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Claim No. CL-2017-000323

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF GERALD MARTIN SMITH
AND IN THE MATTER OF THE CRIMINAL JUSTICE ACT 1988

07 February 2023

BEFORE:
Mr Justice Foxton

BETWEEN

(1) JOHN MILSOM
(2) DAVID STANDISH
(IN THEIR CAPACITY AS JOINT ENFORCEMENT RECEIVERS)

Applicants

And

(1) GERALD MARTIN SMITH
(2) THE ESTATE OF PHYLLIS IRENE SMITH (DECEASED)

Respondents

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

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1. **MR JUSTICE FOXTON:** It is customary on occasions like this to begin with a comment along the lines of, “Despite the valiant submissions of Mr, or Ms, X ...” , before proceeding to reject all of those submissions. Very often that is simply an idle phrase, but it is not always so, and today is one of those occasions when it is far from an idle phrase, because faced with what, for the reason I am about to give, is factually an incredibly challenging case, Mr Curry has done an extremely good job of extracting the best that can be extracted from it. It is no reflection on him that I have been left with absolutely no doubt at the end of the evidence that the beneficial ownership of this property was and remains in Dr Gerald Martin Smith, and has never been in Ms Phyllis Smith or, now, her estate.
2. This is the hearing of an application by enforcement receivers, Mr Milsom and Mr Standish (“the Enforcement Receivers”), appointed to realise the available assets of Dr Gerald Martin Smith under the Criminal Justice Act 1988 for the purpose of satisfying a confiscation order which was made against him on 13 November 2006 in the sum of just under £41 million. With interest, the outstanding amount is now close to double that. The order was made following Dr Smith's guilty pleas to 10 counts of theft and false accounting on 24 April 2006.
3. The specific issue which arises for decision today is whether a property at 137 Cavendish Meads in Ascot, which I shall refer to as “the Property”, is an available asset of Dr Smith for the purposes of that confiscation order or whether it was beneficially owned by his late mother, Ms Phyllis Smith, such that following her death in December, the Property would pass to her estate.
4. At the hearing, in addition to submissions from Mr Beswetherick KC for the Enforcement Receivers, I heard, as I have indicated, submissions from Mr Curry as well. It is right that I should record the nature of his involvement in the case. He was instructed by Dr Smith's brother, Mr Anthony Smith. Mr Anthony Smith is named as an executor in Mrs Phyllis Smith's will but has not taken up probate. He is the father of two of the beneficiaries of Mrs Smith's estate, his two sons, and the uncle of the other two beneficiaries, the daughters of Dr Gerald Smith and his ex-wife, Dr Gail Cochrane.

5. Mr Anthony Smith is someone who, on his account, has had a close involvement with his mother in relation to the Property, certainly over recent years. In circumstances in which I felt it was appropriate for the court to hear submissions reflecting the two differing views as to who the beneficial owner of the Property was, I gave Mr Anthony Smith permission to instruct counsel to make submissions on the basis that he would not be liable for any adverse costs order by reason of doing so. The Enforcement Receivers consented to that approach. It has undoubtedly assisted my determination of the case, but also the interests of justice, to have those submissions put forward in opposition to those advanced by the Enforcement Receivers.
6. So far as the legal principles are concerned, it was common ground that where, as in the present case, a particular individual is the sole legal registered owner of a property, it is to be assumed that they are also the sole beneficial owner, with the burden on those contending otherwise to establish that position; see *Stack v Dowden* [2007] 2 AC 432 at [56] and [58]. As it was put in another case to which I was taken, *Hudson v Hathway* [2022] EWCA Civ 1648 at [143], it is for the party contending they hold a beneficial interest to establish both that they do, and the extent of it.
7. Mr Curry put the case that the beneficial owner of the Property at the time of her death was Mrs Smith in two ways: first, that the evidence established an express declaration of trust by Dr Smith, which, although it did not satisfy the requirement of being in writing under section 53 of the Law of Property Act 1925, was nonetheless a beneficial interest which Dr Smith could not deny because that would be tantamount to using the statute as an instrument of fraud. That argument was argued by reference to the well known authority of *Rochefoucauld v Boustead* [1897] 1 Ch 196.
8. In relation to that issue, I accept Mr Beswetherick's submissions that that principle is only engaged when property is transferred by a beneficiary to the putative trustee on the basis of an oral agreement that the property will be held on trust when received, with the trustee then seeking to rely on the absence of written record of the trust to preclude the beneficiary from challenging the absolute nature of the transfer. This is not such a case; rather it is a case in which Dr Smith acquired the property from a third party and is said, either contemporaneously or immediately afterwards, to have made an oral declaration of trust. The distinction between those two types of cases is clear,

see for example Mr Justice Fancourt in *Archibald & Archibald v Alexander* [2020] EWHC 2161 (Ch) at [32]. In the second type of case, the absence of writing cannot so easily be overcome. If it could, if I may permit myself the Chancery luxury, it would be to drive a coach and four through the requirement for writing under the 1925 Act.

9. Secondly and, in fairness to Mr Curry, I think the principal way in which the case was put, was that there was a common intention constructive trust here. That requires, first of all, an agreement, arrangement or understanding between the legal owner and the putative beneficiary that the latter is to have a beneficial interest (see *Snell's Equity* 34th at [24-051]); second, that the putative beneficial owner has acted to their detriment in reliance upon such an agreement, arrangement or understanding (*Snell's Equity*, [24-056]). I was also referred to *Lewin on Trusts* (20th) at [10-069], saying that what the requirement of detrimental reliance meant was that the claimant must have done something which he could not reasonably be expected to have done unless he was to have an interest in the property.
10. As is so often the case, it is not really the legal principles on which this particular application turns, so much as the facts, and it is to those which I now turn.
11. One preliminary point I should address is that the Enforcement Receivers invited me to place evidential weight on the fact that Dr Smith had not himself given evidence, it being said that I should therefore draw an adverse inference against those who are relying upon his intention at the time that the Property was acquired in accordance with principles summarised in cases such as *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm), [1542] to [1543].
12. I have found it necessary to approach that submission with a degree of caution. Dr Smith has twice been convicted of separate sets of offences of dishonesty and has been found in subsequent civil judgments to have engaged in serial dishonesty after his release from the second period of imprisonment. He may well have felt that no judge would attach significant weight to his oral evidence, save where corroborated by other evidence, and that in those circumstances the evidence that would otherwise have been corroborative should be left to do the heavy lifting on its own. In those circumstances, I am not going to draw an adverse inference simply from the absence of Dr Smith as

a witness in this case. However, given his background and the propensity to deceit on his part, which is well established, I do not feel able to place weight on his untested account in a letter.

13. More significant is the fact that, despite Dr Smith being aware of these proceedings and aware of the fact that his own daughters would stand to benefit from the failure of the Enforcement Receiver's case, no documentation has been forthcoming of any kind which might lend support to the agreement, arrangement or understanding, or indeed express declaration of trust on which the counter-narrative must depend. Given that Dr Smith would have every incentive to look for and make available any such documents, the inference that can be properly drawn from their absence is that there are no such documents.
14. I have already referred to the fact that there are no contemporaneous documentary materials evidencing any declaration, agreement, arrangement or understanding. However, I accept that, given that the Property was acquired in 1985 and that the arrangements are said to have arisen in a familial context, the absence of documents from that period might carry rather less weight than a more recent absence, or the absence of documents in a commercial case. Nonetheless, it is quite a big thing for property which is to be the beneficiary's home to be and remain in the legal name of another party with no record of the trust arrangement at all. More significantly, Dr Smith's career ran into a rather troublesome engagement with the criminal justice system relatively early on in our story. That would have made documenting, and indeed taking steps to evidence, the true nature of the ownership of the Property rather important, and yet no one appears to have made the attempt.
15. In addition, it is not simply the case that there is no documentation supporting the alleged declaration, agreement, understanding or arrangement. There is documentary evidence dating from the time of the acquisition of the Property which is fundamentally inconsistent with such a declaration, agreement, understanding or arrangement.
16. Dr Smith applied for a mortgage to acquire the Property from the Halifax Building Society. In his application form, he expressly declared that no other persons aged 17 or over who would not be parties to the mortgage would live at the Property and that he

would be funding out of his own money the full difference between the amount of the loan and the total cost of the property. That form was filled in before Dr Smith had embarked on the business career which culminated in two sets of convictions for dishonesty and at a stage when he was still working as a doctor in the National Health Service. It should not be too readily assumed that he would have been willing to deceive the lender.

17. As I will come on to, Mr Anthony Smith gave rather vague evidence that it was the common and collective understanding of those in the Smith family involved in the decision to acquire the Property that the beneficial interest of his parents would be hidden from the lender. One would not need to be a recently started mortgage broker, as Mr Anthony Smith apparently was at that time, to realise how important it would have been for Halifax if the Property was to be beneficially owned by persons other than the borrower and who would be in occupation of the Property, to know that this would be the case.
18. There were suggestions by Mr Anthony Smith that Halifax knew at some stage, possibly shortly after acquisition, that the Property was in fact Mrs Phyllis Smith's property and/or that she was paying the mortgage. However, it is striking that all of the correspondence or records from the Halifax are sent to Dr Smith as the owner and are addressed to him at the Property. The 2006 Halifax documents identify the Property as not simply Dr Smith's address but the address to be used for correspondence and they were still corresponding with Dr Smith at that address, and only with Dr Smith, at least as late as February 2021.
19. As I have said, Dr Smith registered the Property in his own name with the Land Registry on 11 October 1985. His solicitors acting in the sale were Paisner & Co. There is no suggestion that they caused any of the steps which a competent solicitor would have caused to be taken if they had understood the Property was being acquired by Dr Smith on trust for his parents. It is absolutely clear that they had no such understanding because they later took a charge over the property in respect of a £1.5 million claim.

20. Dr Smith's subsequent dealings with the Property are also all consistent with sole beneficial ownership on his part and rather weigh against the suggestion that the Property was held beneficially by his parents. First, at a stage when his mother was the sole occupant following his father's death, he granted a second charge over the Property to Paisner & Co on 21 March 1989 to secure a personal liability of potentially £1.5 million. He executed that charge on the basis that he was the beneficial owner and seized of the property for a legal estate in fee simple in possession.

21. There is no documentary evidence to suggest that the existence of this charge was ever brought to the attention of Mrs Phyllis Smith or Mr Anthony Smith. Mr Anthony Smith gave evidence that his mother had consented to it and that he had found out a year after the event. However, I am unable to accept that evidence. First of all, he did not mention it in his witness statement, even though Mr Standish had squarely flagged this as one of the key points being relied upon by the Enforcement Receivers, to whose evidence Mr Anthony Smith was responding. Second, his explanation for not mentioning it, that he did not think it was relevant, was wholly unconvincing. Finally, and more fundamentally, I would not likely assume against Dr Smith that he would have charged the Property beneficially owned by his mother, where she was living and would hope to live for the remainder of her life, in support of a business debt of his own. It seems to me that even allowing for his record of dishonest business activity, it would not be compatible with his character for Dr Smith to treat a close family member in that way.

22. Second, on 19 December 2003, Dr Smith applied for a further advance from Halifax of £450,000 to be secured against the Property on the basis of a 15-year extension of the mortgage. Once again, there is no evidence that this was discussed and agreed with Mrs Smith. Mr Anthony Smith says he was aware of it and he offered what I am afraid was a rather unconvincing explanation as to what was intended, involving some form of deceit of Halifax. We do know that the advance was to be paid into a bank account which was in Dr Cochrane's and Dr Smith's names and which Dr Smith says he regarded as beneficially hers. Once again, it is very difficult to see how that proposed transaction (it did not proceed) is compatible with any belief or understanding on Dr Smith's house that the Property belonged to his mother.

23. Third, on 22 August 2006, Dr Smith wrote to the Halifax changing the mortgage from a capital mortgage to an interest only mortgage, fixing the interest rate and extending the term, saying he planned to use the proceeds of one of his pensions to repay the capital amount outstanding at the end. At that time, it is clear direct debit mandates were provided by companies which I accept on the evidence before me were Mr Anthony Smith's companies but all provided through Dr Smith, covering the ongoing interest element. Halifax's letters relating to these arrangements were all sent to Dr Smith at the Property. On the evidence before me, the overwhelming likelihood is that those arrangements were put in place because the restraint order and ongoing confiscation proceedings against Dr Smith made it impossible for him to continue to apply funds to pay down the mortgage, with companies of Mr Anthony Smith covering the much lower figure of interest until it would be possible for Dr Smith to resume payment.
24. So there is a considerable body of evidence and a strong inherent probability, which is consistent with the Property being Dr Smith's beneficial as well as legal property and which is inconsistent with the beneficial interest in the Property being that of his parents and, following his father's death, of Ms Phyllis Smith.
25. What is there that points the other way? Mrs Smith's statement was taken following interviews in September and October 2021 and is dated 28 November 2021. It has not been tested in cross-examination, and never could have been given her medical condition when it was made. The statement says that her late husband purchased the Property and that she and her late husband made all of the mortgage payments. The statement does not refer to any arrangement by which funds were lent to Dr Smith or Mr Anthony Smith that were repaid by them providing the deposit; the statement does not address the charge in favour of Paisner & Co, the proposed £450,000 advance or any change in the mortgage from a capital repayment to an interest payment, even though that would have had a very significant impact on Mrs Smith's daily life, freeing up her funds to spend on herself instead of reducing the capital balance on the mortgage. The statement that Mrs Smith or her husband paid all the mortgage payments is clearly wrong. There is evidence showing, as I have indicated, companies connected to Mr Anthony Smith paying interest. Ms Sinead Irving, a very close

associate of Dr Smith, who was involved in his business affairs, making at least one payment and another being charged to a card in Dr Smith's name.

26. Whilst there is no explanation in Mrs Phyllis Smith's statement as to how she was able to make mortgage payments, she does say she only receives a state pension. In those circumstances, how she managed mortgage payments that would have been the equivalent of £900 a month over so many years is wholly unexplained. The position is more complicated still when one comes to have regard to the mortgage statement provided by the Halifax Building Society, which shows extremely chunky repayments being made. I will only pick a few examples: £2,200 on 2 September 1986, £2,500 on 6 January 1987, £3,000 on 5 February 1987, £3,200 on 18 March 1987, £7,920 on 2 February 1988, and so it goes on.
27. There are also concerns as to quite how accurate Mrs Smith's recollection of events could have been when asked about them in late September and October 2021. Both Mr Anthony Smith and Dr Cochrane in other contexts have raised concerns about the reliability of Mrs Smith's memory and/or her capacity at this time and on 21 September, so about a month before the statement was produced, Longmores (Mrs Smith's solicitors) wrote to Stephenson Harwood saying that Mrs Smith could not remember what the payments she had made to the Halifax were even for.
28. Second, there is the evidence of Mr Anthony Smith. He gives an account of his parents advancing money to him and to his brother which in due course was paid back to them in the form of the sons providing the deposit for the Property on the basis that the parents would then pay the mortgage and have somewhere to live. The total deposit on the evidence acquired from Halifax as to the acquisition terms would have been in the order of £9,000. Mr Anthony Smith's evidence is completely vague as to the amount he advanced by way of a deposit, the amount lent to him, when and how it was paid back. For someone who was not the mortgagor or the purchaser to provide a significant part of the deposit for the purchase would inevitably have raised questions with the lender. However, there is absolutely no evidence of any such questions being raised. As I have indicated, Mrs Smith made no reference to any loan or deposit arrangement of the kind Mr Anthony Smith advanced.

29. Mr Anthony Smith also referred to his mother paying the mortgage payments – which would have been just under £900 a month - in cash over a long period. Even taking that figure alone, I found that evidence utterly incredible. The idea of Mrs Phyllis withdrawing 88 x £10 notes or 44 x £20 notes, plus the coins that made up the precise figure, from Lloyds Bank, taking them to the Halifax and handing them over every month for 20 years to pay a mortgage in someone else's name would surely have rung alarm bells at both the bank from which the money was being withdrawn and the bank into which the money was being paid. It is clear, however, that the level of cash transaction required would have been an altogether greater figure for the earlier period of the mortgage, by reference to the repayment amounts I have referred to. I also find the idea of Mr Anthony Smith letting his mother transport such large quantities of cash on a regular basis, given her age, highly unlikely. It is also wholly inexplicable how all of this money was sourced from Mrs Smith's pension, it being her evidence, certainly as recently as October 2021, that was the only income that she had.
30. Mr Anthony Smith said that his mother had begun to forget about making the mortgage payments at some point, and that letters and calls came in from the Halifax which worried her which led him to make arrangements for his companies to take over the mortgage payment. Those letters, however, would have been addressed to Dr Smith, being amongst the many letters being addressed to Dr Smith sent to the property.
31. I also find it highly unlikely that Halifax would have spoken to Mrs Smith about a mortgage account which contained no reference to her. Mr Anthony Smith's suggestion that he set up a direct debit after his mother began to miss payments is inconsistent with the available documentary evidence which shows Dr Smith organising a direct debit from Mr Anthony Smith's companies at a stage when he moved the mortgage to interest only payments for reasons entirely explained by the ongoing confiscation process and the restraint order.
32. For all those reasons, I find Mr Anthony Smith's account of the payment of the mortgage incredible in many respects. As I have indicated, he has a very real interest in his two sons and two nieces acquiring an interest in the Property. I therefore find myself unable to place any reliance on his evidence.

33. There is also evidence from Dr Cochrane. Dr Smith's ex-wife, but who acknowledges that they remain close and continue to spend a lot of time together. She also refers to some undocumented and unparticularised arrangement in which the parents lent the Smith sons money which was then paid back through the deposit for the Property, and she suggested that Mrs Smith paid the mortgage over so many years.
34. I also found Dr Cochrane's evidence unreliable and improbable in a number of respects. I accept it is possible that, even before she married Dr Smith, she might have been made aware of a loan and deposit arrangement but I found her evidence that Mrs Smith repeatedly told her about paying the mortgage with her own money and gave her the narrative and story as to why it was she, Mrs Phyllis Smith, who owned the property, very difficult to reconcile with Dr Cochrane's evidence that Mrs Smith was a very private person in relation to her finances. It is helpful to look at Dr Cochrane's account of precisely what she claims Mrs Phyllis Smith told her. She said, "She told me she had been owed money by both boys"; "The way of paying it back was that the property was bought for her and Mr Smith", and "It was their property so they were owed money"; "She told me subsequently about that, I knew that during the time." All of this suggests much greater expansiveness on Mrs Smith's part than the very private person in relation to her finances who Dr Cochrane described on other occasions.
35. Dr Cochrane also claims Mrs Smith was withdrawing funds on a regular basis from her Lloyds Bank account (it is Dr Cochrane who identifies the account) to pay the mortgage. I have already noted the utter improbability of Mrs Smith paying a mortgage in cash and doing so from her state pension over so many years. When Dr Cochrane's evidence as to knowledge of these payments was tested, she initially tied her knowledge to a time when there was a carer living with Mrs Smith. However, it is quite clear that the carer was only living with Mrs Phyllis Smith much later after the mortgage payments had become interest only and after the obligation to make them had been assumed by Mr Anthony Smith's companies by direct debit.
36. Dr Cochrane too has an interest in the Enforcement Receivers' case failing because her daughters, Imogen and Iona Smith, stand to benefit as beneficiaries in the late Mrs Phyllis Smith's estate and it is therefore important to approach her evidence with

that in mind. Once again I found her evidence unreliable, and do not feel able to place any weight on it in the absence of reliable corroborating evidence.

37. Taking all of the evidence I have heard together, there is nothing which, with respect, comes close to rebutting the presumption which arises from the fact that Dr Smith took the legal estate in the Property his own name, that he was the sole beneficial owner of the Property. I therefore am not persuaded as to, and indeed would positively reject, the suggestion that there was any agreement, arrangement or understanding of the kind contended for by Mr Curry, nor any detrimental reliance on such an understanding by initially Mr and Mrs Smith and latterly by Mrs Smith alone.
38. For those reasons, I am satisfied that the Property is the beneficial property of Dr Smith and is subject to the confiscation order made by the Crown Court and I will so declare.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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