Neutral Citation Number: [2020] EWHC 1621 (Ch)

Case No: CH-2019-000116

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM THE COUNTY COURT AT CENTRAL LONDON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2020

Before :

THE HON. MR JUSTICE FANCOURT

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Between :

(1) JOHN ARCHIBALD **(2) BRENDA ARCHIBALD**	**Claimants/ Respondents**
- and –	
PATSY ALEXANDER	**Defendant/ Appellant**

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Mr Michael Levenstein (instructed by **Marsons Solicitors LLP**) for the **Appellant**
Mr Simon Lane (instructed by **A-Z Law Solicitors Ltd**) for the **Respondents**

Hearing date: 17 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FANCOURT

Mr Justice Fancourt :

1. Mrs Patsy Alexander appeals against an order of His Honour Judge Gerald made on 5 April 2019. The order was made following an ex tempore judgment delivered at the end of a 5-day trial. The trial concerned the beneficial ownership of a house, 9 Roslin Way, Bromley, BR1 4QS ("the House"). The Judge concluded that title to the House was held by Mrs Alexander on trust for herself and her brother and sister, the Respondents, as beneficial tenants in common in equal shares. Mrs Alexander had contended that she was the sole beneficial owner.

2. Like the Judge in his judgment, I shall refer to the parties by their given names, or as "the children", and to their deceased mother, who paid for the House, as "Mother". The Respondents are Patsy's siblings, Brenda and John.

3. The basis of the Judge's conclusion was a finding of fact that (in bare outline) shortly before the purchase of the House, Mother and her three children agreed orally at a face to face meeting in late November or early December 1996 that the House would be bought in the name of herself and one or more of the children as joint tenants, to hold it for Mother for life and after her death for the three children equally. That was agreed following some legal advice obtained by Mother about how to structure the ownership, to avoid Inheritance Tax on her death and to protect the children against the claims of any new partner, should she re-marry.

4. In the event, although each of the three children could have become a joint registered proprietor of the House with Mother, John and Brenda were unavailable to participate in the formalities when the House was purchased, so it was transferred into the names of Mother and Patsy only. This potential difficulty with all the children being able to become joint transferees had been identified and discussed when the agreement between them was made.

5. On the basis of that agreement, the Judge held that Patsy as the surviving legal owner held the House on constructive trust for herself and her siblings. His essential conclusions were that: it had been expressly agreed that whichever of the children came to have their names on the title to the House, they would honour their agreement at the meeting; the agreement was made by each of the siblings with Mother and with each other; that in becoming a legal owner with Mother, the sibling or siblings in question were acting on behalf of all the siblings; that by not becoming a legal owner, a sibling was relying on that agreement; and that for the legal owner to renege on the agreement would be unconscionable conduct of the highest order.

6. Patsy sought permission to appeal on multifarious grounds, including alleged errors of law, errors of fact, "errors of discretion" and procedural irregularities, detailed over 10 pages of argument, in a document headed "Grounds of Appeal", which incorporated by reference 16 further pages of skeleton argument arguing the errors of law. With some endeavour, one can extract from this material that the principal arguments advanced as justifying the grant of permission to appeal were:

i) The Judge was wrong to have allowed John and Brenda on day 2 of the trial to amend their Particulars of Claim to allege that the facts already pleaded gave rise to a constructive trust because this permitted them materially to expand their case and it prejudiced the Appellant;

ii) The Judge was wrong to find as a fact that a meeting took place in late November or early December 1996 and that the agreement was made, as alleged by John and Brenda;

iii) The Judge placed insufficient reliance on a document emanating from Mother's solicitors in January 1997 and wrongly found that Patsy had invented a meeting between her, Mother and the solicitor in January 1997;

iv) There were four separate procedural irregularities that beset the trial, including the grant of permission to amend and the lack of adequate reasoning in the judgment;

v) The Judge confused the requirements of proprietary estoppel and constructive trust;

vi) The Judge failed to appreciate that it was necessary in a common intention constructive trust for the claimant to prove detrimental reliance, which John and Brenda were unable to do, any detrimental reliance of Mother being insufficient for their purposes;

vii) The Judge was wrong to conclude, if he did, that John and Brenda had changed their position as a result of the agreement of November/December 1996.

7. I refused permission to appeal on the papers on 23 October 2019, but granted limited permission to appeal on two grounds at a renewed application on 12 March 2020. At that hearing, I was not persuaded that any of the other arguments raised on behalf of Patsy had any real prospect of success, in view of the clear and strong factual findings of the Judge, or that they should be heard for any other reason. The two grounds on which I did give permission emerged to some extent from the oral argument on that day rather than being explicit in the Grounds of Appeal, and so I gave Patsy permission to amend the Appellant's Notice to identify the two permitted grounds.

8. These are whether the Judge was wrong:

i) "to find as a fact (see Judgment para 21) that there was a causative connection between the oral agreement that he found to have been made at a meeting of the parties and Mother in late 1996, at which the purchase of 9 Roslin Way, Bromley, Kent, BR1 4QS ("the Property") was discussed between them, and the failure of the Respondents to become transferees of the Property when it was purchased in 1997";

ii) "as a matter of law to conclude that there was sufficient detrimental reliance by the Respondents on that oral agreement to create an equity in their favour under a constructive trust."

9. In view of the limited basis on which permission to appeal was granted, Patsy is bound by the Judge's factual conclusions other than the finding challenged in the first ground of appeal. In reaching his conclusions of fact, the Judge had to decide between two radically different accounts of what had happened between the children and Mother after the sale of the family home in Fulham and before the purchase of the House. At the time, Mother was living with Patsy, near Bromley. John and Brenda gave, in rather different terms, an account of the meeting in November/December 1996 at which the agreement about ownership of the House was reached; Patsy disputed that any such meeting had taken place and said that on two occasions – one at a meeting with Mother's solicitor, who was not called to give evidence – Mother had told her that she wanted Patsy alone to own the House after her death. What was common ground in the evidence was that family life after Mother's divorce was extremely happy and that relations between Mother and each of the children and between the children themselves were loving and trusting; that Mother was strong-willed and fair minded and treated her children equally, though John, being the youngest child, was rather spoiled by her.

10. The Judge had no hesitation in rejecting Patsy's account and found, in strong terms, that her account was manufactured and her evidence untrustworthy. He accepted the substance of the evidence of John and Brenda about the meeting before the purchase of the House and what had been agreed. He considered that the finding of fact led inevitably to a conclusion that the House was held by Patsy on a constructive trust. He explained this in paras 87 and 88 of the Judgment:

> "87. I therefore conclude and find that at the family dinner back in November/December 1996, held at Patsy's house at Bromley, at which Mother, Patsy, her husband (who did not give evidence), Brenda and John were present, it was agreed that the property would be purchased in the name of Mother and one or more of the children on the footing that they would hold for Mother for life and upon her death it would be held by whichever child or children was or were the registered proprietors on trust for all three of them in equal shares, from which finding it follows that a straight forward application of principles of constructive trust apply and are fully engaged, so that Patsy now holds the property on trust for herself and her two siblings absolutely.
>
> 88. Pausing here, it is important to understand and appreciate that in my judgment, and I find, all children agreed at the meeting that whichever one or more of them put their name on the title, they were doing so on the footing that Mother could live there for life and then all three would take equally. At that point in time at that meeting, it was not clear whether all three would be available to put their names on the property when it was purchased, albeit that Brenda was not going to be able and John might not be able to. The point is, that whichever one or more of the children put his or her or their names on the property deeds, he or she or they would be doing so on the express or implicit footing, understanding, assurance, promise

> or whatever you like to call it, to Mother that he or she or they would honour their word and hold it on trust and could be trusted, but also to the non-signing sibling, that he or she or they would honour their word towards that non-signing sibling and could be trusted and would hold it on trust. Therefore, in so doing, the signing sibling was or were acting not only on his or her own behalf, but also on behalf of the non-signing sibling or siblings and in that way was acting as, effectively, their agent or *quasi* agent; and, fundamentally, the non-signing sibling or siblings, in not signing and not going on the title deeds, was or were acting to his or her or their detriment in self-evident reliance upon the word and promise of the signing sibling or siblings. "

11. Reading paras 87 and 88 together, it appears that the Judge considered that the constructive trust arose for a number of different reasons. First, the House was transferred to Patsy and Mother jointly on the basis of Patsy's prior agreement that she would hold the House on trust for all three children after Mother's death. Second, that by agreement Patsy signed the purchase documents as agent or quasi-agent for John and Brenda too (presumably giving rise to fiduciary obligations). Third, that John and Brenda acted to their detriment in reliance on Patsy's agreement or assurance by not arranging for their names too to go on the title deeds.

12. It is the finding of detrimental reliance by (as it turned out) John and Brenda that is challenged on this appeal, and Mr Levenstein contends that, as a settled principle of equity, detrimental reliance is a necessary precondition to the existence of a constructive trust of this type, which the Judge referred to in a number of places in the Judgment as a common intention constructive trust. Mr Levenstein argues that the Judge was wrong to find any causal connection between the agreement that he described at para 88 and John and Brenda not becoming transferees of the House. That the Judge would find such a connection was indicated at a much earlier stage of the Judgment, before he embarked on a detailed analysis of the evidence that he had heard, when he said, at para 21:

> "… at that point in time [viz November/December 1996], Brenda knew that she would not be able to go on the title because she was going to Grenada for a month. It is also unclear whether or not John would be able to do so because he would need to get time off work in order to visit the solicitors to sign the necessary documentation. Either way, as things turned out, neither Brenda nor John signed the documents *because* they were content to rely on Patsy to effectively sign on their behalf in her name, and they trusted her to carry out their mother's wishes. " (*emphasis added*)

13. The causal connection indicated by the conjunction "because" is not further discussed before para 88 of the Judgement. However, at para 44, the Judge concluded that John and Brenda had both given credible, truthful and honest evidence, notwithstanding some inconsistencies and omissions. He also concluded, at para 50, that it was self-evident to Brenda, in giving her evidence, that "the reason she allowed Patsy to get on with it and sign the documents and be the only person on the title deeds was because

she trusted and loved Patsy and had no doubt at all in her mind that Patsy would keep her word". It is also important to note that para 9 of Brenda's witness statement, which the Judge indicated that he accepted, says:

> "… after my mother had been told by myself and the 1st Claimant that we were not available to put our names on the Property, she told me that the solicitor wanted to charge a lot more money to make it all formal so that we would all definitely get our share of the Property after she died, My mother did not want to spend too much money and I said it was not necessary as we all loved and trusted each other. Also my mother had been complaining that she was short of funds to modernise and refurbish the Property. I completely trusted Patsy and did not want to cause my mother to be stressed and to waste money on paying the solicitor to do something that was not necessary. My mother believed that some of the English ways of doing things were unnecessarily overly formal and that a loving trusting family did not need to waste money on this."

Given the content of this discussion, it probably happened at the time of or after the agreement but before purchase, and it does indicate that Brenda relied on both Patsy's agreement and Mother's preference by not taking more expensive steps to get her name on the title deeds.

14. Evidence of John's reliance on the agreement is less clear. His witness statement explains that he understood that it was necessary for one at least of the children to go onto the title and that his share in the property would not be affected if he did not. He says that he trusted Mother, Patsy and Brenda implicitly and that he told Mother that he could not make it to the solicitor's office "because of being unable to take the time off from my work … and because I thought it was not necessary for me to attend the solicitor, *and because of my love and trust of my mother and the Defendant*". It is fair to say that the Judge does not make any express finding of John's reliance on Patsy's agreement at the November/December 1996 meeting, but concludes that, in view of the agreement made between all four, the non-signing siblings were self-evidently relying on the word and promise of those who did become owners.

15. Mr Levenstein submits that there was no sufficient evidence to justify a finding of reliance by either Brenda or John because their evidence was that they could not attend the solicitor's office to deal with the formalities in any event – Brenda because she was going to be in Grenada and John because he was at work. He also submits that in any event there was no need for formalities: John and Brenda did not need to sign the contract and could have been added as transferees without their signature, or added subsequently by a further voluntary transfer from Mother and Patsy to all four of them.

16. The argument that no signature would have been required from Brenda or John on the form of transfer is a new point. Mr Levenstein invited the court to take judicial notice of the fact that, before April 1997, the standard Land Registry form for a transfer of a registered estate was Form 19, which did not provide for the transferee to sign it. That is not a point of which the Court can or should take judicial notice. Whether John and Brenda could be added as transferees if the contract was made by the seller

with Mother and Patsy would depend on the terms of the contract or the consent of the seller; and whether a transferee would need to sign a deed of transfer could depend on the terms to be contained in the deed. Further, it is not established that the solicitor would have acted for Brenda and John as transferees without seeing them in person, or that any of the four were aware that no such formality or signature was needed.

17. In any event, the argument gets Patsy nowhere. If John and Brenda were aware that they could have become transferees without needing to attend on the solicitor, that fact tends to support rather than undermine the conclusion that they relied on Patsy's assurance, in view of the terms of the agreement that the Judge found. The fact that, subsequently, neither Brenda nor John took any step to become a registered proprietor also suggests – in view of that agreement – that both relied on what Patsy had agreed.

18. In my judgment, the Judge was entitled on the evidence before him to reach the conclusion that John and Brenda relied on the agreement in not themselves seeking to become owners of the House. It is really, as the Judge indicated, self-evident that if an express agreement is made in the terms that the Judge found, in a loving family context, the non-transferees will rely on that by not otherwise protecting their position. Further, there was distinct evidence from Brenda, both in her witness statement and at trial, which the Judge accepted and relied upon, to the effect that she did indeed rely on what had been agreed in not seeking to have herself put onto the title. It is inherently likely that John acted similarly and his witness statement indicates (albeit not in explicit terms) that he did. The difficulties caused by Brenda's absence and John's work commitments could have been overcome, had Patsy refused to agree that she would hold title to the House on trust for the three children.

19. That conclusion disposes of ground 1 of the appeal.

20. Ground 2 is that the Judge was wrong to hold that John and Brenda had acted sufficiently to their detriment to give rise to a common intention constructive trust. Mr Levenstein submits that substantial (though not necessarily monetary) detriment is essential to the existence of any common intention constructive trust (Gillett v Holt [2001] Ch 210 at 232D, *per* Robert Walker LJ) and that detriment has to arise from a self-induced change in position of the claimant, whereby they either incurred a burden or forwent a benefit. He submits that if the Judge held that no detriment was required that was wrong in law, and that there was no sufficient change of position by John and Brenda to give rise to a constructive trust.

21. In advancing this argument, Mr Levenstein submitted that throughout the trial and in the judgment, the Judge was only concerned with a common intention constructive trust, which he said had many similarities to a claim of proprietary estoppel and in particular a requirement of substantial detrimental reliance. Mr Levenstein submitted that it was not open to the Judge to reach a conclusion based on a constructive trust other than one that requires a claimant to prove that they changed their position to their detriment in reliance on some agreement or understanding of an interest in the property.

22. I consider that it is not open to Patsy to contend that the Judge was wrong because he reached his decision (if he did) on the basis of a constructive trust that does not depend on detrimental reliance, namely a trust imposed by equity to prevent a transferee or property from acting unconscionably by denying the terms on which

they received the property. Patsy's Grounds of Appeal sought to argue that the Judge was wrong to grant permission to amend to plead constructive trust and wrong to conclude that detriment was not required, but they do not raise a ground of appeal that the Judge was wrong to reach a conclusion based on a case that was not pleaded. If the Judge did reach his decision on the basis of that type of constructive trust then John and Brenda are entitled to seek to uphold it on that basis.

23. In any event, I do not agree that, in granting John and Brenda permission to amend their Particulars of Claim, the Judge or the Amended Particulars restricted their case to a common intention constructive trust based on detrimental reliance. In his judgment on permission to amend, the Judge rejected an argument that the case based on constructive trust was bound to fail. That argument was that Mother suffered no detriment in relying on the alleged agreement. The Judge rejected that on the basis that it was arguable that "the detriment is to the effect that somebody who you transfer the property to then denies the basis upon which it is being transferred, and instead of holding that property for all three children takes it exclusively for herself". It is therefore clear that the Judge, though he referred to a kind of detriment, had in mind a different kind of constructive trust than a classic common intention constructive trust.

24. The Amended Particulars of Claim plead that "it was their [everyone's] common intention that the Property would be held on trust for themselves" and, separately, that Mother relied to her detriment in transferring the House into joint names with Patsy when she alone provided the purchase money. Para 40, as amended, reads:

> "It would be unconscionable for the Defendant to deny the Claimants' equitable interest in the Property and or defeat the common intention of the Parties and the Deceased by relying on her strict legal rights"

I do not agree with Mr Levenstein that this pleading prevented John and Brenda from seeking to establish, or the Judge from finding, a constructive trust on the basis that it would be unconscionable for Patsy to deny that the House was put into her name pursuant to an agreement that she would hold it after Mother's death on trust for the children equally. Although the word "agreement" might have been more precise than "common intention", the difference is insubstantial and the pleading was apposite.

25. It is true that in a number of places in his Judgment (though mostly in his citation of passages from textbooks) the Judge uses the expression "common intention constructive trust" to describe what it is that John and Brenda are contending for. However at para 29 he says that, despite common ground between Counsel that there is no material difference between a claim based on proprietary estoppel and one based on constructive trust, "constructive trust principles are the more appropriate ones to engage because if what the claimants say is correct, this is, as it were, a straight forward purchase of a property in the name of the true purchaser and one other on terms as to holding the beneficial interest which, if successful, would give rise to an unimpeachable right to a declaration and a beneficial interest". It does not seem to me to make any difference that the Judge on occasions uses "common intention constructive trust" as a label for Brenda's and John's claim.

26. Turning to the substance of the Judge's conclusion, he first deals with an argument advanced (contrary to an earlier concession) by Mr Levenstein that Mother would not have been able during her life to enforce the agreement against Patsy because she had not acted to her detriment in transferring the House to Patsy on the basis of the agreement. The Judge unsurprisingly gave that argument very short shrift. He then dealt with a submission that any detrimental reliance of Mother could not avail Brenda and John, and that neither could Brenda and John simply rely as detriment on the repudiation of their expected interest in the House.

27. The Judge referred to two estoppel authorities, Steria Limited v Hutchinson [2006] WCA Civ 1551; [2007] ICR 445 (a case on pension entitlement, in which Neuberger LJ emphasised the need for relevant detriment – other than the loss of the expected benefit – to be proved), and Lloyd v Dugdale [2001] EWCA Civ 1754; [2002] 2 P&CR 13 (a case on proprietary estoppel and constructive trusts, where the requirement for detriment incurred by the claimant himself is emphasised), and then said at para 93:

> "The problem with those passages and those authorities is that they refer to matters and cases which are quite different from this type of case. In my judgment these arguments are misconceived for the following reasons. Firstly, upon transfer on 8 January 1997, the constructive trust was, as it were, fully constituted, and the joint purchasers and certainly Patsy thereafter held the property on the footing of that which had been previously agreed. It is therefore not necessary for either of the other beneficiaries, namely the claimants, to have acted to their detriment at all, otherwise, it would allow Patsy to dishonour her word to her Mother and her siblings and use the statute as an instrument of fraud. I can see no reason why, as in any other case of, for example, an express declaration of trust, an actual beneficiary, namely Brenda and John, could not enforce the trust."

In para 94, the judge added that, on the assumption that Mother's estate could not enforce the trust, Patsy would otherwise be entitled to defraud her brother and sister of that which they had previously trusted her to hold for them, a conclusion that the judge said that he was "simply unable to accept".

28. I will come shortly to the second reason why the Judge considered that the arguments based on the authorities cited by Mr Levenstein were misconceived, but the above paragraph of the Judgment seems to me to encapsulate the Judge's principal conclusion, which followed from his finding of the terms that had been agreed between Mother and the children. The Judge referred to no authority but, instinctively, considered – in my view rightly – that if a property is transferred gratuitously to a person only on the basis of their agreement to hold it on trust for some other person, equity will not allow the transferee to rely on the absence of a formal deed of trust and keep the property for herself: a principle established in Rochefoucauld v Boustead [1897] 1 Ch 196, if not before.

29. At para 95, the Judge then turned, secondly, and if he was wrong about the conclusion previously expressed, to the position if detriment had to be proved by Brenda and

John. He stated that the essence of the common intention constructive trust is unconscionability and identified what he considered to be a fundamental change in position by Brenda and John. He compared the position that they are in with the position that they would have been in if their names were on the title deeds and said:

> "In relying upon Patsy agreeing to hold the property on trust for the three of them, and therefore effectively holding the ring or holding the property on trust for and on their behalf, not only for each of them, but also for Mother during her lifetime, they have acted to their detriment in not exercising what was their undoubted 'right' to go on the title deeds. To allow Patsy to renege upon that would, in my judgment, be simply wrong and constitute unconscionable conduct of the highest order.

The Judge then pointed out that the detriment of the non-signing siblings was not derived from Mother's detrimental reliance:

> "… but results from not signing or going on the title deeds and so losing his or her promised share of the property in reliance upon the promise of the signing siblings, Patsy, thereby establishing a direct nexus between that promise and the detriment of the non-signing sibling, Brenda and John… "

30. Mr Levenstein submits that the Judge was wrong to find that the "inaction" of Brenda and John, as he put it, was detriment of the requisite character to be capable of supporting an equitable interest under a constructive trust. He says that their position was unchanged: before and after the agreement with Patsy they had no interest in the House. I do not agree with this submission. If, as I have found, the Judge was entitled to conclude that Brenda and John relied upon Patsy's agreement, by not seeking to take any steps to protect their intended share in the House, their desisting on the basis of Patsy's agreement from taking steps that they could and would otherwise have taken is a sufficient change of position. It is not the case that Brenda and John could have taken no steps, nor was it established at trial that they would in any event have done nothing. I therefore consider that the Judge's alternative conclusion, were it necessary to prove detrimental reliance to support a classic common intention constructive trust, was justified.

31. However, that conclusion about detrimental reliance of Brenda and John was unnecessary and the Judge's instinct was right. Patsy is the gratuitous transferee of the House on the basis of her agreement with Mother and her siblings that she would hold the House on trust for Mother during her life and then for the children equally. The House was only transferred to her on the basis of that agreement. Patsy is bound in conscience to give effect to the terms agreed with her siblings, pursuant to which Mother conferred on her a benefit by putting the House into her name. The House was from that time held on constructive trust, for Mother during her life and for the children after her death. That did not depend on anything other than Patsy's agreement and the transfer of the House into her name. The terms agreed negate both the presumption of advancement and any resulting trust. Since, as the Judge held, the

constructive trust was constituted at the time of transfer, the beneficiaries of the trust are entitled to enforce it against Patsy.

32. Mr Levenstein argued that such a conclusion would effectively drive a coach and horses through the requirement for detrimental reliance in a common intention constructive trust (though he did not use that metaphor). That is simply not so. This is not a case in which the owner of a property has expressly or impliedly promised or agreed with another person that they have, or will have, an interest in it. An informal promise of that kind cannot be enforced against the owner unless the promisee has reasonably changed their position in reliance on the promise. By contrast, the instant case is of a different kind, in which a property is transferred (gratuitously) into the name of the owner on the basis of their express agreement to hold the property on trust for another. The owner only obtains the property on the terms of the agreement and equity does not permit them unconscionably to refuse to give effect to the terms. The trust arises from the terms on which the property was transferred, not from detrimental reliance on the agreement by the beneficiary. Had Patsy already owned the property and been persuaded by Mother to agree to hold it on trust for all three children, the case would have been of the first kind. But the true facts, as found by the Judge, make it a case of the second kind.

33. The distinction between these different kinds of case – and the unifying common factor of unconscionable conduct – were explained by Patten LJ in De Bruyne v De Bruyne [2010] EWCA Civ 519; [2010] 2 FLR 1240, a case to which the Judge was not referred. The issue in that case was whether a 1991 appointment of shares held by a US discretionary trust by trustees to a husband, on the basis of his promise to settle those shares on a trust for his children, clothed the shares in a constructive trust, so that the shares were not his property for the purpose of ancillary relief proceedings. The wife argued that there could be no constructive trust because the beneficiaries were minors in 1991, who knew nothing of the appointment, agreed nothing with their father in that regard and had not acted to their detriment. She relied on authorities on common intention constructive trusts and argued that there was no agreement or understanding that the children would receive any interest in the shares and no detriment suffered by them in reliance on one.

34. Patten LJ agreed that the principles of common intention constructive trust could not apply to the facts of that case but held that nevertheless a constructive trust did arise on the making of the appointment. He referred to the judge's findings that the trustees' appointment and the grandparents' consent had been procured on the footing that the shares would be placed in trust for the children, and that on that basis it was impossible to regard the husband as having been free to deal with the shares as his own:

> "49. The authorities dealing with common intention constructive trusts provide only one example of a situation in which equity will impose a trust upon the owner or transferee of property based on the circumstances in which the property is acquired or dealt with. For a trust to be created the court has to be satisfied that it would be unconscionable for the legal owner to assert his legal interest in the property to the exclusion of the alleged beneficiaries. The fiduciary obligation which that involves arises most obviously in an express trust where the

property is held under the terms of a trust instrument in which the interests of the beneficiaries are clearly identified. In such cases the trustee either receives the property subject to the beneficial interests created by the instrument of transfer or, in the case of an express declaration of trust, subjects property already owned by him to those interests. In the case of a constructive trust, the obligation is imposed upon him as a result of his unconscionable conduct.

50. In common intention constructive trusts the equity arises because it would be unconscionable for the owner of the property to be allowed to deny the co-habitee the interest which it was agreed or understood that he or she would have and in reliance on which the co-habitee acted to his or her detriment. In a case like *Lloyds Bank plc v Rossett* where the husband purchased the house with money from his own family trust, and the wife made no financial contribution to its acquisition but relied instead on works of improvement which she carried out to the property, some causal link is necessary in order to connect the work done to the agreement or understanding that the ownership should be shared and so deprive the husband of absolute ownership of the property which he had paid for. This requirement of detrimental reliance is closely bound up with the question of unconscionability and in the analogous context of proprietary estoppel has come to be regarded as something which ought properly to be considered as part of a broader enquiry into whether the repudiation of the assurance given was or was not reasonable in all the circumstances: see *Gillett v Holt* [2001] Ch 201 at page 232D.

51. There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely on any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial

> or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principal is a broad one and applies as much to *inter vivos* transactions as it does to wills: see *Rochefoucauld v Boustead* [1897] 1 Ch 196; *Bannister v Bannister* [1948] 2 AER 133"

Thorpe LJ and Sir Paul Kennedy agreed with Patten LJ.

35. These paragraphs amply demonstrate that a constructive trust may arise in favour of beneficiaries in circumstances in which essential ingredients of a common intention constructive trust are absent, namely an agreement or understanding with the beneficiaries and detrimental reliance. The constructive trust in such circumstances depends on the agreed basis on which the transferee of property received it and on the fact that it would be unconscionable for them to treat the property as their own. The principle applies exactly to the facts of the instant case, as found by the Judge.

36. Undaunted by this authority, Mr Levenstein submitted that the case was plainly distinguishable, in that in De Bruyne the issue arose in matrimonial proceedings of wealthy parties and concerned trust property, of which the children were already beneficiaries; further, that the beneficiaries were minors at the relevant time and so could not have made any agreement with their father. In those circumstances, Mr Levenstein submitted, the court could not apply the principles of a common intention constructive trust and so had to create some new law in an exceptional case, whereas the facts of this case are not exceptional and concern family property.

37. Although the facts and context in De Bruyne were of course different, the essential facts were substantially the same, namely that property had been transferred to a volunteer on the basis of his promise to hold it on certain terms, and would not otherwise have been so transferred. It is true that the facts did not fit a conventional common intention constructive trust analysis, but neither do the facts in the instant case. It is perhaps instructive to ask oneself what would have happened if Patsy had refused to agree to hold the House on trust for the children in equal shares. It is, as the Judge might have said, self-evident that the House would not have been transferred into Mother's and Patsy's sole names in those circumstances.

38. The suggestion that the Court of Appeal created a new legal principle to deal with an exceptional case is an entire misreading of the decision. Patten LJ was applying first principles of equity to the facts of the case before him and created nothing new. He held, in effect, that the judge had been wrong to shoehorn the facts into a common intention constructive trust analysis and that it was unnecessary to do so when they fitted a different well-established type of constructive trust. The different types of constructive trust are well summarised in paragraphs 10–018 to 10–024 of Megarry & Wade's The Law of Real Property (9th ed). These include, as three different sub-categories: parties entering into a joint venture involving land; where it would be inequitable for a landowner to deny a claimant an interest in land; and where a person has acted to their detriment in reliance upon a common intention for that person to acquire an interest in a property.

39. Although the Judge did not refer to De Bruyne, his decision in para 93 is entirely consistent with the *ratio* of that authority. The ground of the argument at trial had moved away from proprietary estoppel, as a consequence of the permission to amend the Particulars of Claim, and then from one type of constructive trust to another in the judgment, but that process was not unfair to Patsy. In the context of defending what was originally a proprietary estoppel claim, Mr Levenstein's suggestion that Patsy might have given different evidence had unconscionability been known to be a central issue cannot be accepted. The decision in this case inevitably followed the judge's factual finding about the terms agreed in November/December 1996, when he wholly rejected Patsy's different and self-serving account.

40. In my judgment, the Judge reached the right conclusion for the primary reason that he gave and Patsy's appeal must be dismissed.