Joint Ownership: Common Intention and Detriment

Mark Pawlowski provides an update on whether detriment is a necessary requirement in joint ownership cases involving the family home

There has been considerable debate as to whether a claimant seeking to establish an enlarged beneficial share in the family home post-acquisition 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. In *Hudson v Hathway* [2022] EWHC 631 (QB), Kerr J, at first instance, held that detriment was not required in a joint names family home case where the parties had not expressly declared their beneficial interests: see, M. Pawlowski, "Joint Ownership: Common Intention and Detriment?", (May 2022, 397), Property Law Journal. That view, however, has now been rejected by the Court of Appeal, on appeal from Kerr J's decision, holding that a party claiming a subsequent increase in their equitable share as a result of a post-acquisition changed common intention must show detrimental reliance on that changed common intention: [2022] EWCA Civ 1648.

Factual background

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 an exchange of emails between the parties in 2013, Mr Hudson agreed to Ms Hathway having the whole of the net sale proceeds when the house was sold. The emails were concluded with the Mr Hudson's name.

In October 2019, Mr Hudson sought an order for the sale of the property, with equal division of the net 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 evidenced by the emails, 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.

Decision of Kerr J

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 v Kernott* [2011] UKSC 53. His 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, therefore, 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): at [67]. 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: 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": 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.

Court of Appeal decision

Release of beneficial interest

An issue not raised before Kerr J at first instance was whether s.53(1) of the Law of Property Act 1925 was satisfied in the present case given that the common intention relied on by Ms Hathway was to be found in an exchange of emails in which Mr Hudson had released his equitable interest in the property in her favour. In this connection, s.53(1) requires that dispositions of equitable interests in land should be made by signed writing.

On this point, the Court of Appeal had no difficulty in holding that emails complied with the statutory formalities. There was no doubt that the property was held by the parties as joint tenants in law and equity. Section 36(2) of the 1925 Act expressly preserved the right of one joint tenant to release their interest to the other. There was no need for any particular form of words. The emails were, therefore, sufficient to amount to a release of Mr Hudson's equitable interest in so far as they showed a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future: at [50]. Moreover, in view of the wide meaning of "disposition" in s.53, it was capable of applying to the release by one joint tenant of their interest to the other. Accordingly, the emails amounted to a disposition: [54].

They also satisfied the statutory formalities because they were in writing and contained Mr Hudson's signature. There was a substantial body of authority to the effect that deliberately subscribing one's name to an email amounted to a signature. In the words of Lewison LJ, at [67]:

> "Given that so much correspondence takes place nowadays by email rather than by letters with a 'wet ink' signature, it is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature. I would hold, therefore, that Mr Hudson's emails of 31 July and 9 September 2013 were 'signed' for the purposes of s.53 (1) (a) and (c) of the Law of Property Act 1925."

Nugee LJ put the matter this way, [181:

> "Mr Hudson added his name "Lee" to the bottom of the e-mails. That is an entirely conventional way to end (or 'sign off') an e-mail and I have no doubt that it satisfies the requirement in the authorities that it was added to authenticate the document. Adding your name at the end of an e-mail confirms that the e-mail comes from you. That seems to me enough to mean that the e-mail is signed by you for the purposes of s.53(1) of the Law of Property Act 1925."

Constructive trust

The Court of Appeal's conclusion on s.53 of the 1925 Act was enough to dispose of the appeal. However, the Court went on to consider whether a constructive trust can arise simply as a matter of common intention without the need to show any detrimental reliance on that intention. On this question, the Court concluded that, in the absence of signed writing, detrimental reliance remained a key component in establishing a common intention constructive trust (*Curran v Collins* [2015] EWCA Civ 404) and was necessary even in the case of an express agreement: *Grant v Edwards*[1986] Ch 638; *Stokes v Anderson* [1991] 1 FLR 391.

In the case of property held jointly, as in the present case, the starting point was that there was a beneficial joint interest so that, at the quantification stage, the court might be able to take a broader view of what amounted to detrimental reliance. But that did not detract from the need to show detrimental reliance in joint ownership cases where the claimant is relying on post-acquisition events to establish a constructive trust. According to his Lewison LJ, there was nothing in *Jones*, or *Stack v Dowden* [2007] 2 AC 432, which pointed to an opposite conclusion. His Lordship stated, at [107]:

> "I do not, therefore, detect in either *Stack v Dowden* or *Jones v Kernott* any intention on the part of the court to abrogate the long-standing principle that what makes an unenforceable agreement or promise enforceable in equity is detrimental reliance. The principle of detrimental reliance was not challenged in either case, and that it why it was unnecessary for the court to deal with it."

And at [108]:

> "In my judgment it would have been astonishing if Lord Walker and Lady Hale intended to overrule a long-standing principle that detrimental reliance is necessary to crystallise a common intention constructive trust and to depart from two decisions of the House of Lords affirming that proposition without saying so, particularly in the light of their approving references (in *Stack v Dowden*) to *Stokes v Anderson* and (in both cases) to *Grant v Edwards*."

And at [153]:

> "In my judgment Kerr J was wrong to hold that detrimental reliance is no longer required. The overwhelming weight of authority both before and after *Stack v Dowden* and *Jones v Kernott* is to the contrary. Moreover, to hold that an oral agreement, disposition or declaration of trust was binding without more would directly contradict two statutory provisions. Equity cannot repeal the statute."

Contrary to the view taken by Kerr J, his Lordship did not regard the decision in *Barnes v Phillips* [2015] EWCA Civ 1056 as authority for abrogating the requirement of detrimental reliance. That was a case in which the trial judge (1) inferred an intention to vary the shares in which the property was held by reference to subsequent conduct and (2) quantified the altered shares again by reference to conduct. In that case, therefore, conduct both established the common intention and also evidenced detrimental reliance. Despite, however, differing from the reasoning of Kerr J, the Court of Appeal held that detrimental reliance had been established on the facts and dismissed Mr Hudson's appeal.

Conclusion

It is now clear, at least at Court of Appeal level, that a mere oral agreement unaccompanied by any detrimental reliance, will not suffice to make a post-acquisition change in common intention enforceable in equity. As Lewison LJ put it, at [73]:

> "What makes it unconscionable to resile from a promise or agreement unenforceable at common law is detrimental reliance on that agreement or promise."

His Lordship was reinforced in this view by the leading textbooks, all of which "took the same view" that, in the absence of signed writing, detrimental reliance remains a key component in establishing a common intention constructive trust: at [128]-[129].

Although the starting point in single and joint ownership cases is different (because in a sole name case, the claimant has first to rebut the presumption that he or she has no interest at all, whereas in a joint names case, the starting point is that there is a beneficial joint interest), the requirement of detrimental reliance falls be satisfied in both cases. In a joint names case, however, the court may be able to take a broader view of what amounts to detrimental reliance at the quantification stage but, whilst Lady Hale's non-exhaustive list of factors in *Stack* included discussions at the time of the transfer, this did not mean that discussions alone will be sufficient: [150], per Lewison LJ. Ultimately, the same principles regarding detrimental reliance will apply both to an initial common intention (in single ownership cases) and also to a change of common intention post-acquisition (in joint ownership cases).

Points for the practitioner

1. The meaning of "disposition" in s.53 of the Law of Property Act 1925 is wide enough to apply to one joint tenant's release of their interest in property to the other party. Emails are capable of amounting to a disposition because they are in writing, and deliberately subscribing one's name to an email is capable of amounting to a signature.

2. 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 must show that he or she has acted to their detriment. A common intention alone will not suffice to alter the parties' beneficial shares.

3. A constructive trust is unaffected by statutory formalities; it is a creature of equity, which acts where the application of the common law would produce an unconscionable result.

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