

Declaration of Trust: Is It Conclusive?

Can an express declaration of trust be varied informally by a common intention constructive trust? Asks Mark Pawlowski

The orthodox view, until recently, has been that an express trust is conclusive of the parties' intentions regarding beneficial ownership of the family home irrespective of whether the contributions to purchase are made at the time of acquisition of the property or at a later date. In other words, an express declared trust precludes the possibility of a common intention constructive trust based on differential contributions to the purchase price until the declared trust is *formally* varied by subsequent agreement or displaced by the informal mechanism of proprietary estoppel. However, a recent High Court decision, namely, *Nilsson v Cynberg* [2024] EWHC 2164 (Ch) has now called this orthodoxy into question.

The orthodox view

The point is specifically addressed by Slade LJ in the well-known case of *Goodman v Gallant* [1986] Fam 106, at 110-11:

“. . . if the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting, implied or constructive trusts unless or until the conveyance is set aside or rectified.”

In this case, the conveyance declared that the parties (husband and wife) were to hold the equity upon trust for themselves as joint tenants. The wife served a notice of severance of the joint tenancy and argued that she was entitled to three-quarters of the beneficial interest in the property on the basis that she already owned a half-share by virtue of a prior agreement between the parties. Slade LJ, giving the judgment of the Court of Appeal, held that the declaration was exhaustive and, consequently, the wife was only entitled to a half-share of the beneficial interest. It is noteworthy that the wife was seeking to rely on an *existing* beneficial half-share in the property in order to raise a constructive in order to override the express trust declared in the conveyance. Since such a trust would directly contradict the parties' express trust, the conveyance was held, not surprisingly, to be conclusive of the parties' beneficial ownership at the time of its execution. Indeed, Slade LJ concluded that there was only one qualification to the conclusiveness of the express trust, notably, where there was evidence of mistake or fraud at the time of the transaction.

This view has been reiterated in subsequent case law. In *Pankhania v Chandegra (by her litigation friend, Ronald Andrew Eagle)* [2012] EWCA Civ 1438, Patten LJ stated, at [16]:

“The judge’s imposition of a constructive trust in favour of the defendant was ... impermissible unless the defendant could establish some ground upon which she was entitled to set aside the declaration of trust contained in the transfer.”

In this case, the property was purchased with the aid of a mortgage and transferred into the names of the parties as joint tenants to be held by them as tenants in common in equal shares. The transfer contained an express declaration of trust by the parties to that effect. The trial judge proceeded on the basis that it was open to him to decide what was the common intention of the parties and impose a constructive trust in favour of the defendant giving him the entire beneficial interest in the property on the ground that the claimant had only joined in the purchase so as to allow his income to be taken into account for the purposes of obtaining the mortgage. The Court of Appeal, however, unanimously disagreed with this approach. On the facts, there was nothing to suggest that the parties never intended to create an express trust or that they intended to give a false impression to third parties so as to deprive the declaration of trust of legal effect. The transaction could not be characterised as a sham (as argued by the defendant) nor vitiated on any other well-established grounds. The point has also arisen more recently in *Bahia v Sidhu* [2022] EWHC 875 (Ch), where the notion that a pre-existing equity based on a constructive trust could be used so as to informally vary a subsequent declared trust was emphatically rejected. Neither proprietary estoppel nor a constructive trust could be relied upon to contradict or override the terms of a subsequent declaration of trust.

The notion that the express trust is conclusive appears to rule out also the possibility of a *subsequent* constructive trust based on later contributions or expenditure following acquisition of the property. In *Wilson v Wilson* [1963] 2 All ER 447, expressly approved by the Court of Appeal in *Goodman*, the family home had been conveyed in 1957 into the joint names of husband and wife and the conveyance contained an express declaration stating that they held the equity as joint tenants. The purchase price had been provided as to £750 by the husband from his own resources and loans, and the balance of £1,600 by a mortgage. Some four years later, when the parties’ relationship broke up, the house was sold by which time the husband had paid off £400 under the mortgage. Based on these repayments, he claimed the whole beneficial interest, but the Court of Appeal unanimously rejected his claim holding that the effect of the conveyance was that the wife was entitled to one-half of the proceeds of sale in any event. Significantly, despite the husband’s subsequent mortgage contributions, all members of the Court held that the court had no power, under s.17 of the Married Woman’s Property Act 1882, to override the formally declared beneficial title of the parties as set out in the conveyance.

Another case involving subsequent contributions is *Leake (formerly Bruzzi) v Bruzzi* [1974] 2 All ER 1191, where the parties were again husband and wife. The matrimonial home was purchased in 1967 with the aid of a mortgage and conveyed into the sole name of the husband. A trust deed was also executed by the parties which declared that they held the

property on trust for themselves as joint tenants beneficially. Both parties initially contributed to the mortgage repayments but later (in 1971), when the wife left her husband, he alone paid the mortgage instalments. Despite the husband's subsequent contributions, the Court of Appeal held that the court could not go behind the terms of the express trust which was conclusive of the parties' respective beneficial shares in the home. Stephenson LJ, who gave the leading judgment, regarded the question of the parties' beneficial entitlement, in the absence of any claim for rectification or rescission, as being concluded by *Wilson* and that, accordingly, the wife was entitled to one-half of the proceeds of sale regardless of the husband's greater financial contribution (over time) towards purchase.

Similarly, in *Pink v Lawrence* (1977) 36 P & CR 98, where the house was transferred (in 1967) to the parties expressly as joint tenants both in law and in equity. The claimant argued that he owned the beneficial interest absolutely since the defendant had contributed nothing towards the purchase and he was only joined to satisfy the lender. Although the report of the case does not say what subsequent contribution was made by the claimant towards the purchase, one can assume that this comprised the payment of mortgage instalments from the date of purchase (in 1967) until the court hearing (in 1977). In this connection, it seems that the defendant's only contribution was a modest payment of £500 towards the initial purchase. On these facts, the Court of Appeal held that a constructive trust could not arise since the express declaration of trust continued to govern the parties' respective beneficial interests. Buckley LJ was quite emphatic on this point, at 101:

“Where there is an express declaration of trust, the doctrine of constructive trusts cannot be referred to to contradict the expressly declared trust. The doctrine of constructive trusts is one which applies in circumstances in which there is no declared trust . . . Once a trust has been effectively declared, it can only be got rid of either by rescinding the document containing the declaration of trust on the ground of fraud or mistake, or rectifying it in the appropriate manner to vary or delete the declaration of trust.”

In reaching this conclusion, his Lordship referred to the House of Lords' decision in *Pettitt v Pettitt* [1970] AC 777, at 813, where Lord Upjohn observed that: “if [the conveyance] declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the [parties] . . . for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter . . .” More recently, in *Re Iqbal (Nilsson v Iqbal)* [2024] EWHC 49 (Ch), ICC Judge Burton concluded that a variation of an express declaration of trust could only be effective where the parties' subsequent agreement met the requirements of the Law of Property (Miscellaneous Provisions) Act 1989; in other words, a common intention constructive trust would never suffice.

A contrary view?

There is other case law, however, which suggests that an express declaration of trust may not be as conclusive of the parties' intentions as the orthodox authority appears to demonstrate. In *Stack v Dowden* [2007] 2 AC 432, at [49], the point is addressed by Baroness Hale where she reiterates that an express declaration of trust is conclusive of the parties' beneficial ownership "unless varied by subsequent agreement or affected by proprietary estoppel." Whilst acknowledging that an express declaration of trust may be varied by subsequent agreement or an estoppel, her Ladyship, at [49], also emphatically re-affirms that the effect of a conveyance declaring a beneficial joint tenancy is "clear, irrespective of why the property was conveyed into joint names and of the parties' later dealings in relation to it". Again, later in her speech, at [67], she is even more emphatic in stating that: "no one thinks that such a declaration can be overturned, except in cases of fraud or mistake." This mirrors the view taken in the earlier case law, notably, *Wilson and Leake*, that an express trust may only be challenged on specific grounds which permit rescission or rectification of the formal document. However, in *Clarke v Meadus* [2010] 3117 (Ch), Warren J, relying on *Stack*, concluded that the prior existence of an express trust did not preclude the establishment of either a proprietary estoppel or a constructive trust as a result of matters which took place after the express trust provided the requisite pre-conditions for such an estoppel or trust were established on the facts. In his view, proprietary estoppel and constructive trust were simply different routes to the same result.

This liberal approach has now been endorsed most recently in *Nilsson v Cynberg* [2024] EWHC 2164 (Ch), where the parties (husband and wife) bought a property in 2001 and lived in it together, holding it expressly on trust for themselves as joint tenants. In 2009, they separated and the husband moved out. He and the wife reached an understanding that he did not wish to retain an interest in the property and was content for her to have the whole of it. The property remained in joint names and the wife continued to live there with the children of the marriage. She paid all the outgoings, including the monthly mortgage repayments, and spent just over £10,000 on home improvements. The husband contributed nothing. In 2018, the husband was declared bankrupt and his trustees in bankruptcy asserted that he had a 50 per cent beneficial interest in the property which now vested in them. The wife, in turn, brought proceedings seeking a declaration that the understanding she had reached with her husband gave rise to, inter alia, a common intention constructive trust such that she was now the sole beneficial owner.

The High Court held that an express declaration of trust was conclusive unless, in the words of Baroness Hale in *Stack*, it is varied by "subsequent agreement" or affected by proprietary estoppel. According to James Pickering KC (sitting as a Deputy High Court Judge), the term "subsequent agreement" was not limited to a formal agreement complying with the legal formalities, but was capable of including an informal common intention constructive trust. In other words, if an express declaration of trust could be overridden by a subsequent equity arising by way of a proprietary estoppel, there was no reason why it could not also be overridden by a subsequent equity arising by way of a common intention constructive trust. Moreover, on this point, the case of *Pankhania* was distinguishable in so far as it dealt with an alleged understanding between the parties at the time of the purchase of the property in

question. Significantly, it did not concern the possibility of a common intention constructive trust arising out of matters which had taken place subsequent to the express declaration of trust. Similarly, the decision in *Bahia* was premised on the extent to which an express declaration of trust was capable of being overridden by a prior equity. So far as *Re Iqbal* was concerned, the Deputy Judge alluded to the fact that “no consideration appears to have been given to why an equity arising by way of a proprietary estoppel could impact on a prior express declaration of trust but not one by way of a common intention constructive trust”: at [47]. In the words of the Deputy Judge, at [49]:

“. . . why should an express declaration of trust be capable of being overridden by way of a subsequent equity arising by way of a proprietary estoppel, but not by a subsequent equity arising by way of that very similar beast, a common intention constructive trust? The interpretation put forward on behalf of the Trustees in the present case would result in that somewhat arbitrary distinction . . .”

Significantly, the Deputy Judge was also able to confirm that, in his view, “an express declaration of trust was not capable of being overridden by (what would otherwise be) a common intention constructive trust which arises prior to, or at the same time as, the express declaration of trust”: at [48].

Conclusion

Whether or not an express declaration of trust remains conclusive of the parties' common intention which has changed as a result of subsequent events must now be questioned given the latest ruling on this subject in *Nilsson*. It will be interesting to see whether the decision receives support at appellate level and, if so, how the courts will seek to reconcile the obvious need for certainty and clarity in this area of law, against the desirability of allowing a co-owner to challenge the apparent conclusiveness of beneficial ownership under the terms of an express trust where the parties' common intention has clearly altered with the passage of time.

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