Neutral Citation Number: [2019] EWHC 537 (QB)

Case No: D00SO192

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE COUNTY COURT
HH JUDGE BERKLEY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before:

MR JUSTICE FREEDMAN

- -

Between:

ANDREW JAMES HORN

Claimant

- and -

CLAIRE ANNE CHIPPERFIELD

Defendant

- -
- -

George Laurence QC (instructed by **Clarke Willmot LLP**) for the **Claimant**

Hearing dates: 08/02/2019

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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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MR JUSTICE FREEDMAN

Introduction

Mr Justice Freedman:

1. This has been a very unusual application for permission for appeal. It is the oral renewal of an application for permission to appeal against an order of HH Judge Berkley ("the Judge") made on 6 July 2018 ("the Judgment"). It concerned a declaration in respect of the interests of the parties in a property known as 4 Saxon Place, Lower Buckland Road, Lymington SO41 9EZ ("the Property"). The Claimant and the Defendant were a couple who never married and who have two children born in 2002 and in 2005. The Court declared contrary to the Claimant's case, and in accordance with the Defendant's case, that they held the Property in equal shares as tenants in common, the Claimant having contended that they held the Property in unequal shares.

2. The curiosity of the application for permission is that whereas Counsel for the Claimant who had appeared below put the application on one footing and then amended it following receipt of the transcript of the evidence below, new Counsel for the Claimant was appointed very shortly before the oral hearing for permission, namely Mr George Laurence QC. He has made an altogether new argument which has involved the striking out of the entirety of the argument before his involvement. On 18 October 2018 Mr Justice Pepperall had refused the paper application for permission to appeal by reference to the previous argument, which Mr Laurence QC has jettisoned. I regard the decision of Mr Laurence QC to abandon the old argument as very prudent because I agree with the entirety of the reasoning of Mr Justice Pepperall. The question is whether the new argument should have a more successful outcome than the previous argument.

3. Mr Laurence QC has entirely recast grounds of appeal supported by an entirely new skeleton argument. In response, Mr Thomas Worthen of Counsel, who appeared below but not at the hearing of the application since it was about permission alone, submitted a Respondent's skeleton argument dated 7 February 2019. Mr Laurence QC submitted a supplementary skeleton argument dated 7 February 2019.

Outline of the facts

4. In summary, the greater income of the parties was earned by the Claimant who worked on contracts for limited length as a chief executive, managing director and vice president of companies in the field of commercialising technology, with periods of unemployment between assignments. The Defendant worked as a midwife, but reduced from full time to part time during the relationship and ceased work during the early years of the children's lives. They lived together from 1999 to May 2016: in October 2016, the Claimant left the Property.

5. Originally, the Claimant and the Defendant had their own properties in London. They sold their respective properties and then purchased the Property for £740,000. The Property was purchased from proceeds of sale of the Claimant's London property comprising £231,820, a further sum of £23,741 from the Claimant and an advance from the Halifax of £486,725 in joint names. The Claimant also paid the costs and the SDLT in a sum of £29,600. The Judge found that a sum of £39,000 had been transferred by the Defendant to the Claimant at his request: the Claimant "eventually accepted that the money had assisted in the purchase of No. 4 (the Property)". There is dispute as to the

extent to which the Defendant used the net proceeds of sale of her London property for the household.

6. It is common ground that the Property was purchased in joint names, but in the words of the Judge (paragraph 7) *"it is at the heart of this dispute whether the parties intended to purchase No 4 (the Property) as joint tenants (Defendant) or tenants in common in unequal shares corresponding to their financial contributions to the purchase (Claimant)."* There was a conflict of evidence as to the stated intentions of the parties. The Defendant says that the parties discussed that they would own the property together and that it was a joint purchase reflecting their committed relationship and status as a nuclear family. On one occasion in a pub, the Defendant says that the Claimant said to her *"Well, that's it Chip, we are now 50/50 owners but that means you owe half the debt as well."* The Claimant said that there were no discussions about the beneficial ownership, and he did not mind that the Defendant and her mother wished her to be a party to the mortgage.

7. There is also a letter dated 28 November 2006 from solicitors acting for the parties on the purchase to the parties describing a joint tenancy as a way of holding the property so that it goes to the survivor on death and a tenancy in common on the basis that each owns a share which would form part of the deceased's estate on death. Following this, an instruction was given to the Land Registry to register the parties as joint tenants. Both parties deny giving instructions to the solicitors about this.

The findings and assessment of the Judge

8. The Judge assessed the evidence of the parties carefully at paragraphs 44-54 of the Judgment. He found that the Claimant failed to acknowledge (i) the sacrifices which the Defendant made to the family in terms of her career, and (ii) the significant contributions which she made to the family finances, including investing almost the entire proceeds of her property into the family "pot". The Judge held that her sacrifices do inform of the likely intentions of the parties at the time of the acquisition of the Property.

9. Critically, the Judge found that the conversation in the pub occurred in the manner recalled by the Defendant and he found that *"at the relevant time, he was prepared to commit to a 50/50 ownership based on the parties' joint debt and the parties' commitment to one another"* [J/50]. As for the instructions to the solicitor, the Claimant was happy at the time to have the Property registered as equally owned because it reflected his feelings and the parties' intentions at the time [J/51].

10. The Judge also held that there was nothing to disturb the presumption that the beneficial interest follows the legal interest. He held that there was no point subsequent to the purchase of the Property when the parties formed a common intention to hold the Property differently from how they had purchased it [J/54.3]. He found that neither at the time of the purchase nor thereafter was there any discussion to the effect that the shares should be other than 50/50 or any conduct which might indicate this to be the case [J/54.4].

The original application for permission to appeal

11. The application for permission to appeal was in its inception about (i) alleged lack of reasons, (ii) unreasonable delay, (iii) challenge to findings of fact, (iv) errors of law, (v) procedural irregularity, and (vi) new evidence. For reasons set out fully by Mr Justice Pepperall, none of those grounds had any real prospect of success. At the heart of it was a challenge to the findings of fact of the Judge about the essence of the case which was bound to fail.

The amended grounds of appeal and submissions in support

12. Very shortly before the hearing of the renewal application, Mr George Laurence QC was instructed. He recognised the lack of prospect of success of the appeal as originally framed. In a very short time to his credit, he put together a radically different re-amended ground of appeal.

13. Mr Laurence QC has not sought to challenge the findings of fact of the Judge. Instead, he says that there is a real issue to be tried that the conversation in the pub does not support a finding of a beneficial joint tenancy ("the Conversation"). He says the same about the instructions given by the Claimant to the solicitors in November 2006 ("the Instruction"). He submits that the Conversation by itself would have been enough to have displaced the Stack/Jones presumption ("the Presumption"). He contends that the Conversation and the Instruction were inconsistent with the Presumption. He also submits that against that background and errors of law, the Judge erred in failing to find that the Presumption was displaced by the fact that the Claimant paid the net purchase price plus SDLT and costs out of his own resources.

14. As regards the Conversation, Mr Laurence QC submitted that this means only that they were joint mortgagees and that the Defendant had an undivided share in the Property such that if either died, there would be a right of survivorship to the other. He submits that this entirely begs the question as to the shares during the lifetime of the parties.

15. Similarly, Mr Laurence QC submits that the Instruction to the solicitor for a joint tenancy was only in the context of a letter from the solicitor referring to what would happen if one was to die, but which was silent as to the percentage owned in the event of severance of the joint tenancy. According to the Claimant, he did not mind that the Defendant would inherit on his death, but that was not to say that he was content to have provided all or most of the money provided for the purchase (other than the mortgage) and to be in a position where the Defendant could forthwith sever the joint tenancy and take 50% of the value of the property for herself. It was also not evidence of the intention of the Defendant who did not give the Instruction and who had no part to play in the Instruction. When I put in argument to Mr Laurence QC in respect of the Conversation that the words "50/50" showed that it was intended that the property would be not only held on a joint tenancy but would be owned equally beneficially, he responded by saying that the words were not to be treated as meaning what they said literally. It was to be treated as one of the matters relevant when reaching a view as to the inferred common intention. In particular, it was to be seen in the light of the lion's share of the financial contribution coming from the Claimant. On this basis, a statement made at 12 noon could easily be displaced by inconsistent conduct at 2pm e.g. the provision of the lion's share of the money to acquire the property.

16. Mr Laurence QC said that in respect of the Instruction, the evidence was that the Defendant had not provided the same, and so it cannot amount to evidence of common

intention. Further, the Instruction only showed that the Claimant was willing for the Defendant to inherit on his death, but said nothing about the respective shares during their lifetimes. He also said that the subsequent conduct after acquisition might evidence what the original intentions of the parties were. In the instant case, the subsequent payments predominantly by the Claimant might be evidence that (a) the common intention of the parties was not equality, and (b) the Presumption was or might thereby be displaced.

Discussion

17. I reject the Claimant's submission as regards the Conversation. It was regarded as crucial by the Judge, and effectively in the failed submissions of previous Counsel: hence, his attempt to impugn the finding of fact. In my judgment, the totality of what was found was not restricted to the right of survivorship, but to 50/50 ownership too. It went hand-in-hand with the contributions to the mortgage. The inequality financially of contributions at the time of acquisition and thereafter did not change the position. The Judge was right to see the Conversation in the context of the case as a whole. That included that (a) the parties had taken a joint mortgage, (b) the Defendant made sacrifices for the family unit, and (c) the Claimant and the Defendant had joint commitment to one another at the time. The Judge specifically referred to (a) a significant financial contribution from the Defendant (contrary to the evidence of the Claimant [J/54.5]]), and (b) the sacrifices made by the Defendant for the sake of the family (which the Claimant failed to acknowledge [J/45] and [J/54.6]).

18. In my judgment, the Judge's emphasis on the Conversation cannot be faulted. Contrary to the submission made on behalf of the Claimant, the words were to be given their literal meaning which is also their natural and ordinary meaning. The reference to 50/50 meant both literally and in context that the ownership would be shared in those proportions. The context of the mortgage was highly significant, and this was highlighted in the Conversation in graphic terms, namely that "*you own half the debt as well."*

19. As regards the Instruction, in no sense does the Instruction undermine the findings as regards the Conversation or the wider context. It may not be crucial by itself, but it is still significant in that the Claimant did nothing to indicate that he wished to secure an unequal beneficial entitlement during his lifetime. If the Judge gave to the Instruction more weight than it merited, then in view of the crucial nature of the Conversation and the overall context, any excessive weight given to the Instruction could not have affected the overall result of the case and does not justify a rehearing of the case.

20. As regards the Presumption, it is important to quote from the speeches in *Stack v Dowden* [2007] UKHL 17; [2007] 2 AC 432, and especially from the speech of Baroness Hale whose reasoning was adopted by the majority of the justices. At paragraphs 68-69:

69. 68. ***The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon.*** *In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A*

full examination of the facts is likely to involve disproportionate costs. ***In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual.*** *Nor may disputes be confined to the parties themselves. People with an interest in the deceased's estate may well wish to assert that he had a beneficial tenancy in common.* ***It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase. In law, "context is everything" and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual. (emphasis added)***

21. Mr Laurence QC has rightly emphasised how the Presumption can be displaced as per *Stack v Dowden*. He particularly emphasised paragraph 92 per Baroness Hale and paragraphs 130-131 per Lord Neuberger which I now cite:

per Baroness Hale:

"*92.This is, therefore, a very unusual case. There cannot be many unmarried couples who have lived together for as long as this, who have had four children together, and whose affairs have been kept as rigidly separate as this couple's affairs were kept. This is all strongly indicative that they did not intend their shares, even in the property which was put into both their names, to be equal (still less that they intended a beneficial joint tenancy with the right of survivorship should one of them die before it was severed). Before the Court of Appeal, Ms Dowden contended for a 65% share and in my view, she has made good her case for that.*"

per Lord Neuberger:

> "130. *In the present case, for instance, there is a disagreement as to the effect of the declaration in the transfer of the house to the parties that the survivor "can give a valid receipt for capital money arising on the disposition of the land". At any rate in the absence of any evidence that the effect of this provision was explained to the parties, I would reject the contention that it has the effect of operating as a declaration of joint beneficial ownership. That contention is based on inference, and the legal basis of that inference is open to argument. Indeed, at the time the home was acquired, any well-informed solicitor would have advised that the law was that such a declaration probably would not give rise to such an inference, in the light of the Court of Appeal's decision in Huntingford v Hobbs [1993] 1 FLR 736. Quite apart from that, it seems to me that, in the absence of any evidence of contemporaneous advice to the parties as to the effect of the declaration, the alleged inference would simply be too technical, sophisticated, and subtle to be sustainable, at least in the context of the purchase of a home by two lay people.*
>
> *131. Any assessment of the parties' intentions with regard to the ownership of the beneficial interest by reference to what they said and did must take into account all the circumstances of their relationship, in the same way as the interpretation of a contract must be effected by reference to all the surrounding circumstances. However, that does not mean that all the circumstances of the relationship are of primary or equal relevance to the issue.*"

22. It is to be noted that the reasoning of Baroness Hale above, with which the majority agreed, was different from the reasoning of Lord Neuberger, who gave reasoning by reference to a resulting trust, which would have given more emphasis to the amounts of the contributions than was contained in the reasoning of Baroness Hale.

23. Applying the reasoning of Baroness Hale in *Stack v Dowden*, I reject the suggestion that the unequal financial contributions when seen in context serve to displace or even weaken the operation of the Presumption in this case. On the contrary, in the instant case, the Conversation and the overall context justify the finding of the Judge that there was *"..a joint enterprise, so to speak: the parties and their children were a true family, and the parties had thrown their lots in together."* [J/46].

24. The Judge took into account the fact that the parties kept their finances separate throughout the relationship and that the Claimant did not like the Defendant opening letters addressed to him [J/48]. The Judge regarded this as just one of the factors. In my judgment, he was right to do so, and he was entitled to find that looked at as a whole, this did not make this case like the *Stack v Dowden* case as characterised by Baroness Hale at paragraph 92 of her speech quoted above. It was not one of those *"very unusual"* cases (the expression used by Baroness Hale both at paragraphs 68 and 69 of her speech in *Stack v Dowden*) where the Presumption may be displaced. On the contrary, it was reinforced by the facts as found by the Judge including (a) the Conversation which was of crucial importance, (b) the decision to have joint ownership of the house, (c) the joint mortgage, (d) the fact that the home was a family home for the family including the children, (e) the financial contributions of the Defendant, (f) the sacrifices of the Defendant, and (g) the overall characterisation of the relationship by the Judge at [J/46] as expressed in the last sentence of paragraph 23 above.

25. It is right that one can look at subsequent conduct as evidence of the parties' intention at the inception. In this case, the fact that unequal contributions were made thereafter did not depart from what was understood at the start. It does not provide further information in the round from which the Presumption is to be displaced.

26. In my judgment, the Judge identified the law correctly and applied it correctly. Mr Laurence QC wisely identified that he should abandon the attempt to seek to overturn findings of fact of the Judge. In the re-characterised appeal, he was able to say that the Claimant was no longer seeking to impugn the findings of primary fact. He says in his supplemental argument at paragraph 6 that *"all the Appellant now seeks to be allowed to do is to subject the findings, as made, to analysis."* The footnote adds *"with a view to demonstrating that neither the conversation nor the instructions supported the PBJT."* In my judgment, this approach fails for the following reasons.

27. First in my judgment, in reality, the Claimant is seeking to impugn the evaluation of those facts and the inferences to be drawn from them. This was the subject of criticism by Lewison LJ in the case of *Fage UK Limited v Chobani UK Limited* [2014] EWCA Civ 5 at para.114 where he said the following:

> "114. *Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC 1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include:*
>
> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus, even if it were possible to duplicate the role of the trial judge, it cannot in practice be done*."

28. Secondly, for the reasons set out above, the Court rejects the views expressed by the Claimant about the meaning and effect of the Conversation and the wider context of the matters to which the Judge had regard: it also does not accept that the Instruction was capable of displacing the Presumption. In the circumstances, whereas the Claimant contends that the Presumption is displaced or might be displaced such as to justify a new trial, in my judgment, the Presumption has not been displaced. On the contrary, the findings as a whole of the Judge serve only to reinforce the Presumption.

29. In my judgment, the Judge stated the law correctly and applied the law correctly to the facts. Whilst the reformulated appeal is not an appeal against primary facts, it is an appeal against the evaluation of those facts and inferences properly drawn from them, which was peculiarly for the Judge. There is no reason to believe that that evaluation was wrong.

30. Although that suffices, it is to be noted that the consequence of a successful appeal would be, as is accepted by Mr Laurence QC, that it would be necessary to have the case remitted to the Judge, or more likely to a different judge, to retry the matter. Using the word of Lewison LJ, the appeal would involve 'duplication' of the role of the trial Judge: the consequence would be worse, because of the remitting the matter for a retrial. For the reasons which I have given, this is unwarranted. The purpose of referring to *Fage* is to emphasise how cautious the appeal court is about an exercise of this kind, and the very good reasons for such caution. The reasons have particular resonance in this case.

Disposal

31. I pay tribute to the well-placed decisiveness of Mr Laurence QC in jettisoning the whole way in which the appeal had been previously presented, and in identifying how the arguments had been bound to fail. His novel and attractive presentation of the case was the result of a dogged and determined attempt to salvage the appeal. However, on careful examination, in my judgment, the new grounds are incapable of giving new life to an intended appeal. On the contrary, however expressed, this appeal has no real prospect of success, nor is there any other compelling reason to hear an appeal. It follows that the application for permission to appeal is dismissed.

32. Technically, the Court must consider whether the appropriate order is to refuse permission to amend before considering the permission to appeal. In the event, I have proceeded as if the application to amend had been allowed, and considered whether permission to amend should be given in respect of those re-amended grounds. I have come to the following conclusions:

    (1) The original application for permission to appeal (including as amended following the receipt of the transcript) was correctly refused by Pepperall J.

    (2) The application to re-amend was appropriately made by Mr Laurence QC, and so I grant permission to re-amend the grounds of appeal not upon the re-amended grounds being arguable, but simply to reflect the fact that it was appropriate for Mr Laurence QC to abandon the previous grounds, and to seek to advance something in their stead;

    (3) For the reasons set out above, the application for permission to appeal on the re-amended grounds is rejected.

33. An application is made by the Defendant for the costs of producing the short skeleton of 7 February 2019 to be the subject of detailed assessment alongside the costs of trial on the basis that *"the skeleton is a proportionate response to the complete late change to the grounds of appeal, and that it is just to make such an order in the circumstances*

(see CPR PD52B paragraph 8.1)". It is unusual for such an order, but the circumstances of this permission to appeal application are unusual. That was very properly recognised by Mr Laurence QC who to his credit very properly informed the Defendant's Counsel of his intentions and provided his argument promptly to him so that in effect he could respond if he wished to do so. In the event, the Defendant's argument has been directed both to whether the eleventh-hour amendment should be allowed and to the merits of new grounds. The Court has benefited from having the perspectives of the arguments of the Defendant and the Claimant in response. In these unusual circumstances, it is right that the Defendant should be paid its costs of producing its skeleton of 7 February 2019.