Claim No. HC 2017-000419

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

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Before:

MR JUSTICE MORGAN

- -

Between:

RAJA	**Claimant**
- and -	
(1) NICHOLAS VAN HOOGSTRATEN	**Defendants**
(2) MAXIMILIAN HAMILTON	
(3) ALEXANDER HAMILTON	
(4) BRITANNIA HAMILTON	
(5) RICHMOND HAMILTON	
(6) LINCOLN HAMILTON	
(7) NICHOLAS RHODES HAMILTON	
(acting by his litigation friend, Hugh Cole)	
(8)	

- -
- -

MR PETER IRVIN for the **Claimant**
The First Defendant appeared in person
MR MARK WARWICK QC for the **Second to Seventh Defendants**

- -

Approved Judgment

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MR JUSTICE MORGAN:

The Issue.

1. This is the trial of a preliminary issue which was directed by Deputy Master Arkush on 25 May 2017. The issue is defined in these terms:

> "What, if any, beneficial interest does the first defendant have in the properties
>
> (1) 12 The Drive, Hove, East Sussex BN3 3JA, title No ESX184132; and
>
> (2) 208 Preston Road, Brighton, East Sussex BN1 6RA, title No SX142621."

The background facts.

2. Before dealing with the specific facts which are relevant for the determination of this issue, I wish to refer to some background matters. The litigation between the Raja estate and Mr Van Hoogstraten goes back a long way. Some of the relevant events and some of the steps in that protracted litigation are described in the judgment of the Court of Appeal, reported as *Raja v Van Hoogstraten (No 9)* [2009] 1 WLR 1143. In the judgment of the Court of Appeal given by Mummery LJ the court said:

> "12. Mr Raja was a property developer. On 8 October 1993 he began an action for damages against Mr van Hoogstraten. In April 1999 he obtained the leave of the court to amend his particulars of claim to plead fraud.
>
> 13. On 2 July 1999 Mr Raja was shot dead. Arrests and criminal charges followed in September 2001. Mr van Hoogstraten was accused of engaging 2 men to murder Mr Raja. On 22 July 2002 the two gunmen were convicted of Mr Raja's murder. Mr van Hoogstraten was acquitted of murder. He was convicted of manslaughter and sentenced to 10 years imprisonment. The Court of Appeal quashed his manslaughter conviction in July 2003 and gave directions leading to his re-indictment. Mr van Hoogstraten remained in prison until December 2003 when the fresh indictment was quashed. He was then released from prison.
>
> 14. In the civil proceedings Lightman J gave a series of judgments culminating in a judgment of 19 December 2005, [2005] EWHC 2890 (Ch), in which he held that Mr van Hoogstraten had hired two thugs to murder Mr Raja in order to halt the prosecution of his claim. The Court of Appeal refused permission to appeal against that judgment."

3. Mummery LJ's judgment on behalf of the Court of Appeal continues with a detailed description of the many steps taken in that litigation. I need not refer to matters of detail. In the course of that litigation, the Raja estate has obtained a number of orders for costs against Mr Van Hoogstraten. I am told that the sums which are due from him to the Raja estate are now in excess of £1.6 million, including interest. I am also told that the damages payable by him to the Raja estate for the unlawful killing by him of Mr Raja have not yet been assessed.

4. Mr van Hoogstraten has not paid a penny towards the costs of £1.6 million. He has defiantly said, repeatedly, that he does not intend to pay anything to the Raja estate. He feels able to ignore orders which the court has made against him. Although he has often boasted about his great wealth in the past, his case now is that he has no significant assets, and that the Raja estate will be unable to recover any sum from him. He obviously takes great pleasure in that being (if it is) the state of affairs.

The charging orders.

5. The Raja estate plainly found out that there were two properties registered at the Land Registry in the name of Nicholas Hamilton. Mr van Hoogstraten has used that name extensively in the past. In fact most of the documents which are relevant in this case are in the name Hamilton rather than van Hoogstraten. Nonetheless, I will continue to use the name van Hoogstraten, as that is the name which has been used in this litigation.

6. The two properties in question are 12 The Drive and 208 Preston Road. On 25 August 2006 Pumfrey J made interim charging orders under the Charging Orders Act 1979 in relation to the costs orders in favour of the Raja estate.

7. Not much happened in relation to these charging orders until 2016. I can take the story up from the judgment of Norris J given on 4 November 2016. I need to refer to that judgment not only for the history of the matter, but also as to the judge's reasons for the course which he took. In paragraph 7, Norris J referred to the Charging Orders Act 1979 and to the fact that a charging order can be made in relation to an interest held by the debtor beneficially – see section 2(1) of the Act.

8. Norris J then set out the history of the matter between 2006 and 2016. The Raja estate applied to the court for the interim orders to be made final. Mr van Hoogstraten opposed that on the basis that he held the properties on trust for his children. He said that the trust had been declared by a Deed of Trust dated 30 June 1992.

9. I will now read paragraphs 68-73 of the judgment of Norris J:

> "68. In my judgment it is now far too late for Mr. Hoogstraten to seek to advance the claim that this property is trust property. He could have done so in 2006. If he had prosecuted his claim then, one could not, of course, have got the evidence of Mr. Bagot who died in 1993, but one could have got evidence much closer to the events of 1992 than is now available. This, I consider, puts the Raja estate at a significant disadvantage in being able to challenge whether the trust is indeed a genuine trust and whether the assets are, in truth, the assets of Mr.

> Bagot or assets which formerly belonged to Mr. Hoogstraten and which he had put into trust in an attempt to avoid his creditors. By lying low Mr. Hoogstraten has made these issues much more difficult of resolution. I do not consider that he may now advance his arguments because of his delay.
>
> 69. In these circumstances, although I do not consider that the effect of not having a decision on the issue raised by Mr. Hoogstraten on the 9th October 2006 rendered the interim order final, it is now in effect final because the issues can no longer fairly be examined.
>
> 70. In these circumstances I will declare that the charging order is final. Whether it should be enforced by an order for sale is an entirely separate question.
>
> 71. I do not consider it in the circumstances necessary (as the Raja estate submitted it was) to examine the question whether the trust is a sham trust. I do not consider it necessary to seek disclosure from Mr. Hoogstraten about how the trust has been administered from 1992 through to 2016. These avenues, it seems to me, could have been explored in 2006 had he prosecuted his case but now are disproportionately expensive to pursue and with much reduced prospects of anything valuable emerging.
>
> 72. It is said by Mr Hoogstraten that this is unfair on the beneficiaries. I do not agree. The beneficiaries have their claims against Mr. Hoogstraten for having failed to preserve the trust assets. They are his children. It is entirely a matter for them whether they take those proceedings up or not.
>
> 73. In the result, I find and hold that the effect of Mr. Justice Pumfrey's charging order on the 26th April 2006 is to charge The Drive and Preston Road with the judgment debt awarded to the Raja estate in respect of its costs of pursuing Mr. Hoogstraten."

10. If matters had rested there, I think the position would have been fairly plain. The judge had held it was too late for Mr van Hoogstraten to assert the existence of a trust over the two properties. The judge made the charging orders final. That would allow the Raja estate to apply for an order for sale, and if an order for sale were made the proceeds of sale would be paid to the Raja estate to the extent needed to pay the sums due under the costs orders. The judge considered the position of the alleged beneficiaries under the trusts. The alleged trustee had failed to defend the trust property and the judge held that any claim the beneficiaries might have should be addressed to the defaulting trustee.

11. However, matters did not rest there. Mr van Hoogstraten sought permission to appeal to the Court of Appeal, but this was refused by Gross LJ on paper on 3 April 2017. In addition, the 6 children of Mr van Hoogstraten applied to intervene in the proposed appeal. Gross LJ did not permit them to intervene. However, the directions which he gave and his reasons for them are highly relevant:

> "**Decision:** …
>
> 1. The Defendant ('the Applicant') is refused PTA.
>
> 2. It follows that there is no appeal in which the (alleged) Beneficiaries ('the IPs') can intervene.
>
> 3. The application by the IPs for a stay of the enforcement of the Charging Order, the subject of the judgment and order of Norris J dated 4 November 2016 ('the judgment') is refused.
>
> 4. If the IPs are so advised, they are at liberty in the course of the Respondent's application for an order for the sale ('the order for sale proceedings') of the properties in question ('the properties').
>
> (i) To seek to assert their (alleged) beneficial interests in the properties; and
>
> (ii) To contend that the final Charging Order by its terms only affects any beneficial interest of the Applicant in the properties. This Court expresses no view one way or the other on the outcome of any such application by the IPs, though the Court hearing the order for sale proceedings will no doubt be mindful of the decision in *JSC BTA Bank v Ablyazov (No 15)* [2016] EWCA Civ 987; [2017] 1 WLR 603.
>
> **Reasons**
>
> 1. The Applicant has no good reason for having failed to pay the Respondent the very significant sums outstanding over many years in respect of costs (now estimated at £1.5 million).
>
> 2. On the facts of this case and the terms of the interim Charging Order, Norris J did not err as to the Burden of Proof.
>
> 3. If the IPs were minded to intervene, they should have intervened in the proceedings before Norris J prior to, not after, his judgment.
>
> 4. In any event, the judge's decision advserse to the Applicant did not override the rights of the IPs, in that they are at liberty in the order for sale proceedings to proceed in accordance with **Decision, para 4**, above. Additionally, the IPs may have other remedies as indicated by the judge, at [72] of the judgment

> (though, again, this Court expresses no view on the merits of any such claims, if they are pursued).
>
> 5. There is no let alone any real prospect of any appeal by the Applicant succeeding.
>
> 6. PTA is accordingly refused.
>
> 7. It follows that there is no appeal in which the IPs can intervene.
>
> 8. In the circumstances, the application by the IPs for a stay of the enforcement of the Charging Order falls away. In any event, in all the circumstances already recounted, it would be contrary to the interests of justice now to grant a stay.
>
> 9. It is instead just that the IPs are left to pursue such remedies as are open to them under **Decision, para 4** and **Reasons para 4** above."

12. Gross LJ plainly thought that the children would be entitled to seek to assert their beneficial interest in the 2 properties providing they were joined as parties at the stage when the Raja estate applied for orders for sale of the properties. It is ultimately not for me to question the reasoning of Gross LJ. I would point out, however, that in the *Ablyazov (No 15) case*, to which he referred, the application by the alleged beneficiary to intervene in the charging order proceedings was made before the charging order was made final. By way of contrast, in this case Norris J had made final charging orders, and he had specifically addressed the position of the alleged beneficiaries. He may or may not have been right about the view which he took, and the alleged beneficiaries might have persuaded the court to allow them to intervene and appeal his decision, but Gross LJ did not do that. He left the order of Norris J undisturbed. However, in the events which have happened my comments about the course taken by Gross LJ no longer matter. When the Raja estate brought the present proceedings for orders for sale they named Mr van Hoogstraten alone, but by order of Deputy Master Linwood on 5 April 2017 the children were joined as defendants and they were directed to serve a defence to the claim. There was no appeal against that order.

13. In his defence to this claim, Mr van Hoogstraten pleaded that he was a trustee of both properties. He pleaded that he held the same on the terms of a Trust Deed dated 30 June 1992. The children served a defence saying that they were the beneficiaries under the same Trust Deed. The Raja estate served a reply, saying that the purported trust was not genuine.

> "8. The purported Trust is not and was never intended to be genuine, or to confer a beneficial interest on these Defendants as children of the First Defendant, for the reasons set out below. It is a vehicle that the First Defendant intended to use and has continued to use to avoid payment to his creditors. The First Defendant has boasted on numerous occasions over the years both in court and in the media of the fact that he has

> insulated himself from creditors by placing his assets in the name of 'stooges', who will carry out his wishes, so that he retains control and is able to use those assets for his own purposes.
>
> 11. Accordingly, the First Defendant as sole alleged trustee would therefore be able to do exactly what he liked with the properties or the proceeds of sale for the rest of his life, unless of course he intended to comply with his duties as alleged sole trustee. The Claimant contends that is highly unlikely in the case of someone of the First Defendant's notorious background and propensities. The Claimant further contends that it is extremely unlikely that any children of the First Defendant would have the knowledge or temerity, or possibly even motive, to challenge anything their father did with regard to the purported trust of which they were supposedly beneficiaries. In all the circumstances, it is to be inferred that he had no intention from the outset of operating the alleged trust as a genuine trust, and that the purported settler Mr Bagot, as an associate of the First Defendant, must have known that."

The reply also pleaded that 12 The Drive had been transferred to Mr van Hoogstraten by an earlier transfer dated 3 February 1992, but it was pleaded that Mr van Hoogstraten had an "alleged capacity" of a trustee. The reply pleaded that 208 Preston Road had been transferred to Mr van Hoogstraten by a transfer of 18 August 1989, and there was no reason to doubt that Mr van Hoogstraten was the beneficial owner of 208 Preston Road.

14. This reply led to a rejoinder by the children. The rejoinder pleaded that if 12 The Drive was not held on the terms of the Deed of Trust of 30 June 1992, then it was held on the trust declared by the earlier transfer of 3 February 1992.

15. Various orders for disclosure have been made in these proceedings. On 25 May 2017, Deputy Master Arkush ordered all parties to give disclosure. On 31 January 2018 Master Shuman ordered the children to give specific disclosure of the categories of documents set out in a schedule to her order.

16. At the trial of the preliminary issue, Mr Irvin appeared on behalf of the Raja estate and Mr Warwick QC appeared on behalf of the children. Mr van Hoogstraten attended the trial in person. He intended to participate in the trial of the preliminary issue as a party to the proceedings. At the beginning of the trial I ruled that the effect of the judgment and order of Norris J was that it was not open to him to contend that the properties were held by him on trust for the children. I held that the order of Gross LJ had not altered that position. Conversely, I indicated my view that in the light of the order of Gross LJ and the further orders joining the children as parties to these proceedings and the direction that a preliminary issue be tried, I was now required to try that issue. There was no appeal by the Raja estate against the order that a preliminary issue be tried. Accordingly, at the trial of the preliminary issue the children, as parties to these proceedings, were entitled to participate and to contend that the properties were held on trust for them. I also held they were entitled to call

Mr van Hoogstraten as a witness in accordance with a witness statement he had served, albeit out of time.

17. In the course of the trial there was discussion as to how the children could assert that 12 The Drive was held on the trusts of the deed dated 30 June 1992; alternatively, on the trusts of the transfer dated 3 February 1992. Whilst there may in an ordinary case be no difficulty in pleading cases in the alternative, on the facts of this case there was a considerable logical difficulty in putting forward a primary case that the trust of 3 February was of no effect, and therefore the trust of 30 June 1992 was effective; but then, in the alternative, reversing that and saying that the trust of 3 February 1992 was effective after all. In the light of this discussion, the children amended their defence to contend that 12 The Drive was held on the trusts of the transfer dated 3 February 1992; alternatively, on the trusts of the deed of 30 June 1992. At least that way of putting the case was logical. I gave the children permission to make that amendment. In response, the Raja estate has contended that the alleged trust of 12 The Drive declared by the transfer of 3 February 1992 was not genuine either.

18. Mr van Hoogstraten and his eldest son, the second defendant, gave evidence at the trial. Mr van Hoogstraten was a deliberately difficult witness. He was prepared to argue his case and to give information which he considered would help his case. He was very reluctant to give any other information. He was reluctant to give straight answers to proper questions. He frequently, indeed usually, suggested that the question was a stupid question which he could not be expected to answer, and he abused Mr Irvin instead of answering the questions put. This unhelpful attitude on Mr van Hoogstraten's part meant that taking his evidence took far longer than should have been the case. Nonetheless, part of his evidence was corroborated by the documents. I am also prepared to accept some of his evidence, even if not corroborated by the documents, on the basis that his evidence in those respects is likely to be true. The second defendant was more straightforward than his father in giving his evidence. He did answer many questions, but he also took the questions as an opportunity for him to argue with the cross-examiner, which was not helpful. I also heard evidence from a Mr Browne, who, amongst other things, witnessed the signatures on the Deed of Trust in this case.

<u>The events of central importance</u>.

19. I start by giving the dates of birth of the first 4 children, as these dates are relevant to a number of the documents which were entered into. The second defendant was born on 9 June 1985, and the third defendant was born on 24 February 1988. The fourth and fifth defendants were born on 13 September 1990 and 3 January 1991 respectively. It follows that Mr van Hoogstraten had 4 children prior to the alleged Deed of Trust on 30 June 1992. The sixth and seventh defendants were born after that alleged Deed of Trust. Five of the 6 children are now adults, the sixth child is 9 years old. (I will refer to them as "the children" without any disrespect, as it is convenient to do so in view of their ages at the dates of the documents in this case.)

20. The first transfer to which I will refer is not a transfer to Mr van Hoogstraten. It is the transfer dated 9 August 1985 of 106 Upper Brockley Road, Brockley, London SE4 to Miss Caroline Williams, the mother of the second and third defendants. The price paid was £15,000. It was not argued before me that Miss Williams held that property as a nominee for Mr van Hoogstraten.

21. In 1985 and 1986 a Mr Bagot made 3 gifts of sums of money. Mr Bagot's date of birth was 22 December 1905, so that he was an elderly gentleman at the date of these gifts. He had been an accountant and an investor in property. He was unmarried. He had known Mr van Hoogstraten for many years and they had a close relationship. Mr Bagot had made Mr van Hoogstraten the executor of his will as early as 26 October 1973, and under that will Mr van Hoogstraten was to be the residuary beneficiary of Mr Bagot's estate. Mr Bagot's 3 gifts of money were made on 10 October 1985, 5 June 1986 and 24 July 1986. On 20 January 1986 Mr Bagot signed an Inland Revenue Capital Transfer Tax form stating that the gift of 10 October 1985 was to the second defendant, who was at the date of the gift some 4 months old. It is possible that Mr Bagot filled in similar forms for the later 2 gifts, but, if so, they have not survived.

22. I will now refer to 8 transfers of 8 properties to Mr van Hoogstraten. In 7 of these transfers Mr van Hoogstraten is stated to be a trustee for either the second defendant or the third defendant.

23. The first of these transfers was on 24 June 1987. The property transferred was 38 First Avenue, Hove. The transferor was Mr Bagot. The transferee was stated to be Mr van Hoogstraten as trustee for the second defendant. The consideration was nil.

24. The second of these transfers was on 25 February 1988. The property was 39 First Avenue, Hove. The transferor was Mr Bagot. The transferee was stated to be Mr van Hoogstraten as trustee for the third defendant. The consideration was nil.

25. The third of these transfers was on 22 November 1988. The property was 161 Upper Brockley Road. The transferor was Miss Williams. The transferee was stated to be Mr van Hoogstraten as trustee for the third defendant. The consideration was £30,000.

26. The fourth of these transfers was on 6 March 1989. The property was 196 Kingston Road, Leatherhead, Surrey. The transferor was Mr Bagot. The transferee was stated to be Mr van Hoogstraten as trustee for the third defendant. The consideration was nil.

27. The fifth of these transfers was also on 6 March 1989. The property was 822 Harrow Road, London NW10. The transferor was Mr Bagot. The transferee was stated to be Mr van Hoogstraten as trustee for the second defendant. The consideration was nil.

28. The sixth of these transfers was on 18 August 1989. The property was 208 Preston Road, Brighton. The transferor was a Mr Knight. The transferee was Mr van Hoogstraten. There was no mention of any trust. The consideration was £190,000.

29. The seventh of these transfers was on 3 February 1992. The property was 12 The Drive, Hove. The transferor was Messina Estates Limited, a company with which Mr Bagot and Mr van Hoogstraten were connected in some way. The transferee was stated to be Mr van Hoogstraten as trustee for the second defendant. The consideration was £246,000.

30. The eighth and last of these transfers was on 24 March 1992. The property was 106 Ledbury Road, London W11. The transferor was Mr Bagot. The transferee was

expressed to be Mr van Hoogstraten as trustee for the second defendant. The consideration was £90,000.

31. Taking stock at this point, the transfers to which I have referred purported to provide for Mr van Hoogstraten to hold 4 properties on trust for the second defendant, 3 on trust for the third defendant, and 1 where no trust was mentioned. The properties held for the second defendant were 38 First Avenue, 822 Harrow Road, 12 The Drive and 106 Ledbury Road. The 3 held for the third defendant were 39 First Avenue, 161 Upper Brockley Road and 196 Kingston Road. The one where no trust was mentioned was 208 Preston Road.

The Trust Deed

32. The Trust Deed is dated 30 June 1992. The parties to the deed were Mr Bagot (referred to as 'the Settlor') and Mr van Hoogstraten (referred to as 'the trustee'). The recitals to the Deed provided:

> "(1) The Settlor has transferred to the Trustee the following sums of money on the dates specified for the benefit of the Trustee's existing and future children: 10 October 1985 – £20,000; 5 June 1986 – £15,000; 24 July 1986 – £245,000.
>
> (2) The said sums of money have been applied by the Trustee in the purchase of the properties as set out in the Schedule hereto which properties now form the assets of the trust hereinafter described.
>
> (3) The Settlor and the Trustee wish to set out the terms and conditions upon which the said assets are and will continue to be held by the Trustee and have consequently agreed to execute this Deed."

Clause 1 of the Deed contained definitions as follows:

> "1. In this Deed where the context permits:
>
> (1) 'The Trustee' hereinafter means the Trustee or other the Trustees or Truste fo the time being hereof.
>
> (2) 'The Trust Fund' means the said assets and ay assets hereinafter added to the Trust Fund by way of further settlement (whether by the Settlor or any other person) capital accretion accumulation or income or otherwise and all assets from time to time representing the above mentioned assets.
>
> (3) 'The Beneficiaries' means the children of the said Nicholas Hamilton now living and all other children of the said Nicholas Hamilton who may be born in future (but excluding any child born after the attainment of twenty five years by the first child of the said Nicholas Hamilton to attain that age).

> (4) 'The Accumulation Period' means the period of twenty one years commencing from the date of this Deed.
>
> (5) 'The Perpetuity Period' means the period of eighty years from the 10 October 1985 (being the Perpetuity Period for the purposes of this Settlement).
>
> (6) 'The Act' means the Inheritance Tax Act 1984."

Clause 2 of the Deed was the relevant Declaration of Trust in these terms:

> "2. Subject to the powers and provisions hereinafter contained the Trustee shall stand possessed of the income and capital of the Trust Fund UPON TRUST absolutely for such of the Beneficiaries as shall attain the age of forty years before the expiry of the Perpetuity Period and if more than one in equal shares and subject thereto for each of the Beneficiaries of their issue as shall be living at the end of the Perpetuity Period in equal shares per stirpes absolutely."

Clause 3 dealt with the position in relation to the income of the Trust. Clause 4 allowed accumulation of the income. Clause 5 provided that Section 32 of the Trustee Act 1925 applied to the Deed. Clause 6 of the Deed provided:

> "In default of and subject to the trusts and powers hereinbefore declared and to the extent that the same shall not take effect the Trustee shall hold the Trust Fund and the income thereof UPON TRUST for the said Nicholas Hamilton absolutely."

Clause 7 of the Deed provided that the Trustee could declare that a beneficiary under the age of 40 should be deemed to have reached the age of 40. Clause 8 provided that 2 trustees would be able to resettle the Trust property on alternative trusts, including discretionary trusts in certain circumstances. I did not hear submissions on the meaning and effect of this clause and I do not express any view as to its operation. Clause 9 expressed certain limitations on the powers of the Trustee. Clause 10 dealt with powers of investment. Clause 11 incorporated the statutory power of appointing new trustees. The Schedule to the Deed of Trust listed the 8 properties to which I have earlier referred. It was not disputed that the Deed of Trust was executed by Mr Bagot and by Mr van Hoogstraten.

33. I comment at this stage that the apparent purpose of the second recital was to demonstrate that the properties in the Schedule were the result of investing the 3 gifts of money referred to in the first recital. This would mean that the date of the lifetime gifts by Mr Bagot were the dates of the 3 gifts of money and not any other dates. However, the second recital was wrong. Four properties – 38 First Avenue, 39 First Avenue, 196 Kingston Road and 822 Harrow Road – had not been bought with the gifts of money, but were separate gifts for nil consideration at later dates than the date of the gifts of money. There is also reason to suspect the statement that the other 4 properties were bought with Mr Bagot's gifts of money. The gifts totalled £280,000 and the purchase prices totalled £556,000. However, I recognise that it is possible

that some of the purchase prices were raised on mortgage. I therefore make no specific finding on that matter.

34. The real oddity about the Trust Deed is that it purported to declare new trusts when, on the case which is now presented to me, 7 of the 8 properties were the subject of pre-existing and inconsistent trusts. I also note that 2 of the 7 earlier trusts had been declared very shortly before the Trust Deed of 30 June 1992. I refer to the transfers of 3 February 1992 and 24 March 1992 respectively. It is clear that the solicitors who drew up the Deed of Trust were not aware of the 7 earlier declarations of trust. It seems inconceivable that the solicitors could have drafted the Deed of Trust in the way in which they did if they had known of the earlier trusts. There was obviously some communication between Mr van Hoogstraten and the solicitors before the Deed of Trust was prepared, and the solicitors plainly gave advice to Mr van Hoogstraten. All that has survived of these communications is a detailed letter from the solicitors of 26 June 1992, which describes the effect of the then draft deed.

Events after 1992.

35. After 1992 Mr van Hoogstraten sold 6 of the 8 properties referred to in the Deed of Trust. I was not given very much by way of documentary evidence as to the dates of the sales, nor as to the net proceeds of sale. There are documents which show the position in relation to 822 Harrow Road and 161 Upper Brockley Road. The evidence, which is not completely reliable, was that the properties were sold for the following prices: 38 First Avenue – £130,000; 39 First Avenue – £75,000; 822 Harrow Road – £65,000; 106 Ledbury Road – £285,000; 196 Kingston Road – £60,000; and 161 Upper Brockley Road – £120,000. These figures total £735,000. The evidence as to what happened to the proceeds of sale is not reliable either. There were mortgages on one or possibly more of these properties. There appears to have been a mortgage in relation to 106 Ledbury Road. There was a suggestion that there were mortgages on 12 The Drive and 208 Preston Road, but they were not sold. It was suggested that the proceeds of sale went to buy 2 properties, namely 6 Oakley Close, Welwyn AL6 0QL and 10 Tongdean Road, Hove. The price for the Welwyn property was £240,000. I was not told the price for 10 Tongdean Road. These properties were used as residences for members of the family. The properties were owned by limited companies. The 5 adult children were the shareholders in the company owning the Welwyn property. I think it was suggested that the children, or some of them, were the shareholders in the company owning 10 Tongdean Road.

36. I will now consider what happened to the income from the properties since 1992. The position for the period up to or around 2004/2005 is less clear than for the later period. However, at all times it seems that the income was paid into an account where it was mixed with non-trust money. Expenditure on the properties came out of this account. The account was used for other expenditure also. It is not possible to know precisely what the income was used for before 2004/2005. From 2004/2005 the mixed account appears to have been managed by the second defendant rather than by Mr van Hoogstraten. Some rudimentary accounting was done on the basis that the income from the properties was held for the children rather than for Mr van Hoogstraten. There was no separate trust bank account and there was no proper process of accounting for trust monies.

37. It emerged at a late stage in the trial that since around 2006 the income from 12 The Drive and 208 Preston Road has been treated as the income of a limited company Hamilton Property Holdings Limited. The 6 children are the shareholders in this company. As the income is treated as the income of the company and not the income of a trustee, corporation tax is potentially payable on the income, save that the losses of the company in other respects have reduced the relevant income to nil, or nearly nil, so that minimal tax is paid. Of course, if the net income had been treated as trust income, as the children assert in this court it should have been, a much higher rate of tax would have been payable.

38. Mr van Hoogstraten did not tell me about these arrangements in his evidence. The second defendant suggested that HMRC had agreed to this method of accounting and taxation. He did not produce any document to record any such agreement. I understood from his evidence that he himself had not seen any such document. I am very sceptical as to whether this evidence is true as to the position of HMRC. However, as the matter emerged late in the trial and was not fully explored, I am cautious as to whether I should find there has been a blatant attempt to cheat HMRC, although I can say that the position looks very suspicious indeed.

The law.

39. I was referred to a number of authorities for the legal principles to be applied when considering whether a purported legal document is a sham. The cases to which I was referred were *Snook v London & West Riding Investments Limited* [1967] 2 QB 786; *AG Securities Limited v Vaughan* [1990] 1 AC 417; *National Westminster Bank plc v Jones* [2001] 1 BCLC 98; *Hitch v Stone* [2001] STC 214; *Shalson v Russo* [2005] Ch 281; and *A v A* [2007] 2 FLR 487. I am also aware of the recent decision in *JSC Mezhdunarodniy Bank v Pugachev* [2017] EWHC 2426 (Ch). Based on these authorities, I can summarise the principles, insofar as they are relevant in this case, as follows:

1. A sham involves acts done or documents executed by the parties to the sham which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations, if any, which the parties intend to create.

2. The persons whose intentions are relevant in this context are the persons who did the acts, or who were the relevant parties to the documents which were executed.

3. The concept of a sham can apply to a settlement by way of trust.

4. An allegation of sham is an allegation of deliberately misleading conduct which involves a degree of dishonesty.

5. There is a presumption that a duly executed legal document is intended to have legal effect in accordance with its terms.

6. It follows from (5) above that the person who alleges that a legal document is a sham has the burden of establishing that contention.

7. The conduct of the parties to the alleged sham after they have entered into the transaction is admissible on the question whether the transaction was intended to be genuine or a sham.

8. A trust which is not initially a sham cannot subsequently become a sham.

9. The fact that a trustee under a genuine trust subsequently commits a breach of trust does not show that the trust was not originally genuine.

10. A trust which was initially a sham could conceivably subsequently lose that character and become a genuine trust, but that was not argued in this case.

Discussion.

40. On 10 October 1985, Mr Bagot made a gift of £20,000 for the benefit of the second defendant, who was then about 4 months old. On 20 January 1986, Mr Bagot completed an Inland Revenue Capital Transfer Tax form stating that the gift was in cash and the transferee was the second defendant. No doubt the money was handed to Mr van Hoogstraten rather than to the 4-month old second defendant, so that Mr van Hoogstraten would be the trustee of the money for the second defendant. The fact that this gift took place is not in dispute. It is also not in dispute that this was a genuine gift by Mr Bagot to the second defendant. The gift of £20,000 shows a number of things. The first is that Mr Bagot, who was an accountant, was aware of the Capital Transfer Tax consequences (later the Inheritance Tax consequences) of lifetime gifts made by him. The second is that Mr Bagot, who was then nearly 80 and unmarried, wished to be generous to a child of Mr van Hoogstraten. The evidence shows that Mr Bagot and Mr van Hoogstraten had had a close relationship for many years. The Deed of Trust recited that Mr Bagot had made 2 further gifts of money. These gifts were stated to have been £15,000 on 5 June 1986 and a much larger sum, £245,000, on 24 July 1986. The documents do not include Capital Transfer forms in relation to these 2 gifts but it is accepted that these gifts were made by Mr Bagot. The Deed of Trust states that the gifts were made for the existing and future children of Mr van Hoogstraten. It may be that that is not how it was expressed when the gifts were actually made, it may be that it was stated that the gifts were for the second defendant, but I do not need to make a finding on that matter. These further gifts further show that Mr Bagot was prepared to be generous to a child of or the children of Mr van Hoogstraten.

41. Mr Bagot made 4 transfers of properties for a nil consideration to Mr van Hoogstraten. These were 38 First Avenue on 24 June 1987, 39 First Avenue on 25 February 1988, 196 Kingston Road on 6 March 1989, and 822 Harrow Road on 6 March 1989. Each of these 4 transfers stated that the transfer was to Mr van Hoogstraten on trust for a child. The second defendant was the beneficiary in the case of 2 of these properties. The third defendant was the beneficiary in the case of the other 2. Each of those 4 properties was sold by Mr van Hoogstraten before the Raja estate obtained the charging orders in this case, but it is still relevant to ask whether those 4 transfers on trust were genuine. The contemporaneous evidence points clearly to these 4 transfers being genuine. As was seen with the 3 gifts of sums of money, Mr Bagot was prepared to be generous to the children of Mr van Hoogstraten. Apart from a point I will consider later as to how it came about that Mr Bagot and Mr van Hoogstraten executed a deed of trust in June 1992 declaring inconsistent trusts of

these 4 properties, and apart from a submission as to the effect of events after 1992, there is really no reason to think that these 4 declarations of trust were anything other than genuine.

42. I accept Mr van Hoogstraten's evidence that neither he nor Mr Bagot would have wished these 4 properties to be transferred from Mr van Hoogstraten as beneficial owner. The evidence is clear that by this stage, as a result of his earlier dealings with the Inland Revenue, Mr van Hoogstraten genuinely wished to divest himself of his assets, although he genuinely wished his former assets to be available to his children.

43. On 22 November 1988, Miss Caroline Williams, the mother of the third defendant, transferred 161 Upper Brockley Road to Mr van Hoogstraten on trust for the third defendant. I was not asked to find that Miss Williams had owned 161 Upper Brockley Road as a nominee for Mr van Hoogstraten. So apart from the impact of the later Declaration of Trust, and apart from the submission as to events after 1992, there is no contemporaneous reason to think that the transfer of this property on trust for the son of Miss Caroline Williams was anything other than genuine.

44. On 18 August 1989, Mr van Hoogstraten bought 208 Preston Road from a Mr Knight. The transfer to Mr van Hoogstraten did not state that he was a trustee for anyone. It may be that if the later Deed of Trust was correct, Mr van Hoogstraten may have used some of the money given to him by Mr Bagot on trust for a child or children in order to buy this property. If that had happened, then Mr van Hoogstraten would have held the property on the same trusts as the trusts of the money. However, I was not invited by either party to make this finding.

45. On 3 February 1992 Messina Estates Limited transferred 12 The Drive to Mr van Hoogstraten on trust for the second defendant. The purchase price was £246,000. It does not matter whether Mr van Hoogstraten used the money previously given by Mr Bagot towards the purchase price of this property, as the transfer clearly states that Mr van Hoogstraten is a trustee for the second defendant. As I understand it, both Mr Bagot and Mr van Hoogstraten were in some way connected with Messina Estates Limited. This is one of the properties that was later made the subject of a charging order in favour of the Raja estate.

46. Was the declaration of trust contained in the transfer of 3 February 1992 genuine? As before, there is really no contemporaneous material to suggest that this was not a genuine trust.

47. On 24 March 1992, Mr Bagot transferred 106 Ledbury Road in return for a price of £190,000 to Mr van Hoogstraten as a trustee for the second defendant. As before, there is really no contemporaneous material to suggest that this trust was not genuine.

48. Not long after the transfers of February and March 1992 Mr Bagot and Mr van Hoogstraten wished to have a Deed of Trust. I find that Mr Bagot wanted, for Inheritance Tax purposes, a Deed of Trust to help establish the date of certain gifts he had made to the children of Mr van Hoogstraten. Mr van Hoogstraten wanted a Deed of Trust because he wanted to set out more formally the relevant trusts. He particularly wanted a measure of control over the circumstances in which a beneficiary would inherit. He explained to me, and I accept, that he wished to have that degree of control in case the lifestyle of the child was considered by him to make

the child unfit or unworthy of benefiting under the trust. I find that Mr van Hoogstraten instructed the solicitors to draw up a Deed of Trust in that way. I also find he instructed them on behalf of himself and of Mr Bagot.

49. I have already found that the second recital to the Deed of Trust was inaccurate as to the gifts of money being used to buy the 8 properties which were the subject of the Deed. I have also found that Mr van Hoogstraten did not tell the solicitors about the 7 previous declarations of trust. I have also explained that the trusts apparently declared by the Deed are inconsistent with the 7 earlier trusts. Does that show that the 7 earlier trusts were not genuine? Does that show that although Mr van Hoogstraten was named as a trustee in the 7 earlier trusts, he had no intention of acting as a trustee but instead he intended at all times to be the beneficial owner of those 7 properties? If that had been Mr van Hoogstraten's intentions at the earlier times, was it also the intention of any other party to the 7 transactions where that party's intentions were relevant as to the declarations of trust? *Prima facie* the intentions of Mr Bagot in relation to the 4 transfers for nil consideration and the intentions of Miss Williams would be relevant, though there might be more room for argument as to whether the intentions of the vendors were relevant in the 2 cases (12 The Drive and 106 Ledbury Road), where it might be said that Messina Estates Limited and Mr Bagot were simply vendors of the properties and not settlors of the declared trusts.

50. I have considered with some care the implications of the inconsistent Deed of Trust in June 1992. In the end, I am not persuaded that the inconsistent Deed of Trust shows that the earlier trusts were not genuine on the part of Mr van Hoogstraten, or on the part of Mr Bagot, or on the part of Miss Williams. I consider that the real explanation is that Mr van Hoogstraten wrongly believed that as the trustee for 2 of his children it was open to him to set out in detail the trusts on which he was to hold the properties. I find that he genuinely intended to be a trustee, first under the 7 earlier transfers, and then under the Deed of Trust. He did not intend to be the beneficial owner of the 8 properties after the Deed of Trust. Of course, it should have been obvious to Mr van Hoogstraten that he could not ignore the earlier trusts and he could not create different trusts. Nonetheless, I find that was not obvious to him.

51. Mr Irvin submitted that the evidence as to the events which occurred after June 1992 showed that Mr van Hoogstraten never regarded the Deed of Trust as creating a trust of the 8 properties the subject of that Deed. In this regard, Mr Irvin raised questions as to the following matters.

1. The sale of 6 of the 8 properties.

2. The payment of the income from the alleged trust properties into a mixed fund.

3. The absence of a separate trust fund for the proceeds of sale and the income from the trust properties.

4. The absence of trust accounts.

5. The fact that the income from the trust properties was treated as the income of a property company, Hamilton Property Holdings Limited, and corporation tax was paid on the profits of the company and tax was not paid at the rate appropriate for the income of a trustee.

52. Mr Irvin also submitted that all of the defendants had been reluctant to reveal the true position as to the administration of the alleged trust over the years. I agree that the defendants have made it difficult for the Raja estate and for the court to ascertain the way in which the trust properties have been treated over the years. however, certain matters have emerged. As to the sale of the 6 properties, it is probably the case that the net proceeds of sale have been reinvested in the properties at Welwyn and Tongdean Road. I have referred to the ownership of those properties. There is no evidence before me that those properties are owned beneficially by Mr van Hoogstraten. It is certainly true that the alleged trust has not been properly administered. However, certainly since 2004/2005 it has been administered in an informal way whereby the income of the alleged trust does appear to go to the beneficiaries under the trust. On the evidence before me, I am not able to make a finding that the income of the trust has been treated by Mr van Hoogstraten as if it were his own income.

53. As to the tax treatment of the tax income, this point only arose at a late stage. *Prima facie* the trustee has not paid the tax which he ought to have paid. The second defendant told me that this underpayment of tax was with the agreement of HMRC on an interim basis. I have already explained that I am very sceptical about the truth of that statement, but I am not able to make a firm finding one way or the other. However, even if I had held that Mr van Hoogstraten was a trustee and that he was not paying the correct tax, that would still not persuade me to hold that the trusts were not genuine. In those circumstances, the right finding would be that the trusts were genuine, but that Mr van Hoogstraten, assisted by his children, were cheating HMRC.

The result.

54. The result of this reasoning is that I hold the transfer dated 3 February 1992 of 12 The Drive created a bare trust of that property in favour of the second defendant. That trust could not have been and was not affected by the Deed of Trust of 30 June 1992. I further hold that 208 Preston Road is held on the trusts of the Deed of Trust of 30 June 1992. The preliminary issue is answered accordingly.
