

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ON APPEAL FROM
THE CENTRAL LONDON COUNTY COURT
HIS HONOUR JUDGE LEVY QC**

Royal Courts of Justice
Strand, London, WC2A 2LL

19/05/2008

B e f o r e :

THE HONOURABLE MR JUSTICE DAVID RICHARDS

Between:

THOMAS JOSEPH BARRETT

Appellant

- and -

JOHN JOSEPH BARRETT

Respondent

**Mr Christopher Maynard (instructed by Messrs Owen White & Catlin) for the Appellant
Mr Miles Croally (instructed by Messrs Graham White & Co) for the Respondent**

Mr Justice David Richards:

1. Thomas Joseph Barrett (Thomas) appeals against the order of His Honour Judge Levy QC, sitting at the Central London County Court, whereby he struck out Thomas' claim against his brother John Joseph Barrett (John) under CPR 3.4(2) on the grounds that the statement of case disclosed no reasonable grounds for bringing the claim. The basis of the claim was that a residential property originally owned and occupied by Thomas but sold by his trustee in bankruptcy to John had been acquired and held by John on trust for Thomas. John denied any such trust arrangement but, relying on *Tinsley v Milligan* [1994] 1 AC 340 and other authorities, submitted that even if it existed it was made for an illegal purpose and was unenforceable. The judge accepted the submission and accordingly struck out the claim.
2. The undisputed facts are as follows. Thomas purchased a freehold house at 137 Bilton Road, Perivale, Greenford, Middlesex (the property) as sole legal and beneficial owner in 1977. Thomas lived at the house and from time to time John and another brother, Patrick, also lived there. On 28 June 1993 Thomas was declared bankrupt and the property became vested in his trustee in bankruptcy. On 12 October 1994, on the application of the trustee in bankruptcy, a possession order was made by consent, such order not to be enforced for 42 days. John offered to purchase the property at a price which, after discharging a mortgage on the property, would leave the trustee with £15,000. The trustee in bankruptcy accepted the offer. John paid £32,000 to redeem the mortgage and paid £15,000 to the trustee in bankruptcy and, with effect from 1 March 1995, became the registered proprietor of the property. John raised £40,000 from the Woolwich Building Society, secured by a mortgage on the property. The balance of the funds required for

the purchase were paid from John's account with the Woolwich Building Society. Thomas was discharged from bankruptcy in June 1996. Non-preferential creditors received a dividend of 38.32p in the pound, so that if Thomas were to succeed in his claim it would be open to a trustee in bankruptcy to claim it for the benefit of the estate. Thomas continued to live at the property until it was sold in September 2005. John was living at the property at the time of the sale by the trustee in bankruptcy and continued to do so until about 2000.

3. The property was sold in September 2005 for £235,000. After the discharge of one or more mortgages, the balance of the price was paid to John. John paid £115,000 to his sister Bridget in about October 2005. John claimed that Bridget held this sum as his nominee. When Bridget refused to re-pay it to John, the latter issued proceedings for its return. Bridget defended the proceedings on the basis that she received the sum to hold for Thomas. She had paid £21,200 to Thomas and she paid the balance into court, whereupon the claim against her was discontinued. Thomas was joined as a party to the proceedings. The action then proceeded as a claim by Thomas against John for a declaration that the proceeds of sale of the property were held by John upon trust for Thomas and for an account of the proceeds and consequential relief. Thomas served particulars of claim as the Part 20 claimant and John served a defence and counterclaim to which Thomas served a reply and defence to counterclaim.
4. For the purposes of the application under CPR 3.4 (2), John must accept the truth of the facts pleaded by Thomas, although it is right to mention that most of them are disputed. Both because the order under appeal was made essentially on the grounds that Thomas' claim was unsustainable as a matter of law and because of the underlying principles established by the House of Lords in *Tinsley v Milligan*, it is important to see exactly how Thomas puts his case. I will therefore set out the essential part of his particulars of claim (substituting Thomas for "the Part 20 claimant" and John for "the claimant"):

"The arrangement for the Re-Purchase of the Property

11. In or about August 1994, the Trustee in Bankruptcy issued an application for possession of the Property. By an order of Mr Registrar Simmonds dated 12 October 1994 and made with the consent of the parties, Thomas was directed to give possession of the Property to the Trustee in Bankruptcy, such order not to be enforced for 42 days from that date.

12. At or about that time, it was expressly agreed between John and Thomas that John would seek to raise sufficient funds by way of a mortgage of the Property to enable him to re-purchase it from the Trustee in Bankruptcy and to redeem the Abbey National Charge, thereby allowing Thomas to remain in occupation of the property.

13. Pursuant to this agreement, John offered to purchase the Property from the Trustee in Bankruptcy for the sum of £15,000, which offer was accepted in principle by the Trustee in Bankruptcy in a letter to John dated 10 October 1994. By a further letter from the solicitors acting for the Trustee in Bankruptcy dated 17 November 1994, it was confirmed that this acceptance was subject to John's also redeeming the Abbey National Charge.

14. John paid the sum of £15,000 to the Trustee in Bankruptcy and applied the sum of £32,000 in redemption of the Abbey National Charge. Accordingly, the Property was transferred to the John, who became the registered proprietor thereof with effect from 1 March 1995. The sums paid by John were raised in part by an advance of £40,000 from the Woolwich Building Society, which was secured upon the Property ('the Woolwich Mortgage').

15. Notwithstanding the transfer of the legal title to the Property in the name of John, there was at or about that time an express agreement, arrangement or understanding between the John and Thomas that John would hold the Property and its proceeds of sale upon trust for Thomas absolutely.

PARTICULARS

(1) There was an agreement, arrangement or understanding between John and Thomas that:

(a) the purpose of the transactions referred to at paragraphs 12 to 14 above was to allow monies to be raised in John's name in order to enable Thomas to re-gain ownership of the Property and to avoid its being repossessed by the Trustee in Bankruptcy or by the chargee of the Abbey National Charge;

(b) Thomas would be responsible for all payments and expenses relating to the property, including utility and other bills and repayments of the Woolwich Mortgage, or would reimburse John for any such payments or expenses actually incurred by John; and

(c) John was to be only the 'paper owner' of the Property.

(2) John told Thomas that the Property was his (i.e. Thomas') house and that he (i.e. Thomas) could sell it or do with it what he wanted whenever he wanted.

(3) The existence of the agreement, arrangement or understanding between John and Thomas is evidenced in part by the 'Report and Valuation for Mortgage' prepared by the Woolwich Building Society and dated 21 October 1994 (a copy of which is served with these Particulars of Part 20 Claim marked "Appendix A"), which refers to the fact that the applicant (i.e. John) was purchasing the Property under a family arrangement.

16. In reliance on the said agreement, arrangement or understanding, Thomas took upon himself sole responsibility *vis-à-vis* John for the payment of the Woolwich Mortgage instalments out of his own resources (although, in accordance with the original agreement, arrangement or understanding, the Woolwich Mortgage remained in the name of John).

17. In further reliance on the said agreement, arrangement or understanding, Thomas incurred additional expense in relation to the Property.

PARTICULARS

Thomas:

(1) painted and decorated the Property, arranged and paid for the installation of a new bathroom and central heating, and paid for the renewal of the guttering;

(2) personally removed the chimney breast, installed a new boiler and carried out the plumbing necessary to replace old piping at the Property;

(3) carried out and paid for such other maintenance as was necessary from time to time around and about the Property;

(4) undertook responsibility *vis-à-vis* John for paying the Council Tax and other utility bills in relation to the Property; and

(5) arranged and paid for the buildings insurance in relation to the Property.

18. Further or alternatively, by reason of the matters pleaded at paragraphs 16 and 17 above there is to be inferred a common intention that John should hold the Property and its proceeds of sale upon trust for Thomas.

19. Thomas has acted to his detriment on the faith of the express agreement, arrangement or understanding (alternatively on the faith of the implied common intention) that he should be the

beneficial owner of the Property and its proceeds of sale. In the circumstances, he is entitled to claim and does claim such a beneficial interest and it is now unconscionable for John to deny him such an interest.”

5. A number of points may be noted about the pleading. First, it appears to suggest that there were two agreements or arrangements. One was an express agreement in about October 1994 that John would purchase the property with funds which he would raise, but would allow Thomas to remain in occupation. Pursuant to this agreement John raised the required funds and agreed to purchase the property. The other was “an express agreement, arrangement or understanding” made or reached “at or about” the time of the transfer of the legal title to John that he would hold the property and its proceeds of sale on trust for Thomas absolutely. I will assume that this second agreement, arrangement or understanding existed by the time of the contract to purchase the property and its transfer to John.
6. Secondly, the primary case is that there was an express trust in favour of Thomas, on terms that Thomas would be responsible for all payments and expenses relating to the property, including repayment of the mortgage. As there was no declaration of trust in writing such trust must take effect, if at all, as a resulting or constructive trust. Unlike *Tinsley v Milligan*, the case is not pleaded as a presumed resulting trust arising by reason of payments made by Thomas. It is right that it should not be, because Thomas made no direct payments towards the purchase price and was not liable to the mortgagee: on the mortgage: see, for example, *Carlton v Goodman* [2002] 2 FLR 259 and *Curley v Parkes* [2004] EWCA Civ 1515 at paras 14 and 15 per Peter Gibson LJ. Thomas’ case is properly analysed as a constructive trust.
7. I should note here an argument suggested by Mr Maynard for Thomas in his supplementary written submissions that, in the light of observations of Lord Walker of Gestingthorpe in *Stack v Dowden* [2007] 2 AC 432, contributions towards mortgage instalments made by a person other than the mortgagee(s) should be treated as contributions to the purchase price for the purposes of a presumed resulting trust, as opposed to a constructive trust. I can see nothing in Lord Walker’s speech or in any of the other speeches to support this submission.
8. Thomas’ alternative case is a common intention constructive trust to be inferred from the payments alleged in paragraphs 16 and 17 to have been made in reliance on the agreement, arrangement, or understanding.
9. It was submitted for John before the judge that it was clearly implicit in the pleaded agreement or arrangement that Thomas’ beneficial interest would not be declared to his trustee in bankruptcy as required by section 333(2) of the Insolvency Act 1986, with the result that the agreement or arrangement was made for an illegal purpose. It was submitted that Thomas had to rely on the illegal transaction to establish his title, so that applying the principles established in *Tinsley v Milligan* and applied by the Court of Appeal in *Collier v Collier* [2002] EWCA Civ 1095, 6 ITELR 270, the claim was bound to fail. It was accepted on behalf of Thomas before the judge, as it was on the appeal, that the agreement was made for an illegal purpose.
10. The judge, having set out the facts and the relevant parts of the particulars of claim, referred to *Tinsley v Milligan* and set out passages from the judgments of Chadwick LJ and Mance LJ in *Collier v Collier*. At paragraph 29 the judge said:

“It seems inescapable to me that Thomas has to rely on his illegality to put forward the agreement which he says was made. Mr Croally has submitted various grounds that such an agreement was improbable, but this does not arise for decision having regard to the fact that, in my judgment, Thomas does have to rely on his illegality. In those circumstances, this is a claim which, if it does come to trial, falls within paragraphs 3.4(1) and (2) of the Civil Procedure Rules.”
11. On this appeal, it is again accepted for Thomas that the purpose of the agreement pleaded at paragraph 15(1)(a) of the particulars of claim, was to evade the rules of bankruptcy and was

therefore an unlawful purpose. It is however submitted by Mr Maynard for Thomas that Thomas does not have to rely on this purpose in order to establish a beneficial interest in the property. On the facts as pleaded, Thomas can prove contribution to the purchase, by way of payment of mortgage instalments in accordance with the agreement, as an objective and neutral fact without recourse to the illegal motive. It is also submitted that Thomas can rely, without needing to rely on the illegal motive, on any of the following to establish his beneficial interest: an express trust, a common intention trust evidenced by his agreement to discharge all the bills following transfer and his subsequent conduct in doing so, an equity in his favour arising by way of proprietary estoppel, or an equity in his favour arising under principles established in *Pallant v Morgan* [1953] Ch. 43. It will be noted that these submissions do not entirely reflect the way the case is pleaded but they rely on the pleaded facts and, if any are sustainable, the case should be allowed to continue with any amendments that may be necessary

12. Alternatively, Mr Maynard submits that the tainted motive in this case is too remote to bar enforcement of Thomas' interest in the property or its proceeds. He points out correctly that the pleaded agreement or arrangement involved the creation of a new interest in favour of Thomas, his original interest in the property having vested in his trustee in bankruptcy. The creation of such an interest was not of itself unlawful. The illegality lay in the failure to disclose the acquisition of this new interest to his trustee in bankruptcy.
13. It is convenient to deal first with Mr Maynard's alternative submission that the tainted motive in this case is too remote. In my judgment it is not well-founded. Thomas accepts that the purpose of naming John as the purchaser and registering him as the proprietor was to enable Thomas to evade the obligation imposed on him by section 333(2) of the Insolvency Act 1986:

"Where at any time after the commencement of the bankruptcy any property is acquired by, or devolves upon, the bankrupt or there is an increase of the bankrupt's income, the bankrupt shall, within the prescribed period, give the trustee notice of the property or, as the case may be, of the increase."

The prescribed period for giving the required notice is 21 days and failure to comply without reasonable excuse constitutes a contempt of court punishable accordingly : section 333 (4). The requirement to give notice is essential for the operation of section 307 which entitles the trustee in bankruptcy to claim after-acquired property for the benefit of the bankrupt's estate.

14. Thomas accepts that, by enabling him to conceal his interest, the agreement's effect and purpose was to deprive his trustee of the opportunity to acquire Thomas' interest in the property. In substance the estate was defrauded of that opportunity. That was clearly the whole purpose of the alleged agreement that John would hold the property on trust for Thomas. Far from being too remote from the agreement, it was its essence. As Mr Croally for John put it, the illegal purpose shaped the whole form of the transaction. In his reply, Mr Maynard submitted that the transaction had a dual purpose, first to keep the property from the trustee in bankruptcy and secondly to preserve the family home. Even if I accept the premise of a dual purpose, it would not assist Thomas but in any event the only purpose of the trust arrangement, as opposed to the purchase from the trustee in bankruptcy, can have been to conceal Thomas' interest from the trustee in bankruptcy.
15. The position is indistinguishable from *Lowson v Coombes* [1999] Ch 373 where a house jointly purchased by a man and a woman was held in the sole name of the woman in order to defeat any potential claim by the man's wife under section 37 of the Matrimonial Causes Act 1973, and from *Collier v Collier* where a father transferred legal ownership of business premises to his daughter for the purpose of defeating a potential claim for costs in litigation. By contrast, it is distinguishable from *21st Century Logistics (Solutions) Ltd (in liquidation) v Madysen Ltd* [2004] STC 1535, on which Mr Maynard relied. In that case a seller was held entitled to sue for the price of goods delivered under a contract of sale, although the seller, unknown to the buyer, had intended to defraud HM Customs & Excise of VAT payable on the price. The seller's fraudulent

intention was too remote from the contract, because the contract was a straightforward and lawful contract and the illegality lay in the seller's subsequent failure to account for VAT. The contract did no more than provide the seller with the opportunity to profit from his intended fraud.

16. Turning back to the first issue, the starting point is the decision of the House of Lords in *Tinsley v Milligan*. The majority there held that a claimant could enforce an equitable proprietary interest which had arisen under an agreement made for an illegal purpose provided that the claimant did not need to plead or rely on the illegality. It is a case which is concerned with the recognition and enforcement of existing property rights, not contracts. All members of the House recognised the rule at common law that legal property rights will be recognised and enforced even though they have arisen under a contract made for an illegal purpose, provided that the claimant can establish his title without pleading or leading evidence of the illegality. At page 370 Lord Browne-Wilkinson deduced the following proposition from the authorities dealing with legal title:

“(1) property in chattels and land can pass under a contract which is illegal and therefore would have been unenforceable as a contract; (2) a plaintiff can at law enforce property rights so acquired provided that he does not need to rely on the illegal contract for any purpose other than providing the basis of his claim to a property right; (3) it is irrelevant that the illegality of the underlying agreement was either pleaded or emerged in evidence: if the plaintiff has acquired legal title under the illegal contract that is enough.”

In cases of property, such as land or shares, where there is an instrument of transfer, the claimant will not normally need to refer to the contract at all. In the case of other property, such as goods, it may be necessary to do so but only for the purpose of “providing the basis of his claim to a property right”. So, if under the terms of a contract for the sale of goods property in the goods has passed to the claimant, he may need to refer to the contract to show that is the case and he will be permitted to do so unless he necessarily also has to rely on the illegality involved in the contract.

17. The division between the members of the House arose as to whether these principles should apply also to the recognition and enforcement of equitable interests in property, the essential difference being that by their nature equitable interests require the court's assistance for their recognition and enforcement. The majority held that equitable proprietary rights are to be treated in essentially the same way as legal proprietary rights and will be enforced provided that the claimant does not plead or lead evidence of the illegality.
18. Lord Jauncey of Tullichettle and Lord Lowry agreed with the conclusions and reasons given in the speech of Lord Browne-Wilkinson, but also gave reasons of their own as to why Ms Milligan should succeed on her counter-claim against Ms Tinsley for a declaration that the property registered in Ms Tinsley's sole name was held on trust by her for them both in equal shares. The purchase of the property had been financed as to two-thirds by a mortgage loan in the name of Ms Tinsley and as to the balance by funds provided jointly by the two of them. The property was put in the sole name of Ms Tinsley to enable Ms Milligan to make fraudulent claims for financial support from the Department of Social Security. In asserting her counter-claim, Ms Milligan pleaded a common intention that the property should belong to both of them and that she contributed to the purchase price : see pages 371H-372A. She did not rely on the illegal purpose, which emerged only in her reply and cross-examination. She claimed her interest under a resulting or implied trust : page 371C-D.
19. Lord Jauncey identified the central issue as follows:

“The ultimate question in this appeal is, in my view, whether the respondent in claiming the existence of a resulting trust in her favour is seeking to enforce unperformed provisions of an unlawful transaction or whether she is simply relying on an equitable proprietary interest that she has already acquired under such a transaction.”

He cited Lord Diplock's description of the nature of a resulting trust in *Gissing v Gissing* [1971] AC 886 at 905, whereby a legal owner who induces another to act to his detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the property will not be allowed to deny the interest. He held that as soon as the agreement was performed by the sale to Ms Tinsley alone she became a trustee for Ms Milligan who could rely on the equitable proprietary interest presumed to have been created in her favour by reason of her contribution to the purchase price. She had "no need to rely on the illegal transaction which had led to its creation".

20. Lord Lowry's reasoning was perhaps more narrowly based. Ms Milligan succeeded because she had contributed to the purchase price and she was therefore entitled to plead and rely on the presumption of a resulting trust in her favour. She did not, and did not need to, rely on the illegal purpose of the arrangement with Ms Tinsley.

21. Lord Browne-Wilkinson's reasons also rely on the presumption of a resulting trust arising from Ms Milligan's contributions to the purchase price but they do not exclude all reference to the agreement or common understanding with Ms Tinsley. At page 376E-G he said:

"...In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

As applied in the present case, that principle would operate as follows. Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was common understanding between her and Miss Tinsley that they owned the house equally. She had no need to allege or prove *why* the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There was no evidence to rebut that presumption. Therefore Miss Milligan should succeed."

22. There is accordingly no bar to some reference to the arrangement between the parties provided that it is not sought to plead or prove its illegal purpose. In the case of a transaction to which the presumption of advancement applies, "in order to establish any claim the plaintiff has himself to lead evidence sufficient to rebut the presumption of gift and in doing so will *normally* have to plead, and give evidence of, the underlying illegal purpose" (per Lord Browne-Wilkinson at page 372C) (emphasis added). It will "normally" be necessary to plead and give evidence of the underlying illegal purpose because otherwise the claimant will on the evidence fail to rebut the presumption of advancement. This appears from Lord Browne-Wilkinson's citation from *Chettiar v Chettiar* [1962] AC 294 at pages 375-376 and from his analysis of that case at page 376 C-D. As Lord Denning giving the advice of the Privy Council observed in *Chettiar v Chettiar*, "it was essential for the father to put forward a convincing explanation why the transfer took the form it did, and the explanation that he gave disclosed that he made the transfer for a fraudulent purpose....in the present case the father has of necessity to put forward, and indeed, assert, his own fraudulent purpose, which he has fully achieved". See also *Collier v Collier* at paragraph 98 per Mance LJ.
23. Building on this approach, Mr Maynard made his principal submission that, while he conceded the illegal purpose of the agreement between Thomas and John, Thomas did not need to rely on that purpose in order to prove that he had a beneficial interest in the property. He could rely on contributions to the mortgage instalments made in accordance with the agreement. There can be little doubt that if Thomas had made direct contributions to the purchase price, he could have relied on them to establish a resulting trust in his favour. Such a resulting trust would arise whether or not he also pleaded a common intention that he was to have a beneficial trust.

24. Contributions to mortgage instalments do not stand in the same position as direct contributions to the purchase price. They may be intended to confer a beneficial interest on the payer, but equally they may be intended as an advance to the mortgagor, entitling the payer to be subrogated *pro tanto* to the mortgagee's rights, or they may, as John contends in this case, be intended as payments in lieu of rent. To establish that they are intended to confer a beneficial interest, they must be referable to an agreement or arrangement made at the time of purchase that the payer should be responsible for the mortgage instalments either on terms that he should have a commensurate beneficial interest or in circumstances from which such an intention can be inferred – see *Carlton v. Goodman*. It is for this reason that Mr Maynard relies on contributions to mortgage instalments made “in accordance with a pre-purchase agreement.”

25. Given that Thomas must rely on the pleaded agreement or arrangement that he was to be the beneficial owner and was to pay the mortgage instalments, can he avoid reliance on its unlawful purpose? In my judgment, he cannot. He has in effect pleaded the unlawful purpose in paragraph 15(1)(a) of his particulars of claim : the purpose of purchasing the property in the name of John was “to avoid its being repossessed by the Trustee in Bankruptcy”. Without that purpose, the agreement or arrangement has no rational explanation. Thomas needs to allege and prove it in order to establish the agreement, but in doing so he relies on his own illegal purpose and thereby renders his interest unenforceable.

26. This also provides an insuperable objection to the alternative ways in which Mr Maynard seeks to put Thomas' case. The express trust is not a written declaration of trust satisfying the requirements of section 53(1)(b) of the Law of Property Act 1925, but the same agreement or arrangement which is said to have made provision for the mortgage payments. The pleaded purpose of the express trust is the same, as set out in paragraph 15(1)(a), viz. the avoidance of repossession by the trustee in bankruptcy, which is to be achieved through concealment of Thomas' interest by means of the trust. The case is on all fours with the decision of the Court of Appeal in *Collier v Collier* in which Chadwick LJ said at paragraph 80:

“This is a case in which the father has to rely on an agreement to establish his equitable interest; and, in relying on the agreement which the judge found to have been made, he has to disclose his dishonest or fraudulent purpose.”

Likewise, Mance LJ was of the view that where the existence of the trust and of the claimant's alleged beneficial interest under it depends on no more than an agreement entered into for the illegal purpose of deceiving third persons, the beneficial interest will not be recognised or enforced : paragraph 105.

27. The second alternative, a common intention trust evidenced by Thomas' agreement to discharge all the bills following transfer, and his subsequent conduct in doing so, is no different from the primary case of an agreement or arrangement coupled with payment of the mortgage instalments. They both fail because of the pleading of the purpose of the trust arrangement and the need to allege and prove that purpose. Similarly, the third alternative of a proprietary estoppel is a different way of putting the same case, requiring again the agreement or arrangement, and its purpose, to be alleged and proved. I find it difficult to see how a *Pallant v Morgan* equity could arise if the other ways of putting Thomas's case have failed but in any event it too is dependent on the pleaded agreement or arrangement with its illegal purpose.

28. As a final alternative, Mr Maynard submitted that even if it is necessary for Thomas to rely on the illegal purpose, the court should decline to strike out the claim because the nature and quality of the illegality, John's engagement in achieving the purpose of the agreement and his consequential enrichment make it unconscionable to permit John to retain the profit at Thomas' expense. As Mr Maynard was inclined to accept, this submission depends on the exercise of a discretion which the court does not possess, although the Law Commission has suggested that it should be given it: Law Commission Consultation Paper 154: Illegal Transactions: The Effect of

Illegality on Contracts and Trusts. The present position is that if the claimant relies on his illegal purpose, he cannot succeed in his claim to enforce a proprietary right.

29. I therefore conclude that the judge was right to strike out Thomas's claim and that the appeal should be dismissed.
30. I am grateful to both counsel for their helpful submissions including the supplemental written submissions provided, at my request, following the hearing.