[2019] UKFTT 0510 (PC)

REF/2018/0796

IN THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

DEAN RUSSELL

APPLICANT

and

CHARMAINE LORRAINE BROWNHILL

RESPONDENT

Property Address:	**66 Pencroft Road, Shard End, Birmingham B34 6SP**
Title Number:	**WM714210**
Before:	**Judge Hansen**
Sitting at:	**Birmingham Employment Tribunal**
On:	**19-20 June 2019**
Representation:	**Mr Trussler of Counsel for the Applicant** **Mr Gale of Counsel of Counsel for the Respondent**

ORDER

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1. The Tribunal orders that the Chief Land Registrar do give effect to the Respondent's application dated 6 October 2017 by removing the two restrictions contained in paragraphs 2 and 3 of the Proprietorship register relating to Title number WM714210.

2. Any application for costs by either party shall be made in writing and filed and served by 22 July 2019 accompanied by a Schedule of costs in form N260.

3. Any response to any such application for costs shall be filed and served by 5 August 2019 and the Tribunal will then deal with costs and summarily any costs which it orders any party to pay on the basis of the parties' written submissions unless the Tribunal refers the quantum of costs for detailed assessment.

BY ORDER OF THE JUDGE
William Hansen
Dated this 1st day of July 2019

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DECISION

KEYWORDS – Beneficial Interest – Restriction

Cases referred to

Gascoyne v. Gascoyne [1918] 1 KB 223
Tinker v. Tinker [1970] P 136
Patel v Mirza [2017] AC 467
Chief Land Registrar v. Silkstone [2011] EWCA Civ 801
Jayasinghe v. Liyanage [2010] EWHC 265 (Ch)
Stack v. Dowden [2007] UKHL 17
Kernott v. Jones [2011] UKSC 53
Tinsley v. Milligan [1994] 1 AC 340

This Reference

1. This reference arises out of the Applicant's application in form RX1 dated 11 January 2017 to enter a restriction against the title to 66 Pencroft Road, Shard End, Birmingham ("the Property"). By reason of a mistake made by the Land Registry two restrictions were placed on the register without having given the Respondent an opportunity to object. Accordingly, and at the invitation of the Land Registry, the Respondent applied on form AP 1 to cancel the restrictions and the matter comes before me today to determine that application, although I am, in substance, determining the original application for a restriction.

2. The Property is registered at HM Land Registry under title number WM714210 in the Respondent's sole name. It was previously registered in the joint names of the Applicant and Respondent but was transferred into the Respondent's sole name by a Transfer dated 19 October 2012 ("the 2012 Transfer"). In the absence of an express trust to the contrary, the presumption is that the sole legal owner is also the sole beneficial owner. The party who alleges that this presumption does not reflect the parties' true intentions about the beneficial shares in the property bears the burden of proof, which is the usual civil standard on the balance of probabilities.

3. The basis of the Applicant's claim to a beneficial interest was set out in panel 12 of Form RX1 in the following terms:

> *"The applicant states that the applicant has a sufficient interest in the restriction being entered on the register.*
>
> *Nature of applicant's interest:*
>
> *Trust as a result of direct financial contributions made to acquire the property and then towards the subsequent mortgage payments.*
>
> *Details of how the applicant's interest arose:*
>
> *The property was initially rented. It was purchased in 1999 from the local authority in the joint names of the applicant and the current registered proprietor; they were cohabitees from 1999 to November 2016.*
>
> *The mortgage repayments were met from a joint account held in the joint names of the current registered proprietor and applicant from 1999 to November 2016. By agreement the property was transferred into the current proprietor's sole name; the Official Copies show the applicant remaining liable for restrictive covenants.*
>
> *The applicant's interest arises from the direct financial contributions made towards the property".*

4. The Applicant signed his name at the bottom of panel 12 suggesting that he endorsed the claim as advanced in the RX 1. However, the claim as advanced before me bears no resemblance to the claim set out in the RX 1. Indeed Mr Trussler, who appeared for the Applicant, opened the case by accepting that his client made no direct financial contributions to the mortgage after the 2012 Transfer. The claim, as advanced in the Applicant's statement of case, was that the transfer of the Property into the Respondent's sole name was prompted by the advice of a solicitor advising the Applicant in connection with a personal injury claim arising out of an industrial accident. The Applicant's Statement of Case at paragraph 9 says this:

> *"In 2012 the Applicant was involved in litigation which was eventually resolved in Court at the end of 2012. He was during the early stages advised by his solicitors to transfer the property. This was a precautionary measure in case a counterclaim was made and was successful as this claim could be satisfied against the Applicant's share of the property. This state of affairs was discussed with the Respondent. She urged the Applicant to follow the advice and assured the Applicant that the property would later be transferred back into joint names. Relying on the assurances, the property was transferred and was just a formality".*

5. That account immediately prompts concern and calls to mind the line of cases beginning with Gascoyne v. Gascoyne [1918] 1 KB 223 and culminating in Tinker v. Tinker [1970] P 136 in which Lord Denning said this:

> *"He cannot say that the house is his own and, at one and the same time, say it is his wife's. As against his wife, he wants to say it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it is conveyed to her for her own use; and he does not rebut the presumption by saying that he only did it to defeat his creditors".*

6. Salmon LJ concurred and added this at page 143C:

> *"All I want to add is this: since some attack has been made on Gascoigne v Gascoigne [1918] 1 KB 223, I entirely agree with the Master of the Rolls that Gascoigne v Gascoigne was correctly decided ... It is trite law that anyone coming to equity to be relieved against his own act must come with clean hands. If in a case such as the present he were to put forward as a reason for being relieved against his own act a dishonest plot on his part, for example, to defraud his creditors the court would refuse him leave and say let the estate lie where it falls."*

7. That was a case involving a husband and wife and the presumption of advancement. The present case is different involving parties who were unmarried partners where there is no presumption of advancement. However, Mr Gale says the same principles apply in the present case and prevent the Applicant from relying on what is said to be his own fraudulent design to rebut the presumption that the sole legal owner is also the sole beneficial owner. I shall have to return to the topic of illegality in due course.

However, in order to explain how ultimately the Applicant's case was put, and thereby to identify the issues which I have decide, it is necessary to consider a yet further iteration of the Applicant's case. He was asked in chief about the advice which he said his personal injury solicitors had given him in relation to the risks arising from that litigation. He said: "*I was advised that I could be counter-sued and that it could run into thousands or tens of thousands of pounds. I told the Respondent this and she went ballistic and said we cannot let the family home be taken away*". He went on to allege that it was on this basis that the Property was transferred into her sole name and denied that he had ever even discussed the Property with his then solicitors. He alleged that the Respondent was the prime mover in making arrangements for the Property to be transferred, he denied taking any independent legal advice and when asked what his understanding was of what would happen when the personal injury case was over, he said this:

> *"We discussed that as soon as the case was over, it would be transferred back into joint names and we would carry on as normal".*

8. So the case as advanced before me is now put on the basis of this explicit assurance which it is said gives rise to a constructive trust or proprietary estoppel in the Applicant's favour, the Applicant having relied to his detriment on this assurance by transferring the Property into the sole name of the Respondent. Ultimately, Mr Gale accepted that the Applicant's conduct in so transferring the Property would amount to detrimental reliance if there had been an agreement as alleged by the Applicant but invited me to reject the suggestion that there was any underlying agreement or assurance or understanding to the effect alleged by the Applicant. He also relied on the doctrine of illegality and the case law to which I have referred above and submitted that even if there was such an agreement, I should decline to allow the Applicant to rely on what Mr Gale said was a thoroughly dishonest and fraudulent transaction designed to defeat a possible creditor and he referred me to s.423 of the Insolvency Act 1986 and the recent Supreme Court case of *Patel v Mirza* [2017] AC 467 on illegality.

9. The issues therefore for me to decide are as follows: (i) was there an agreement or assurance or understanding to the effect that the Property would be transferred back into the parties' joint names after the Applicant's personal injury case had concluded; (ii) if there was such an agreement or assurance or understanding so as to potentially give rise to a constructive trust or proprietary estoppel, can the Applicant rely on it to establish the equitable interest which he claims or is he barred from doing so on the grounds of illegality. I say no more about detrimental reliance given Mr Gale's sensible concession on that topic other than to say that insofar as Mr Trussler relied on alleged indirect financial contributions to the mortgage as alleged acts of detrimental reliance, I reject that case as it was ultimately not based on any reliable evidence at all. Before turning to my conclusions on the evidence, I should briefly set out the relevant law.

The Law

10. The power of the registrar to enter a restriction is set out in section 42(1) of the Land Registration Act 2002 ("LRA"), the material part of which provides as follows:

> *(1)The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of—*
>
> *(a) ...*
>
> *(b) ...*
>
> *(c) protecting a right or claim in relation to a registered estate or charge.*

11. A person may apply to the registrar for the entry of a restriction under section 42(1) if he or she has a sufficient interest in the making of the entry: s.43(1), LRA. If the Applicant has a beneficial interest under a constructive trust or proprietary estoppel, then he has a sufficient interest. The issue for the Tribunal is whether he has such a beneficial interest. The Tribunal has to determine the merits of the underlying dispute between the parties: see *Chief Land Registrar v. Silkstone* [2011] EWCA Civ 801 at [37], approving *Jayasinghe v. Liyanage* [2010] EWHC 265 (Ch).

12. This is not the occasion for a detailed examination of the law relating to constructive trusts or proprietary estoppel. Following *Stack v. Dowden* [2007] UKHL 17, the law relating to constructive trusts was examined again by the Supreme Court in the case of *Kernott v. Jones* [2011] UKSC 53, and the applicable principles were set out in the joint judgment of Lord Walker and Baroness Hall at [51], albeit in the context of a family home bought in the joint names of a cohabiting couple who are both responsible for the mortgage, but without any express declaration of trust.

13. For present purposes, what is more relevant is what they said at [52]:

> ***"This case is not concerned with a family home which is put into the name of only party only. The starting point is different. The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at para 51(4) and (5) above."***

14. Where no express trust has been declared, the starting point is that equity follows the law. Thus if a property is registered in the name of one party only, then they will be presumed to be the sole beneficial owner: *Stack v. Dowden* (above) at [4], [5], [56], [109].

15. The effect of the presumption is to allocate the burden of proof: Snell's Equity (33rd Ed.) at 24-050. The party who alleges that this presumption does not reflect the parties' true intentions about the beneficial shares in the property bears the burden of proof, which is the usual civil standard on the balance of probabilities.

16. The party alleging the different beneficial share must prove that there was an agreement, arrangement or understanding about their respective beneficial shares in the property. Such agreement may be express, based on actual discussions about their beneficial entitlements to the property, or the agreement may be inferred. The primary search is to ascertain what the parties actually intended to agree, as deduced objectively from their words and conduct: Snell, 24-053.

17. Simple proof of the oral or inferred agreement between the parties or an unwritten declaration of trust would not be enough to entitle the claimant to an enforceable interest in the property under a trust. Such an arrangement could only take effect as an express trust. It would be unenforceable since it would not be evidenced by writing signed by the party declaring the trust. Accordingly, proof that the claimant has acted to his detriment in reliance upon the agreement that he would take an interest in the property is essential to explaining the constructive trust. In these circumstances it would be fraudulent for the proprietor of the legal estate to rely on the formality requirements to deny the enforceability of the beneficial interest and claim the entire beneficial rights to the property for himself. The constructive trust arises to prevent this result.

18. A constructive trust arising out of an express agreement between the parties may overlap with a claim founded on proprietary estoppel. In both, the claimant may have acted to his detriment in reliance on the belief that he would obtain an interest. In both, equity acts on the conscience of the legal owner to prevent him from defeating the common intention. The distinction between the claimant's rights under an estoppel and under a constructive trust is now much diminished since both may operate as interests in land and be overreached. The difference remains, however, that the remedy by which an estoppel is enforced is discretionary, while under a constructive trust the claimant is entitled to his agreed beneficial share.

19. I will deal later with the issue of illegality.

Was there an agreement or assurance as alleged by the Applicant?

20. The background facts were largely common ground. The parties were in a relationship for over 25 years. It finally ended in 2016, although I shall have to revisit this issue in due course because Mr Trussler made much of an alleged inconsistency in the Respondent's evidence on this topic. They never married but had 3 children, Shanice born on 8 September 1995, Kelsie born on 30 October 2000 and Lucia born on 28 October 2009. They also fostered and looked after the Respondent's niece, Dana, from

about 2009. The parties previously occupied the Property as tenants of the local authority until they exercised their right to buy and bought the Property in 1999 for about £26,000. They paid a deposit of about £2,000 and the balance of the price was funded by a mortgage. The Property was conveyed into joint names and it was common ground that the parties were originally beneficial co-owners. At all material times the Respondent has been in continuous part time work as an NHS Support Worker. The Applicant was in work until about 2007 and made regular contributions to the mortgage payments. He was then out of work but continued to contribute with the benefit of an insurance policy and subsequently incapacity benefit until 2012. However, it is common ground that he made no direct financial contribution to the mortgage or the costs of running the household after 2012. The Applicant says he contributed thereafter by being a "*stay at home dad*" and made indirect financial contributions towards the mortgage by virtue of the fact that payments that he claimed were due to both of them in the form of tax credits and/or fostering payments were in fact paid to the Respondent alone and/or used by her as she wished with his agreement.

21. The four principal factual issues related to the existence or otherwise of the alleged agreement or assurance, the date when the parties finally separated, the state of the relationship at various material times and the question of what (if any) indirect financial contribution the Applicant made to the mortgage payments and/or the running of the household. I have already recorded the fact that I reject the suggestion that the Applicant made any indirect financial contribution to the mortgage payments.

22. The date when the parties finally separated was clearly potentially quite important. The Respondent in paragraph 2 of her witness statement said: "*our relationship had irretrievably broken down in 2012 at which we separated permanently*". If this were correct, it would lend support to her account of what happened in 2012 and how the Property came to be conveyed into her sole name but if not correct, it might tend to undermine her account and the logic behind the transfer of the Property into her sole name. The Applicant maintained that the parties remained in a relationship and lived together at the Property until November 2016. His evidence was supported in this regard by the evidence of Shanice and Kelsie. On this basis Mr Trussler attacked the Respondent's credibility and submitted that her credibility was fatally undermined by

her insistence that the relationship had broken down and that the parties had separated by 2012.

23. I am satisfied that the Applicant's evidence, supported as it was by Shanice and Kelsie, was technically correct about the date when the parties finally separated but it does not lead me to reject the Respondent's evidence. Firstly, the sentence from paragraph 2 of the Respondent's witness statement must not be viewed in isolation. In paragraph 3 she went on to say that she and the Applicant had "*subsequently sought to effect a reconciliation*" but it was unsuccessful. In paragraph 4 she said: "*As a result we finally separated in 2016*". So read as a whole, I am satisfied that the Respondent had acknowledged that the relationship had continued after 2012 and only finally ended in 2016. Secondly, it was clear from the Respondent's oral evidence, which I accept, that *she* considered the relationship over in 2012 and she mentioned the Applicant leaving the family home for a period before returning. So whatever the Applicant or his children thought at the time, I am satisfied that in her own mind the Respondent believed that the relationship was over in 2012 and that her subsequent attempt at a reconciliation is not inconsistent with that finding. Thirdly, I reject the contention that the Respondent has only belatedly accepted that the relationship continued after 2012 after seeing the witness evidence of 2 of her daughters. I am satisfied that her written evidence, taken as a whole, always acknowledged that there had been an attempt at reconciliation after 2012 and that the parties had only finally separated in 2016.

24. Both parties described the relationship as having had its "ups and downs". That was clearly the case and I am satisfied that the relationship was in a particularly bad state in 2012 at or about the time of the 2012 Transfer. However, the Respondent went much further than this and said that the Applicant was guilty of coercive and controlling behaviour. It is difficult to know where the truth lies in that regard but ultimately I have decided that I do not need to resolve this issue. I do however find that the relationship was at a particularly low ebb in 2012, and that a significant reason for that was the Applicant's inability and, so I find, unwillingness to make any financial contribution to the household. By this date he had been out of work for about 5 years and his incapacity benefit ceased in 2012. I am satisfied that a combination of the poor state of the relationship and the Applicant's inability and unwillingness to make any financial contribution to the household prompted a discussion about the

Property and ultimately led to the Applicant's agreeing that the Property should be transferred into the sole name of the Respondent.

25. On its face, the 2012 Transfer recorded that it was "*not for money or anything that has a monetary value*" and whilst that was strictly correct, in reality I find that the 2012 Transfer was executed on the basis of a bargain by which the Respondent agreed to relinquish any claims against the Applicant for child support and the like and in return the Applicant agreed to transfer his interest in the Property to the Applicant. The Respondent's Statement of Case said this:

> *"Prior to the transfer of the property in 2012, the Applicant had sustained an injury at work and had not worked for several years. The Tribunal will note on the Applicant's own documentation provided that there are no payments from the Halifax account into the Respondent's account post 2010. From that time the Respondent paid for the entirety of outgoings in relation to both the property and the children. At that time, their relationship continued to be very much on and off due to the lack of contribution...*
>
> *Therefore in 2012 the relationship was significantly strained between the Respondent and the Applicant resulting in frequent separations...*
>
> *At that time the Applicant had indicated to the Respondent that he could play no part in being financially responsible for the property or indeed outgoings or relation to child maintenance for either herself or the children going forward, and that the transfer of the property was to be in lieu of any further financial obligations by him towards anything arising from the relationship either in relation to the Respondent, child maintenance, or the property. It was on that basis that the Applicant told the Respondent to instruct solicitors to deal with the transfer of the property ... and the TR1 was duly executed by him".*

26. In her oral evidence the Respondent confirmed this account, and recalled that the Applicant had said: "*Don't come after me for any money and I won't come after you for the house*". I accept this evidence. The Respondent did not find it easy giving evidence, nor did the Applicant, and I bear in mind the stresses and strains that both parties were clearly under as a result of this litigation. However, as between the two protagonists, I have no doubt that the Respondent's evidence is to be preferred. The Applicant's evidence, particularly on the critical issue of whether there was an

agreement or assurance as alleged by him, was, I regret to say, wholly unreliable. Mr Trussler made the fair point that his client was not a sophisticated party and was certainly no lawyer. However, this does not excuse serial inconsistency and ultimately I found his evidence, particularly on the critical issue of whether there was an agreement or assurance as he alleged, incredible. The suggestion that his personal injury solicitors would have suggested that he might be the subject of a counterclaim running to tens of thousands of pounds is entirely improbable and no one could suggest on what basis such a claim might have arisen. Mr Trussler wisely disclaimed the notion of a counterclaim and invited me to find that his client had got the wrong end of the stick and that what had been mentioned to him was his potential liability for costs. Even if I were to accept this suggestion, the Applicant's account runs into further serious difficulties. The Applicant's witness statement, referred to above, suggested that his personal injury solicitors had advised him to transfer the Property as a precautionary measure; in other words, to put this asset beyond the reach of a potential creditor. I reject this account if I need to but the Applicant did not persist in this suggestion in his oral evidence; on the contrary, he said the Property had never been discussed with his solicitors and that the suggestion that it be transferred to the Respondent to put it beyond the reach of creditors had come from the Respondent who had gone "ballistic" on being told of the potential adverse consequences if the personal injury litigation went wrong. I regret to say that my ultimate conclusion was that the Applicant was simply making it up as he went along, having recognised that his initial account was wholly implausible. It is not credible that he would have forgotten these details if they were true and yet his witness statement and statement of case made it clear that the suggestion that the Property be transferred had come from his solicitors. I remind myself that the onus of proof is on the Applicant. He has entirely failed to persuade me that there was any agreement or assurance to the effect that he alleges. On the contrary, I am satisfied that the Respondent's account is to be preferred and that is how the Property came to be transferred. Consistent with her account and the agreement which led to the 2012 Transfer, the Respondent has in fact never subsequently made any claims against the Applicant to relation to child maintenance and the like.

Illegality

27. That is sufficient to dispose of this reference and I shall order the Chief Land Registrar to give effect to this application by removing the two restrictions that were mistakenly placed on the register. But even if I were wrong about the agreement or assurance, and there was an agreement or assurance as alleged by the Applicant, I would still have ordered the Chief Land Registrar to remove the restrictions because I consider that it would be contrary to public policy and the public interest to allow the Applicant to rely on an agreement the avowed purpose of which was to defraud creditors. I consider that *Gascoyne v. Gascoyne* and *Tinker v. Tinker* clearly support such a conclusion. The fact that this case is not concerned with the presumption of advancement does not compel a different result. The Applicant can only rebut the presumption that equity follows the law by relying on an agreement whose purpose was to put assets beyond the reach of one or more creditors. He therefore does not come with clean heads. Insofar as it is necessary to consider illegality on the basis of the more recent authorities, I consider that they support the same conclusion. *Tinsley v. Milligan* [1994] 1 AC 340 is no longer good law. The modern approach to illegality is to be found principally in the speech of Lord Toulson in *Patel v. Mirza* [2017] AC 467. Having regard to the range of factors referred to in paragraph 93 of the judgment of Lord Toulson, without treating that list as definitive, I consider that it would not be disproportionate to refuse relief to the Applicant. The public policy considerations in play, in particular that enshrined in section 423 of the Insolvency Act 1986, militate strongly in favour of refusing relief. Any other result would render the law incoherent and self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.

Conclusions

28. On the evidence, and my findings of fact, the claim to a beneficial interest in the Property advanced by the Applicant must fail, whether based on the doctrine of constructive trusts or proprietary estoppel. He cannot begin to discharge the burden of proof upon him.

29. The starting point, following the 2012 Transfer, is that the Respondent was the sole legal owner of the Property and since equity follows the law, she is presumed to have been the sole beneficial owner unless the Applicant can show that the equitable title differed from the legal ownership.

30. I am satisfied that there was no express agreement or assurance to the effect alleged by the Applicant and no words or conduct from which one could infer the requisite common intention.

31. For the same reasons, any claim based on an alleged proprietary estoppel must fail.

32. The result is that the Applicant has no beneficial interest in the Property. I therefore propose to direct the Chief Land Registrar to give effect to the Respondent's application dated 6 October 2017. By mistake two restrictions were placed on the Register and I shall direct the Chief Land Registrar to remove those restrictions.

33. Costs normally follow the event in this jurisdiction. However, before I make any decision on costs, I invite the parties to submit representations on costs, both as to the principle and the quantum thereof, to include schedules in form N260 if I am being invited to assess those costs, such representations to be received within 28 days from the date of this decision.

BY ORDER OF THE JUDGE
William Hansen

Dated this 1st day of July 2019