.

iii) Further, by 2010, when the property was actually bought, the husband had lost his high paying city employment and had been earning something less then £50,000 for the last two years in circumstances where the children were being privately educated; it could no longer be said (if it ever could) that the husband/the family was in a financial position to afford such a gift.

iv) The District Judge's view that Mrs Read's evidence was "thin at best and unconvincing at worst" ties in with an observation he subsequently made in his costs judgment that the husband's case had been "founded on a lie", which "he had persuaded his mother to support".

94. The question therefore when considering whether the judge's declaration recorded in the order of 6 January 2017 that:

> "… the court hereby declares that at all material times the First Respondent is the sole beneficial owner of the Panama property"

can stand, depends upon whether the court can be satisfied that the judge had found that to be the case or whether, in having purported to make a section 37(2) MCA avoidance of disposition order, he had found, on the balance of probability, that a time

had come when the husband had transferred the beneficial interest in the property to Mrs Read.

95. Mr Hames submits that whilst the structure of the judgment may not have been as clear as it might have been, the primary finding of the District Judge was that the husband was, and always had been, the beneficial owner of the Panama property, a conclusion repeated on a number of occasions in different ways within the judgment and referred to by Mr Hames as the District Judge's "essential finding". Mr Hames further submits that the use of the word 'purported' in the section 37 avoidance of disposition order was clearly intended to act as "belt and braces" to the judge's primary conclusion set out in the declaration that the husband remains the beneficial owner on the basis that, even if it subsequently transpired that there was a "purported" transfer, that transfer should be avoided. Mr Hames emphasises the judge's observations at the hearing of 6 January when he said:

> "I make it very clear, so that Mr Read can understand, my view is that this was his property, that the company was used as a means of holding it, beneficially, whether it was in the company's name or otherwise it was owned by Mr Read".

96. Such a conclusion, Mr Hames submits, not only marries up with the judge's findings in the judgment, but also unequivocally ties in with his impression of the parties and what Mr Hames described as the District Judge's "insightful assessment of the witnesses who he had seen giving evidence not only on one occasion but also within the relocation proceedings".

97. Mr Hames goes on to submit that the finding that the husband has and continues to hold the beneficial interest can also be supported by the established law in relation to resulting trusts.

98. I find the arguments of Mr Hames to be persuasive. As set out above, the husband had, in an attempt to deflect any argument as to the existence of a resulting trust in his favour, said in his defence to the wife's points of claim that he had "given" Mrs Read (by "allocating and hypothecating") the money with which she had then purchased the property. Mr Evans, on behalf of the husband, accepts that (i) no money was given to Mrs Read, (ii) the husband had the benefit of the contract, and paid the full purchase price of the property to the developers and then, (iii) pursuant to the contract, procured the transfer of the property into the name of the Company. Mr Evans rightly accepts that in such circumstances a resulting trust would, absent evidence to the contrary, in all likelihood have arisen.

99. In my judgment it is quite clear upon conducting a tracing exercise through the judgment and the transcript of the hearing on the 6 January, that at no stage did the District Judge find to the requisite standard of proof, that the husband had transferred his beneficial interest in the property to Mrs Read. By way of example, the judge said:

> "It is possible that there may have been some subsequent intention to transfer."

> "My judgment, I think, is quite clear as to what I think a) about the beneficial interest and insofar as the beneficial interest was subsequently transferred at any point by gift, then it should be set aside." *(sic)*
>
> "Insofar as he at some point formed an intention to give it to his mother that is the transaction that is set aside."
>
> "If there was some other disposition during the relevant period … then that too would be set aside."
>
> "If I am wrong about that (and) it was transferred by some other transaction, that would be covered too."

100. In my judgment, nothing found in either the judgment or in the transcript of the hearing of 6 January could be said to amount to a *finding* that the husband had at any stage transferred his beneficial interest to Mrs Read.

101. The Order itself refers to: "the *purported* transfer by the First Respondent to the company dated on or about 26 June 2010" (my emphasis).

102. Not only as a matter of jurisdiction is a court unable to set aside a "purported" transfer (the very purpose of an avoidance of disposition order being to avoid a genuine disposition) but the referral to a disposition by a judge as "purported" confirms in itself that there was no finding by the District Judge that the husband had at any stage succeeded in transferring his beneficial interest to Mrs Read.

103. Likewise, the rest of that provision in the order, starts with the words "*if* some other disposition" of the property occurred (my emphasis). This also supports the conclusion that the judge made no finding that such a disposition had in fact occurred.

104. For the reasons set out above, I am satisfied that the District Judge found as a fact that the husband was the sole beneficial owner of the Panama property at all relevant times.

105. As submitted by Mr Hames, in approving the wording in the declaration, the District Judge was clearly endorsing the finding (which he had confirmed unequivocally to the husband at the hearing on 6 January 2017) that the husband was and remains, the sole beneficial owner of the Panama property. Mrs Justice Parker in dismissing the appeal in its entirety said:

> "74…The fundamental finding was that this was the husband's property. He did not find that on a basis of a possibility but as a fact applying the civil standard".

106. In my judgment notwithstanding a certain lack of structure within the District Judge's judgment but bearing in mind Sir James Munby's observations in *Re F,* there is no doubt that the District Judge held that the husband was at all times the beneficial owner of the Panama property. The husband had himself sought clarification of the judgment at the hearing on 6 January 2017. The judge emphasised directly to him, and in no uncertain terms, the effect of his finding as set out in paragraph 95 above.

107. This clarification of the District Judge's findings was incorporated then and there into the order in the form of the declaration subject to the appeal. In my judgment, the judge's 'belt and braces' addition of an avoidance of disposition order 'just in case' has, unhappily, served significantly to muddy the waters in this case but has not, in any way, undermined the District Judge's fundamental and, it may be thought, completely predictable finding on the evidence, that the husband has at all times held the beneficial interest in the Panama property.

108. It follows that I would reject Ground 2 of the Grounds of Appeal.

Outcome

109. Mr Horton and Mr Evans submit that, in the light of the procedural irregularity, the totality of the judge's order including the declaration of the beneficial interest and lump sum order should be set aside. Mr Horton further submits that given that these proceedings have now been continuing for approaching five-years, the court should not order a re-trial but rather should simply make no order in respect of the wife's application for financial remedy. Mr Evans accepts that such a course would result in the wife leaving the marriage with no substantive financial settlement in her favour, but, he says, it would be the same for the husband and that that is the inevitable and proper outcome to the case.

110. In my judgment such an outcome is neither inevitable nor proper. I revert once again to first principles. The wife made an application for a lump sum order. The judge has found that the husband is the sole beneficial owner of the only asset capable of being regarded as a matrimonial asset. That asset, the Panama property, is therefore a financial resource which the husband "has or is likely to have in the foreseeable future". The judge was therefore entitled to make an order under the sharing principle, and indeed on a "needs" basis on the facts of the case, requiring the husband to pay to the wife a lump sum equal to half the value of the property. Whilst the judgment may have lacked some precision, there was no procedural irregularity in the way in which the District Judge reached his findings in relation to the beneficial interest in the property and those findings are not in my judgment, contaminated by the late, and erroneous, introduction by the District Judge of an order under section 37 MCA.

111. It follows from the rejection of Ground 2, that the lump sum order in favour of the wife remains and it is now a matter for the husband whether he requires the legal owner, his mother Mrs Read, to sell the property in order to raise the money with which to satisfy the order, or whether he chooses to raise it in some other way.

112. If my Lords agree I would therefore allow the appeal on Grounds 1 and 3, and set aside the order made under section 37, but would otherwise dismiss the appeal.

Lord Justice Moylan:

113. I agree.

Lord Justice Leggatt:

114. I also agree. It can be tempting for judges, out of an abundance of caution, to give alternative bases for their decisions which are intended to deal with possibilities that

would arise if their conclusions are wrong. Sometimes this may be prudent or helpful in the event of an appeal, or at any rate may do no harm; but sometimes, as the present case shows, the temptation should be avoided. By making an order under section 37 MCA to avoid a disposition if one had been made (my emphasis), the District Judge introduced unnecessary complication and potential for confusion into what would otherwise have been straightforward factual findings about the ownership of the Panama property. This was all the more unfortunate when, as the judge acknowledged at the post-judgment hearing, no reliance had been placed on section 37 MCA – let alone any application made under that provision – at the trial, and its possible relevance was something that had occurred to him only as he was writing his judgment.

115. For the reasons explained by King LJ and with which I entirely agree, the introduction of section 37 MCA into the proceedings at that stage amounted to a serious procedural irregularity which led to an unjust outcome, as well as being legally misconceived. But it was also a red herring because, on analysis, the District Judge had actually found as a fact that the husband was the sole beneficial owner of the Panama property at all relevant times – so that there had in fact been no disposition of the property by Mrs Read to the husband which was capable of being avoided. It is manifestly impossible to set aside a disposition which was never actually made.

116. When this overlay is stripped away, the financial outcome of the case remains the same, except – and it is a big exception – for the incurrence of substantial legal costs on two appeals. There is a lot to be said for keeping things simple.