Joint Ownership - Common Intention and Detriment?

Mark Pawlowski considers whether detriment is a necessary requirement in joint ownership cases involving the family home

In the absence of an express declaration of trust, it is now clear that, where the family home is purchased in joint names, equitable ownership will follow the legal title giving rise to a presumption of a joint tenancy both at law and in equity: *Stack v Dowden* [2007] 2 AC 432 and *Jones v Kernott* [2011] UKSC 53. What is less clear is whether a claimant seeking to rebut this presumption in favour of an enlarged beneficial share in the property is required to establish not only the requisite common intention to alter the parties' respective shares but also show evidence of detriment supporting that common intention.

On one view, any subsequent events giving rise to a challenge to the presumption of joint beneficial ownership after acquisition simply operate to vary the parties' presumed beneficial shares arising by virtue of an ambulatory (or floating) constructive trust already created at the point of acquisition. On this reasoning, if the constructive trust is already formed upon purchase in joint names which allows for a variation of shares based on later events, there is, strictly speaking, no new constructive trust arising post-acquisition. In *Stack*, Lord Neuberger expressly alluded to the notion that the trust which arises at the date of acquisition is of a suspensory nature acknowledging the fact that the parties' intentions as regards their beneficial interests may change (or may be taken to have changed) over time. This, therefore, suggests the existence of just one trust (arising at the time of acquisition) which allows the court to assess the parties' equitable shares afresh (in the sense of addressing only the second

stage of the enquiry as identified in *Lloyds Bank plc v Rosset* [1991] 1 AC 107) based on evidence of changed circumstances.

The alternative view, however, is that that a new constructive trust arises upon the altered common intention to vary the parties' original shares which, in turn, provides the necessary trigger to act as a form of severance so as to convert the former joint tenancy into a tenancy in common. The type of common intention envisaged here, therefore, is no different conceptually from that laid down in *Rosset* in the context of single ownership cases requiring proof of a common intention coupled with detrimental reliance that equitable ownership should be different from a prima facie beneficial joint tenancy. In other words, the court's enquiry here is not just focused on the second (quantum) stage of the *Rosset* test - it requires also an initial determination as to the existence of a common intention giving rise to a new constructive trust.

The point has been specifically addressed most recently by the High Court in *Hudson v Hathway* [2022] EWHC 631 (QB), where Kerr J held that detriment was not required in a joint names family home case where the parties had not expressly declared their beneficial interests.

The facts

The parties, an unmarried couple, started a relationship in 1990. The male partner (Mr Hudson) moved into the female partner's home (Ms Hathway) and became joint owner. They later sold the home and bought another in joint names. Later, in 2007, they bought another property, again in joint names, with no express declaration of trust. In 2009, the parties separated. Ms Hathway stayed at the property with her two sons. In August 2013, the parties

agreed terms regarding their financial arrangements which were set out in an exchange of emails. In October 2019, Mr Hudson sought an order for the sale of the property, with equal division of the proceeds. Ms Hathway agreed that the house should be sold, but argued that she was entitled to the whole of the proceeds under a constructive trust following a common intention and agreement, in reliance on which she had acted to her detriment. The detrimental conduct relied on by her comprised: (1) paying all interest payments on the joint mortgage from January 2015; (2) desisting from claiming against assets in Mr Hudson's sole name acquired during their relationship; (3) not claiming financial support for the benefit of the children under the Children Act 1989; (4) accepting sole responsibility for an oil spill and insurance claim relating to the property; (5) at her own expense, maintaining and redecorating the property from January 2015; (6) relying from 2014 on the understanding that she was sole beneficial owner in conducting her finances and lifestyle; and (7) living frugally to afford the upkeep and mortgage.

The issue

There was no doubt that the parties had reached an express agreement that Ms Hathway would have sole beneficial ownership of the property. The sole question, therefore, was whether detriment was necessary to make the agreement enforceable in equity in the absence of the necessary formalities at law. Interestingly, earlier case law provided no clear answer to this question. In particular, the House of Lords in *Stack* and the Supreme Court in *Jones* did not expressly mention a requirement to show detriment in joint names cases. However, Lord Neuberger, in his dissenting speech in *Stack*, at [124], stated that the court may deduce:

> "an agreement or understanding amounting to an intention as to the basis on which the beneficial interests would be held", which may be "express … or inferred, and must normally be supported by some detriment, to justify intervention by equity."

The ambulatory nature of the constructive trust in joint names cases was, however, tacitly acknowledged in *Barnes v Phillips* [2015] EWCA 1056. In that case, the beneficial shares changed not once but twice (from 50-50, to 75-25 and then 85-15 in the claimant's favour), without any suggestion that the claimant needed to establish that she had relied on the changed common intention to her detriment to establish her right in equity to an increased share. It was apparent in this case that no detriment was necessary because no fresh trust was needed to displace the legal title. In a joint names case, therefore, the decision suggests that, once the claimant has established entitlement to a share in equity, the amount of his or her share may vary, or ambulate, following a change in the common intention, without the need for any detriment to be shown.

Decision

According to Kerr J, it was striking that no mention was made of the requirement of detriment in the statement of the principles laid down by the Supreme Court in J*ones*. His Lordship's conclusion, at [61]-[63], was that:

> "By not dealing with the issue of detriment in *Jones v Kernott*, the Supreme Court either omitted mentioning for completeness that it did not need to be proved in the case before them, or omitted to mention a crucial element of the relevant principles to be applied. In my judgment, the latter is less likely than the former. Lord Walker and Lady Hale at [51] . . . were setting out in summary form 'the principles applicable in a case such as this'. The 'case such as this' before them, they were careful to explain, was one where 'a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests'. I think it most unlikely that they forgot to mention the need to establish detrimental reliance separately from the principle they numbered (3): that the common intention of the parties is deduced objectively from their conduct . . ."

Hi Lordship also reminded himself that the issue, both in sole and joint names cases, was always ultimately one of unconscionability in the broadest sense. The question in each case

was what factors (and what kind of evidence) will satisfy, or not satisfy, the requirement of unconscionability (i.e., persuade the court that the party denying the equitable interest is not permitted to do so): ibid, at [67]. On this point, his Lordship concluded, at [70]:

> "In a case where there is a clear express agreement, the question of detriment does tend to merge with the agreement itself. It is obvious that an express agreement evidences the necessary common intention. It seems otiose to superadd a detriment requirement where the common intention – and unconscionability if the agreement is broken - is already shown by the existence of the agreement; at any rate if the agreement is more than a gratuitous promise."

Significantly, his Lordship also alluded, at [76], to the ambulatory nature of the constructive trust in joint ownership family cases:

> "I find it difficult to explain by reference to a detriment requirement the recognition by the Supreme Court of ambulating beneficial interests after acquisition of a property, of which *Barnes v Phillips* is a particularly striking example. The notion of detriment does not appear to have played any part in the second ambulation, whereby Ms Phillips' share increased from 75 per cent to 85 per cent."

According to his Lordship, therefore, an express agreement between the parties altering their beneficial shares in the jointly owned family home could itself satisfy the requirement of unconscionability without the need to establish separately that the beneficiary has acted in detrimental reliance on, or changed her position in reliance on, the agreement: ibid, at [79]. In terms of the present case, therefore, the parties' agreement, as evidenced by their exchange of emails, itself provided all the evidence needed to make it unconscionable for Mr Hudson to resile from it - "the deal was sufficient to establish the common intention and the common intention was sufficient to establish the constructive trust": ibid, at [81].

That being the case, it was, strictly speaking, unnecessary to consider whether Ms Hathway had, in fact, acted to her detriment in reliance on the agreement. For the sake of completeness, however, his Lordship agreed with the trial judge that it was the agreement between the parties that was crucial on the issue of detriment. In essence, Ms Hathway was relying not on her subsequent conduct, but on a promise in return for which "she gave up the

claims she perceived she had and which Mr Hudson also perceived may be live against shares and pension". That was sufficient to establish the necessary detrimental reliance or change of position.

Conclusion

The notion that a trust can be suspensory or "floating" is a relatively new concept in English law. It has attracted judicial acceptance in the specific context of mutual wills and secret trusts: see further, M. Pawlowski, "Constructive Trusts: Kept in Suspense", (2010) 245 PLJ 22. The possibility of altered intentions in the context of joint ownership of the family home, arising from subsequent events giving rise to the notion that the constructive trust is floating and not fixed at the date of purchase, has also, as we have seen, been tentatively acknowledged at the highest level. In *Stack*, Lords Hoffmann and Neuberger both expressly alluded to the idea that the trust, which arises at the date of acquisition, is of an ambulatory nature. The correct approach, as suggested by Lord Neuberger, was to consider first what the initial intention was and then to examine whether it had altered, and if so to what extent.

The recent decision in *Hudson* is, therefore, to be welcomed as openly acknowledging the acceptance of the floating trust in the specific context of claims to beneficial ownership of the jointly owned family home. It remains to be seen, however, whether this trend is universally acknowledged at appellate level.

Points for the practitioner

1. Where a family home is purchased in joint names, initially with equal ownership rights, a party claiming a subsequent increase in his or her equitable share does not have to show that he or she has acted to their detriment. A common intention alone will normally suffice to alter the beneficial shares.

2. Any subsequent events giving rise to a challenge to the presumption of joint beneficial ownership after acquisition operate to vary the parties' presumed beneficial

shares arising by virtue of an ambulatory (or floating) constructive trust already created at the point of acquisition.

3. Both in sole and joint names cases, the question is always ultimately one of unconscionability in the broadest sense - what factors (and what kind of evidence) will satisfy, or not satisfy, the requirement of unconscionability (i.e., persuade the court that the party denying the equitable interest is not permitted to do so).

4. An express agreement between the parties altering their beneficial shares in the jointly owned family home can itself satisfy the requirement of unconscionability without the need to establish separately that the beneficiary has acted in detrimental reliance on the agreement.

Mark Pawlowski is a barrister and professor emeritus of property law, School of Law, University of Greenwich.