CA on appeal from Leicester County Court (His Honour Judge Mayor QC) before Ward LJ. 12th September 2002.

JUDGMENT : LORD JUSTICE WARD

1. This is an application for permission to appeal against the order made by His Honour Judge Mayor in the Leicester County Court when he dismissed the claimant's claim to be beneficially entitled, whether absolutely or only, in respect of a part of the interest in 49 Navestock Crescent.

2. The defendant is the claimant's brother, so this case has all the hallmarks of family dispute which make it a matter which should never have seen the door of the court at all. But the contest has been fully fought. It relates to the home in which the parents of the parties lived. The claimant contends that he was, with his parents, a tenant of the property from the local authority way back in 1989 when the opportunity arose to acquire the property using all the benefits of discounted property prices when buying from the local authority. His case is that he advanced some £11,000 out of the £22,000-odd required to purchase the property. The balance was serviced by a mortgage of £9,500, payable by way of interest only, to be repaid eventually by an endowment policy taken out on his life. These arrangements changed as the idea was tossed to and fro. He did not acquire the property in his name and the mortgage likewise was only in the name of his parents, no doubt so that they could obtain the benefit of social security benefits to pay the interest. Then the falling out and the bad blood that has made this case difficult since then.

3. The judge found that the moneys paid by the claimant were paid by way of loan. He came to that conclusion on the facts as he found them having preferred the evidence of the defendant and his witnesses to the evidence of the claimant. To appeal against that order is obviously therefore fraught with difficulty. The judge has made findings of fact based on his assessment of the witnesses and to overturn that it is necessary to show that he was plainly wrong. That is quite a mountain to climb.

4. Nevertheless, I am boldly going to give permission to appeal because my antennae are all a quiver in this case. I am troubled by the judge's analysis on page 8 of the judgment that the part payment would give the claimant not simply an interest in the property in the proportion his contribution brought to the purchase price, so that arguably, therefore, he had an interest as a tenant in common in respect of that share. The judge, on the contrary, seems to have assumed that the claimant's case was that he would have a joint beneficial interest in the property to which he would succeed in total by the law of survivor-ship on the death of his parents. I am not sure about that analysis. It may have clouded the judge's views of other facts he held material, such as the great emphasis he placed upon the will of the parents made in 1982 long before this property was ever contemplated to be acquired by the parents, and perhaps even by the emphasis he placed upon the claimant stopping the payments of the endowment policy.

5. I have had a helpful skeleton argument from Mr Iyer, who appears on the applicant's behalf, and perhaps the points that trouble me most are the judge's conclusions that the defendant was reliable when his response to the caution placed on the property in 1993, namely that (see page 110 of the bundle) the balance of the purchase moneys were provided by him. That is completely at variance with the finding of the judge that the money came from the claimant and was the claimant's money.

6. The defendant has given varying accounts of how it was impossible for the claimant to have saved anything. There was a further statutory declaration in which it is asserted that the moneys in the claimant's account were monies the family had saved to buy the parents the home (see page 115 of the bundle) and that is at variance with the judge's findings. I am not going to elaborate further because all of these matters need to be carefully looked at and at the moment the least said the better. Suffice it to say, despite the obvious difficulty of upsetting a finding of fact there are, in my judgment, sufficient arguments with a real prospect of success as to justify this appeal. Least that be misunderstood by anybody, the granting of permission to appeal does not indicate that this appeal is bound to succeed; it remains a difficult one.

7. I shall furthermore direct that this appeal should not be listed until the parties have had the opportunity to accept or reject the prospect of mediation. This court has a mediation service which it can make available and both parties must actively consider their position and decide whether or not to take up that offer of mediation. I urge it upon them, because it seems to me that with a bit of goodwill there is an obvious solution which would not seem to produce any extraordinary unfairness in this family's affairs, and so they must carefully reflect upon this last observation.

8. A copy of this judge will be made available to the defendant in order that he can consider his position. Costs will be reserved. It is a matter which should be listed before a court of three in the Court of Appeal, though one could be a High Court Judge. At least one member of the court should have Chancery experience, and preferably one should also come from the Family Division. The time estimate, probably a day, because if matters of fact are to be scrutinised unfortunately a transcript may need to be obtained, again at expense, and a bundle, so that all relevant documents are before the court, but no more documents than it would be necessary to refer to.

(Application granted; costs reserved).

The Applicant appeared in person.
The Defendant did not attend and was unrepresented.