



REF/2010/0577

**THE ADJUDICATOR TO HER MAJESTY'S LAND REGISTRY
LAND REGISTRATION ACT 2002**

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

(1) NOTTINGHAM CITY COUNCIL

APPLICANT

and

(1) COLIN BERRESFORD

(2) PAMELA JOYCE ATKINS

(3) PHILIP ARTHUR BERRESFORD

RESPONDENTS

**Property Address: 40 Southglade Road, Bestwood, Nottingham, NG5 RGE
Title Number: NT301214**

Before: Mr Malcolm Sheehan sitting as Deputy Adjudicator to HM Land Registry

Sitting at: Nottingham Magistrates Court

On: 23 November 2010

Applicant Representation: Alison Walker, Solicitor, Nottingham City Council

Respondent Representation: James Howlett, Counsel, instructed by Rothera Dowson
Solicitors

DECISION

Application by a local authority to register a charge by way of legal mortgage following declaration of charge pursuant to section 22 of Health and Social Services and Social Security Adjudications Act 1983 – Respondents asserting beneficial interest over property by reason of an express, constructive or resulting trust – whether Respondents establish a beneficial interest – nature of the beneficial interest – whether statutory conditions for local authority to declare charge fulfilled

Cases referred to

Gissing v Gissing [1971] AC 886, Stack v Dowden [2007] UKHL 17, Laskar v Laskar [2008] EWCA Civ 347, Savill v Goodall [1993] 1 FLR 755 at 759, Hertfordshire County Council v Wilson & Others [REF/2004/0547], Kent County Council v Fremlin [REF/2010/756], Yule v South Lanarkshire Council 2003 Hous LR 2 and R (Beeson) v Dorset County Council [2002] EWCA Civ 1812

INTRODUCTION

1. On 24 November 2009 the Applicant sought to register a legal charge over 40 Southglade Road, Bestwood, Nottingham NG5 5GE (“the Property”) in order to secure unpaid residential care charges incurred providing care for Mrs Joyce Berresford (“Mrs Berresford”). Mrs Berresford is the sole registered proprietor of the Property. On 11 November 2009 the Applicant declared pursuant to the power granted to it by section 22 of the Health and Social Services and Social Security Adjudications Act 1983 (“the 1983 Act”) that the Property stands charged with all monies as may from time to time be due from Mrs Berresford.
2. The Respondents are Mrs Berresford’s children and they object to the registration of a legal charge over the Property by the Applicant. The Respondents’ primary case is that they are the beneficial owners of the Property and that the Applicant was not entitled to declare a section 22 charge (“the Statutory Charge”) over the Property or have the Statutory Charge registered.
3. The dispute between the Applicant and Respondent has been referred to the Adjudicator to HM Land Registry. The parties have set out their respective positions in their Statements of Case and skeleton arguments.
4. I heard evidence and submissions in this case on 23 November 2010. At the hearing both parties indicated that they wished to refer me to specific parts of the Charging for Residential Accommodation Guide (“CRAG”) and I asked that copies of sections relied on be sent to the Adjudicator’s office. Initially no materials were sent to the Adjudicator’s office. I then made a direction on 23 December requiring that any such materials were to be sent to the Adjudicator’s office by 7 January 2011. By a letter dated 6 January 2011 Rothera Dawson acting for the Respondents sent to the Adjudicator’s office a full copy of CRAG along with a statement of which parts of the guidance the Respondents rely on. I have allowed a generous additional period for the Applicant to provide any materials it relies on but have not received any CRAG materials from the Applicant.
5. Unfortunately recording facilities were not available at the hearing venue on 23 November. Both parties wished to proceed in the absence of recording facilities.

THE AGREED FACTS

6. I was assisted by the parties confirming that many of the facts relevant to the issues I have to decide are agreed. Paragraphs 1-7 of the Applicant's skeleton argument helpfully set out facts that are not in dispute and during submissions Mr. Howlett confirmed that these matters were agreed.
7. In 1995 Mrs Berresford exercised her statutory Right to Buy the Property under the Housing Act 1985 ("the Right to Buy") which she had previously occupied as a local authority tenant. Mrs Berresford was the only party entitled to exercise the Right to Buy. She purchased the Property with the maximum Right to Buy discount of 60%. This reflected her long-term occupancy of the Property. At the time of purchase two interest-only mortgages were raised in Mrs Berresford's name in the sums of £11,200 and £950 respectively. These advances are protected by registration on the Property's title and Mrs Berresford is the only party legally responsible for repayment of these sums. Repayment of the capital sums advanced is due in 2020.
8. Mrs Berresford was registered as proprietor of the Property on 21 February 1995. A Declaration of Trust dated 19 February 2007 ("the Deed of Trust") was executed by Mrs Berresford and each of the Respondents and records that Mrs Berresford was the sole legal proprietor and that she wished to "*confirm the beneficial interests in the Property of the Beneficiaries*". The Deed of Trust then stated:

"Mrs Berresford HEREBY DECLARES that the Property is held by her upon trust for sale for the Beneficiaries in equal shares as between them"

The Respondents are the Beneficiaries referred to in the Deed of Trust which records that:

"the beneficiaries have paid all amounts due in respect of the mortgage."

9. The Property was Mrs Berresford's home until 2009 when she was assessed as needing permanent residential care pursuant to section 21 of the National Assistance Act 1948 ("the 1948 Act"). The Property is currently unoccupied and none of the Respondents were in occupation of the Property at any relevant time.
10. The Applicant has a statutory duty to provide Mrs Beresford with residential care and is also under a statutory duty to recover from the person accommodated the cost of providing residential care in accordance with the statutory scheme.
11. Mrs Beresford's care costs currently amount to £339 per week. An amount £116 per week is being paid from her income leaving £223 per week which is not currently being paid. Mr Howlett for the Respondents accepted that the Applicant had made an assessment, that sums had been demanded and were due under the assessment and that there was a shortfall between what had been demanded and what was being paid.
12. On 11 November 2009 the Applicant declared the Statutory Charge which states that the Property "*shall stand charged by way of legal mortgage to secure such monies as may from time to time be due to the City Council in respect of residential welfare accommodation charges.*"

13. The register of title for the Property does not contain any reference to the beneficial interest in the Property claimed by the Respondents.
14. It is agreed that Mrs Beresford now lacks capacity and cannot give evidence in these proceedings.

THE ISSUES

15. In their respective Statements of Case and Skeleton arguments the parties have sought to identify the issues which arise on this reference. In my view the following principal issues arise for consideration;

- 15.1. Did the Respondents acquire a beneficial interest in the Property in 1995?
- 15.2. If so, what was the nature and extent of that beneficial interest?
- 15.3. What was the effect of the Deed of Trust?
- 15.4. Was the Applicant entitled to declare the Statutory Charge?

THE LAW

Express, Constructive & Resulting Trusts

16. The Respondents contend that they are the beneficial owners of the Property as a result of the express trust set out in the Deed of Trust, alternatively as a result of the operation of the doctrines of constructive or resulting trusts.
17. Where legal title to land is held by one party but the purchase of that land has been funded in whole or in part by another party the legal presumption of a resulting trust may arise. Where the presumption applies the legal owner holds the legal estate on trust for the party who has funded the purchase to the extent of their contribution, see *Gissing v Gissing* [1971] AC 886. The presumption of a resulting trust arises to reflect assumed intentions as to the beneficial ownership of land. The presumption or a resulting trust is displaced by evidence of the actual intentions of the parties.
18. The presumption of resulting trust will no longer arise in cases concerning beneficial ownership of a matrimonial or quasi-matrimonial home, see the opinion of Lord Walker at paragraph 31 of *Stack v Dowden* [2007] UKHL 17. The doctrine of the resulting trust can still apply to cases between family members where the purchase is for a commercial purpose but the dividing line between cases where the doctrine continues to have effect and cases where it is no longer applicable is not entirely clear, see the discussion in paragraph 10 of the judgment of Lord Neuberger in *Laskar v Laskar* [2008] EWCA Civ 347.
19. The law relating to constructive and resulting trusts of real property was extensively considered by the House of Lords in *Stack v Dowden* [2007] UKHL 17. In cases to which the resulting trust approach is not applicable and where the property is held jointly there is now a legal burden “*on the person seeking to show that the parties did not intend their beneficial interests to be different from their legal interests, and in what way*”, see paragraph 68 of the opinion of Baroness Hale. At paragraph 69 Baroness Hale sets out a

list of factors which may be relevant when considering whether legal joint owners intended that their beneficial interests should be different from their legal interests. Such a conclusion is described as being “*very unusual.*”

20. It remains the case that where there is an express declaration of trust that will usually be considered conclusive of the issue of beneficial ownership. In *Stack v. Dowden* Baroness Hale stated at paragraph 49 that “*no one doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel*”
21. Although there has been much discussion about the circumstances in which a constructive trust can arise where there have been no express discussions between the parties about the ownership of the relevant property, the position where discussions have taken place is clear. Where a court accepts that there was an oral agreement between the legal owner and another about the ownership of property which conferred a beneficial interest on the non-legal owner and the non-legal owner changes position in reliance on the agreement, a constructive trust will arise to prevent the legal owner from denying the other party’s beneficial interest. This type of constructive trust is commonly referred to as an express bargain constructive trust.
22. In the case of express bargain constructive trusts the nature of the beneficial interest to which the non-legal owner is entitled is “*governed by the agreement, arrangement or understanding and no further inquiry will be necessary*” see Nourse LJ in *Savill v Goodall* [1993] 1 FLR 755 at 759. This will be the case unless there is evidence that the intentions of the parties changed at a later date.

Provision of Care & The Charge

23. The Applicant seeks registration of the Statutory Charge. The following provisions are relevant to the Statutory Charge.
24. Section 21 of the 1948 Act as amended provides:

21 Duty of local authorities to provide accommodation

(1) Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing—

(a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.

25. Where accommodation is provided pursuant to Section 21 of the 1948 Act, Section 22 of the same Act as amended requires a local authority to charge for the accommodation:

22 Charges to be made for accommodation

(1) Subject to section 26 of this Act, where a person is provided with accommodation under this Part of this Act the local authority providing the

accommodation shall recover from him the amount of the payment which he is liable to make in accordance with the following provisions of this section.

26. A local authority's power to create a charge over land in respect of unpaid accommodation fees arises from Section 22 of the 1983 Act. The relevant parts of Section 22 provide:

22 Arrears of contributions charged on interest in land in England and Wales

(1) Subject to subsection (2) below, where a person who avails himself of Part III accommodation provided by a local authority in England, Wales or Scotland—

(a) fails to pay any sum assessed as due to be paid by him for the accommodation; and

(b) has a beneficial interest in land in England or Wales,

the local authority may create a charge in their favour on his interest in the land ...

(2A) In determining whether to exercise their power under subsection (1) above and in making any determination under subsection (2) above, the local authority shall comply with any directions given to them by the Secretary of State as to the exercise of those functions...

(7) A charge under this section shall be created by a declaration in writing made by the local authority.

(8) Any such charge, other than a charge on the interest of an equitable joint tenant in land, shall in the case of unregistered land be a land charge of Class B within the meaning of section 2 of the Land Charges Act 1972 and in the case of registered land be a registerable charge taking effect as a charge by way of legal mortgage.

27. Pursuant to Section 7(1) of the Local Authority Social Services Act 1970 the Secretary of State periodically issues CRAG as guidance to local authorities in the exercise of their statutory functions. CRAG provides guidance to local authorities on the proper approach to Section 22 of the 1983 Act.

28. Paragraphs 7.014 – 7.016 and of CRAG gives guidance as to what real property is to be taken into account under Section 22:

Legal and beneficial owners

7.014 The treatment of property will depend on whether the resident is a legal or a beneficial owner. A legal owner is a person in whose name the property is held. A beneficial owner is one who is entitled to receive the profits or proceeds of property. In most cases the legal and beneficial owners will be the same person but, where this is not the case, the value of the property will be valued according to the following paragraphs.

Legal ownership

7.015 For the purposes of assessing the resident's ability to pay a charge, no account should be taken of the value of a property where the resident is a legal owner but has no beneficial interest in the property. i.e. the resident is holding the property on trust for the beneficial owners and has no right to the proceeds or profits should the property be sold.

Beneficial ownership

7.016 Where the resident is the sole beneficial owner of a property the capital value should be taken into account in full. If the resident and the LA agree that the value of the property, after taking into account any deductions in 6.014 (expenses of sale and debts secured on the asset), is over £23,250, or when added to any other capital assets will take the total capital over £23,250, a precise valuation will not be needed. If the resident disputes the value, or there is some doubt as to the value, a professional valuation should be obtained.

Jurisdiction

29. At the hearing of this reference I was concerned that some of the matters raised by the parties in their respective statements of case may fall outside of my jurisdiction. In particular I was concerned that consideration of the Applicant local authority's decision making was a matter for public law review rather than determination within these proceedings.
30. I invited submissions from the representatives of the parties in this respect. Following discussion the Applicant and Respondents' representatives were agreed that a consideration of whether the Applicant had a legal entitlement to declare the Statutory Charge pursuant to section 22 was within my jurisdiction but, if I was satisfied that the Applicant had the power to declare a charge in this case, the Applicant's exercise of that power is properly a matter for public law review.
31. The jurisdiction of the Adjudicator is conferred by section 108 of the Land Registration Act 2002 ("the 2002 Act") and in this case extends to determining the matters referred to him by the Land Registry pursuant to section 73(3) of the 2002 Act. The matter referred to the Adjudicator in this case is whether the Chief Land Registrar should give effect to the Applicant's application to register the Statutory Charge. In my view determining this matter must require the Adjudicator to consider whether the Applicant was legally entitled to declare the charge. This involves a consideration of applicable statutory provisions and the facts of case and, insofar as this task involves the consideration of the whether a beneficial interest exists, involves consideration of issues which are frequently dealt with by the Adjudicator.
32. In reaching this view I note that this is the approach adopted by another Deputy Adjudicator in decisions on section 22 of the 1983 Act. In *Hertfordshire County Council v Wilson & Others* [REF/2004/0547] Mr Michael Mark directed the cancellation of the local authority's application to register a section 22 charge because the requirements of section 22(1)(a) had not been met. In another decision by the same Deputy Adjudicator, *Kent County Council v Fremlin* [REF/2010/756], it was held that there may be circumstances where the Adjudicator is entitled to consider public law issues.

“Registration affects the ability of the owner to deal with her property and there may well be references where relevant public law issues can properly be dealt with.”

33. The Applicant has contended in paragraph 6 of its Statement of Case that that the Deed of Trust was *“an attempt to put [the Property] beyond the reach of the Applicant.”* By Regulation 25 of the National Assistance (Assessment of Resources) Regulations 1992 a local authority *“may”* treat a resident as possessing actual capital if he has deprived himself of that capital *“for the purpose of decreasing the amount that he may be liable to pay for his accommodation.”*
34. The question of the exercise of a local authority’s powers to consider that a person has deprived himself of capital for the purpose of decreasing the amount payable in accommodation costs has been considered in *Yule v South Lanarkshire Council* 2003 Hous LR 2 and *R (Beeson) v Dorset County Council* [2002] EWCA Civ 1812. In both cases the issue was considered in judicial review proceedings as an issue of public law. In my view there are good arguments to be made both for treating this issue as within or outside of the Adjudicator’s jurisdiction. However, for the reasons I set out below it is not necessary for me to determine in this case whether the Adjudicator has jurisdiction to consider this aspect of the Applicant’s case and as I was not addressed in any detail on this point by the parties it is preferable that I do not express a view on this question.

THE EVIDENCE

35. I heard evidence from Ms. Walker for the Applicant and Mr. Colin Berresford, the First Respondent.
36. The parties agreed that Mrs Beresford now lacks capacity and neither the Applicant nor the Respondent sought to adduce evidence from her.
37. Ms Walker confirmed in her evidence that the content of the Applicant’s Statement of Case was true to the best of her knowledge and belief. The Applicant’s Statement of Case states that the Applicant has assessed the needs of Mrs Berresford and has since 30 June 2009 provided her with residential care in accordance with section 21(1) of the 1948 Act.
38. Ms Walker was cross-examined about paragraph 2 of the “facts” section of the Applicant’s statement of case. This refers to Form ACM 13 which is entitled “Community Care Statement of Financial Circumstances.” A copy of this form appears at pages 20-22 of the trial bundle. Ms Walker’s evidence was that the manuscript entries on this form would have been made by a Mr Rob Crossgrove, a financial officer with adult social services. He interviewed the First Respondent Mr Colin Berresford on 27 July 2009, some 3 weeks or so after Mrs Berresford was admitted for residential care. Ms Walker explained that a number of the manuscript entries on the form would have recorded what Mr. Colin Berresford told Mr Crossgrove. There are two manuscript entries which are of significance. On page one of the ACM 13 it states:

“Customers name might be on the Deeds of Ownership, but the kids have always paid the mortgage between them. Customer has never paid anything. House may also be in trust”

39. On the second page of the ACM 13 there is another manuscript entry which states:

“House is owned by 3 children and customer lived rent free. But customers name may be on the deeds”

40. Ms Walker was also cross-examined about the statement made in paragraph 3 of the “facts” section of the Statement of Case which states that *“all former tenants seeking to exercise their right to buy using money from non-qualifying family members are advised that these family members should receive independent legal advice because their contribution may not be recoverable should the property subsequently be sold”* Ms. Walker confirmed that she was not employed by the Applicant at the time that Mrs Berresford exercised her Right to Buy and cannot state whether such advice was given at the time the Property was purchased.

41. The Applicant’s Statement of Case includes relevant documents. Mr Gary Dulson of the Applicant wrote to the First Respondent on 13 October 2009. He stated:

“I have noted the details that you have provided on the financial assessment dated 27 July 2009 stating that the relatives have been responsible for paying the mortgage. However, as their interest is not declared on the land registry document, I am unable to meet your request to disregard the value of the property for assessment purposes”

42. In this letter Mr Dulson stated that if evidence of mortgage payments were forthcoming he might be able to “reassess how much of the proceeds of sale of this property can be taken into consideration.” This letter also stated that instructions have been given to the Applicant’s legal department for a charge to be placed against the property.

43. On 21 October 2009 the First Respondent responded to Mr Dulson. The First Respondent set out the Respondents’ position and provided the Applicant with a copy of the Declaration of Trust and building society and bank statements supporting the Respondents’ position that they discharged the mortgage on the Property.

44. On 6 November 2009 Mr Dulson responded for the Applicant. He stated:

“The Trust document is an equitable agreement and as such would need protection on the Land Registry records for it to be valid. There is no evidence on the register that this document is protected. I have been advised that under these circumstances the Solicitor acting on your behalf would normally register the trust document on the Land Registry records in order to protect the interests of the family.”

45. As noted above, on 11 November 2009 the Applicant proceeded to declare the Statutory Charge. Correspondence between the parties continued thereafter along with the Applicant’s application to register the Statutory Charge. On 15 December the Applicant informed the Land Registry that in its view *“there may be an issue of deprivation of assets”* in respect of the Deed of Trust. This was stated to be an issue that the Applicant was *“currently looking into.”* In a letter dated 25 June 2010 the Applicant’s solicitor stated:

“The “Declaration of Trust” made nearly 12 years after the property was purchased is, on the balance of probabilities, not enforceable against third parties as no Restriction [has been] registered by your clients. In any event the timing of this trust

deed suggests it is an attempt to place Mrs Berresford's main asset beyond the reach of the Local Authority who need to fund Mrs Berresford's continuing care costs."

46. Ms Walker was also cross-examined about the assertion in the Statement of Case that the Deed of Trust was an attempt at a deprivation of capital made in order to ensure that Mrs Berresford's future care would be financed by the public purse. Ms Walker confirmed that she had no personal knowledge of the reasons why the Deed of Trust was created and the Applicant's position is based on the temporal proximity between the Deed of Trust and Mrs Berresford's actual need for residential care.
47. Mr Colin Berresford, the First Respondent, was the only witness for the Respondents. Mr. Berresford is a careers advisor. His witness statement appears at pages 88 – 92 of the Trial Bundle and stood as his evidence in chief.
48. Mr Berresford's evidence was that his mother had lived at the Property since 1951. On 17 March 1994 she applied under the Right to Buy scheme to purchase the Property and the Property was transferred to her by a transfer dated 30 January 1995. The purchase price was £11,200 after a 60% discount was applied. The sum of £11,200 was paid by way of funds advanced by way of mortgage by Nationwide Building Society. He accepted that the mortgage was in his mother's sole name.
49. Mr Berresford stated that at the time of the acquisition of the Property his mother agreed with him and his siblings the following:
 - 49.1. The Respondents would make all payments due under the mortgage and undertake all repairs and maintenance of the Property;
 - 49.2. Mrs Berresford would hold the Property on trust for the Respondents in equal shares;
 - 49.3. Mrs. Berresford would be allowed to live in the Property for as long as she wished or would be able to do so.
50. Mr Berresford stated that that all parties felt that this arrangement would enable Mrs Berresford, who had a limited income, to live comfortably in the Property without the worry of rent, mortgage or housing costs.
51. Mr Berresford stated that the Respondents set up a joint bank account and discharged the sums due under the mortgage each month from this account. Mr Berresford has produced copy bank statements and correspondence from the mortgagee that shows that correspondence relating to the mortgage was sent to Mr Berresford's home address, albeit that it was addressed to Mrs Berresford.
52. Mr Berresford states that his mother was in good health and mentally capable of managing her own affairs in January and February 2007. He states that at this time she visited her solicitor to make a will and was advised that she should create a formal deed confirming the legal and beneficial ownership of the Property. Mr Berresford states that the Deed of Trust was prepared as a result of this advice and that his understanding was that *"it formalised the existing position in relation to ownership of the Property and that it would make administration of my mother's estate simpler."*

53. Mr. Berresford stated that he did not consider that there was any reason for his mother to foresee the need for residential care in early 2007. He did not foresee such a need himself and his understanding was that the Deed was signed pursuant to solicitor's advice *"purely to clarify the position and simplify her affairs."*
54. Mr. Berresford states that it was more than two years later on 2 April 2009 that his mother was admitted to St Francis Hospital for assessment. He agrees that it was on 30 June 2009 that she was discharged into residential care arranged by the Applicant.
55. Mr. Berresford confirms that he spoke to Mr Crossgrove on 27 July 2009 as Ms Walker stated in her evidence. He also confirmed that the manuscript comments set out above *"accurately summarised the position in relation to the ownership of the Property taking into account our original agreement ... and the subsequent declaration of trust."*
56. Mr Berresford stated that he was very surprised to receive the letter dated 13 October 2009 from Mr Dulson referred to above. Mr Berresford noted that the Applicant has since 2009 invoiced the Respondents for Council Tax in respect of the Property.
57. Mr Berresford was cross-examined about a number of matters by Ms Walker. He stated that at the time that the ACM form was completed he did not think that his name was on the deeds to the Property. He was asked about the answer given on page 2 of the ACM which stated that Mrs Berresford did not own a property. Mr Berresford stated that this answer was given as it was his belief that Mrs Berresford did not own the Property. He also stated that he considered it to be correct to say that Mrs Berresford lived in the Property rent-free.
58. In cross-examination Mr Berresford stated that he and his siblings considered that they had provided the funds for the purchase of the Property in 1995. He stated that his mother wanted to take advantage of the Right of Buy but did not have the resources to do so. To allow her to do so and to make her life easy he and his siblings agreed to pay for the purchase of the Property. Mr Berresford stated that as far as he and his siblings were concerned they had purchased the Property for their mother by agreeing to make the mortgage payments.
59. On cross-examination Mr Berresford accepted that the two mortgages taken out in 1995 were interest-only mortgages and that the capital sums advanced by those mortgages remained outstanding in their entirety. The payments made by the Respondents to the mortgagee had been limited to interest repayments. He also accepted that the legal requirement to repay the capital sums remained with Mrs Berresford.
60. Mr Berresford accepted that not everyone was entitled to exercise the Right to Buy but said that he did not have a belief one way or another as to whether he could exercise the Right to Buy in addition to his mother. He accepted that the Right to Buy application which appears from page 9 in the trial bundle named only Mrs Berresford as exercising the Right to Buy and the section entitled "Family member(s) sharing right to buy" was left blank.
61. Mr Berresford stated that he was not aware whether the mortgagee, Nationwide, was made aware in 1995 that Mrs Berresford was not obtaining beneficial ownership of the Property.

He said that he did not know whether this would have affected Nationwide's willingness to lend the purchase monies.

62. Mr Berresford was asked about the circumstances in which the Deed of Trust was executed. His recollection was that the parties to the Deed of Trust did not sign at the same time but that it was circulated between the parties who signed it individually.
63. Mr Berresford was challenged about whether the Deed of Trust was executed in contemplation of the need for nursing care. He stated that it was not and that, in fact, Mrs Berresford still challenges whether permanent residential care is necessary. Mr Berresford's evidence was that the solicitor dealing with the will, Mr Jeremy Allen of Rothera Dawson, had suggested that the Deed of Trust was necessary to protect the agreement reached in 1995 about the ownership of the Property. Mr Berresford could not comment on whether Mr Allen was aware that Mrs Berresford retained sole legal responsibility for repayment of the capital amounts at the end of the mortgage term.
64. Mr Berresford stated that by 2007 he and his siblings had been responsible for all aspects of the property for years and that they had already had discussions between them concerning how the capital amounts would be repaid.
65. Mr Berresford stated that this belief that the Respondents owned the Property was based on the 1995 oral agreement with his mother which was confirmed by the Deed of Trust.
66. In re-examination Mr Berresford stated that the Respondents had paid for a replacement boiler for the property at a cost of approximately £1,000. He also stated decoration had been carried out and that the Third Respondent had replaced side gates at the Property for security purposes.
67. Mr Berresford described his mother in early 2007 as being quite spritely for an 84 year old. Mr Berresford could not recall whether, prior to the purchase of the Property, his mother's rental obligations were discharged by housing benefit.

Findings of Fact

68. In making the following findings of fact I take a number of considerations into account;
 - 68.1. Mr Berresford, along with the other Respondents, has a clear financial interest in the outcome of these proceedings. The Applicant also has a financial interest in the outcome of the proceedings but in my view this would be less likely to have an effect on Ms Walker's evidence;
 - 68.2. the Applicant is understandably not in a position to give any evidence about the relevant events in 1995 and 2007;
 - 68.3. Mrs Berresford would have been an important witness in these proceedings had she been able to give evidence. Her lack of capacity means that I have to determine the issues without the benefit of her evidence. I note that she is not a party to these proceedings and, were I to find that the Respondents have beneficial interests in the Property for the purposes of determining the current Reference, this finding would not bind Mrs Berresford should she or her representatives wish to assert the contrary;

- 68.4. in most cases an individual will not give up their beneficial interest in a property unless there are good reasons for doing so;
- 68.5. in many cases family arrangements are not as clearly spelt out at the relevant time as the court's desire them to be or as the subsequent evidence suggests.
69. Taking all of these factors into consideration I found Mr Berresford to be an honest and credible witness. He was careful only to give evidence about matters within his knowledge and quick to point out if he did not know the answer to a question. His evidence was tested by cross-examination but his answers were measured and consistent. He struck me as being careful to answer truthfully rather than trying to give evidence which would support the Respondents' position.
70. Mr Berresford was cross-examined about the contents of the ACM form. I do not consider that the answers recorded on the ACM are inconsistent with the Respondents' case. While it is correct that at the top of page 2 the answer "no" is recorded in response to the question whether Mrs Berresford owned a property, it is clearly stated later on page 2 that "*customers name may be on the deeds.*" The answer that the "*House is owned by 3 children*" is an accurate statement of the Respondents' position on the beneficial ownership under the Agreement.
71. Mr Berresford accepted that although he considered that he and the Respondents had effectively purchased the Property the mortgage obligations were in the name of Mrs Berresford. In my view Mr Berresford's statement about effectively purchasing the Property for Mrs Berresford reflected the Agreement rather than the contractual obligations re repayment of the mortgage.
72. I therefore find the following in respect of Mr Berresford's evidence and associated issues:
- 72.1. the agreement ("the Agreement") described in paragraph 49 above was reached between Mrs Berresford and her children in 1995;
- 72.2. as part of the Agreement reached between Mrs Berresford and her children the Respondents agreed that Mrs Berresford would live in the Property for as long as she wished or was able to do so;
- 72.3. the Respondents agreed to make all payments due under the mortgage and to undertake all repairs and maintenance of the Property;
- 72.4. the Respondents have in fact made all payments due under the mortgage, as evidenced by the disclosure documents for part of the relevant period, and have incurred expense on maintaining the Property as described by Mr Berresford;
- 72.5. the Deed of Trust was executed by Mrs Berresford in 2007 at the same time as she executed a will when Mrs Berresford was looking to put her affairs in order and with the benefit of legal advice;
- 72.6. Mrs Berresford had capacity to execute the Deed of Trust;
- 72.7. the Deed of Trust expressly states that it was intended to "*confirm*" rather than state for the first time the beneficial interests of the Respondents;
- 72.8. the Deed of Trust reflects the terms of the Agreement rather than stating a new position arrived at in 2007;
- 72.9. the Respondents discussed between them how they would repay the capital sum advanced by way of mortgage and this is consistent with their understanding that they were the beneficial owners.

73. Ms Walker was also an honest witness. In the main her evidence produced documents or stated the Applicant's arguments. There is no issue as to the authenticity of the documents Ms Walker produced.
74. Ms Walker gave evidence about advice which was generally given to family members about protecting their interest if they assisted in a Right to Buy purchase. While it is not known whether such advice was received in this case I do not consider that it is of great relevance. It has not been suggested that the Right to Buy legislation prevented a purchaser of legal title from making informal agreements about the beneficial interest in the property that was being purchased. While it may have been desirable for a deed of trust to have been created at the time of purchase to protect beneficial interests, the failure to do so does not, in my view, suggest that the Agreement was not reached.

DISCUSSION AND CONCLUSIONS

75. I will now address the issues identified in paragraph 15 above. In respect of each issue I have summarised the respective positions of the parties and then stated my conclusions.

Beneficial Ownership in 1995: Constructive Trust

76. The Applicant's position can be summarised as follows;
- 76.1. the Right to Buy scheme was not intended to "*provide a windfall for the relatives of these tenants*" and the statutory scheme is carefully drafted so that non-qualifying family members are excluded from the right to purchase;
- 76.2. guidance which is generally given by local authorities to Right to Buy purchasers advises that family members who provide funds to assist purchase should obtain independent legal advice as their investment may not be protected unless a charge is registered against the property concerned;
- 76.3. families often do not have sufficiently clear intentions to establish a constructive trust. There are other explanations available for the Respondent's conduct in paying interest on the mortgage and maintaining the Property;
- 76.4. the Respondent's fail to displace the presumptions of beneficial ownership set out in *Stack v Dowden* and have not discharged the burden of proof.
77. The Respondents contend the entire beneficial ownership of the Property was vested in them in 1995 when a constructive trust arose in their favour:
- 77.1. Mrs Berresford and the Respondents communicated a shared common intention that Mrs Berresford would hold the legal interest in the Property in trust for the Respondents in return for the Respondents maintaining the mortgage payments on the Property and paying the outgoings;
- 77.2. the Respondents relied on this mutual intention to their detriment by discharging the mortgage payments and all outgoings in respect of the Property;
- 77.3. the arrangement was "*a genuine family bargain*" which is supported by documentary evidence of the Respondents having discharged the mortgage payments in respect of the Property for the last 14 years and by the unchallenged evidence of works having been carried out to the Property by the Respondents.

78. The burden is on the Respondents to establish the existence of a constructive trust. I find that the Respondents have discharged that burden and that the Agreement reached between Mrs Berresford and the Respondents in 1995 created an express bargain constructive trust. I have accepted Mr Berresford's evidence and on his evidence the requirement for an agreement and for a change of position, in the form of the mortgage payments and the maintenance of the Property, is satisfied. While Mrs Berresford has not acted to deny the Respondents' beneficial interest in the Property the lack of this element does not, in my view, prevent the Respondents from asserting their beneficial interest against a non-party to the Agreement who denies its effect.
79. While the Applicant is correct that in many cases families do not reach clear agreements about the ownership of property I find that there was such an agreement in this case. For the reasons already discussed, I do not find the advice which may or may not have been given at the time of the exercise of the Right to Buy is of particular relevance.
80. In stating the relevant law in paragraph 19 I noted that following *Stack v Dowden* there is a legal burden on a joint legal owner of property to establish that the parties did not intend their beneficial interests to mirror their legal interest. As discussed in *Laskar v Laskar* it is not clear how far this burden applies in cases which do not concern co-habitation between family members. It is also relevant to note that the current case is one of sole legal ownership rather than joint ownership. In *Laskar v Laskar* it was held that the presumption did not apply but the court went on to consider the issue as if it did. Adopting the same approach I find that if there is a burden on the Respondents to show that beneficial interest does not mirror the legal interest, this burden has been amply discharged by the evidence of Mr Berresford concerning the Agreement. This is a case where the parties reached a clear understanding in 1995 which is further evidenced by the Deed of Trust in 2007.
81. As noted in paragraph 22, in express bargain constructive trust cases the nature of beneficial interest that a non-legal owner is entitled to is determined by the terms of the bargain. By the Agreement Mrs Berresford vested the entire beneficial interest in her children, the Respondents, and I therefore find that the Respondents are the beneficial owners of the Property. In my view there is nothing in the evidence before me which suggests that there has been any relevant change in this position since the Agreement was reached.

Beneficial Ownership in 1995: Resulting Trust

82. The Applicant's case is;

- 82.1. on a proper analysis the Respondents' contributed nothing to the purchase price of the Property. The mortgages on the property are both interest-only mortgages and the Respondents have only discharged the interest due. The Respondents have not made any capital repayments and these are required to establish an interest under a resulting trust. The payment of interest should be regarded as no more likely to establish a beneficial interest in the Property than the payment of utility or food costs;
- 82.2. in the alternative, if the Respondents are to be regarded as having contributed the mortgage monies, then Mrs Berresford retains a 60% beneficial interest in the

Property as she should be credited with the 60% contribution made by the Right to Buy discount;

82.3. the Respondents here are not even joint mortgagees;

82.4. the Applicant emphasises that the burden of establishing that any resulting trust arose is on the Respondents.

83. The Respondent's fallback position is that if they are not sole beneficial owners of the Property they acquired a 40% interest in the Property:

83.1. the agreement between Mrs Berresford and the Respondents that they would discharge the mortgage and execute all maintenance and repair of the Property means that the Respondents should be seen to have contributed 40% of the purchase price of the Property on acquisition on the application of resulting trust principles;

83.2. the fact that no contributions to capital were made should not prevent the Respondents being regarded as contributing the mortgage sums. Had the Respondents not kept up with the mortgage payments Mrs Berresford would have lost her home and this illustrates the value of the Respondent's contribution.

84. It follows from my conclusion that the Respondents have established an express bargain constructive trust that the presumption of resulting trust does not arise. The presumption of a resulting trust based on contributions is displaced by evidence of the actual intentions of the parties, as established in this case.

85. Had I not found that a constructive trust arose then I would have found that the Respondents did not establish a beneficial interest by reason of a resulting trust. The question of how far mortgage contributions should be regarded as contributions to purchase price is the subject of debate, see the dissenting opinion of Lord Neuberger in *Stack v Dowden* at paragraph 120. In this case the purchase of the Property was enabled by a combination of the Right to Buy discount and the mortgage advances. The Right to Buy discount was Mrs Berresford's entitlement and the mortgage advances were also made to her. So far no capital repayment has been made in respect of the mortgage advances. I accept Mr Berresford's evidence that there have been discussions amongst the Defendants as to how the capital sum will be paid off but in my view this falls short of establishing a contribution to purchase price by the Respondents. To date the Respondents cannot establish that they have made any capital repayments and the works of maintenance on the Property are not sufficient in character to be regarded as equivalent to a contribution to purchase price.

The Deed of Trust

86. The Applicant's case is:

86.1. the Respondents have not produced evidence that Mrs Berresford had capacity at the date of execution of the Deed of Trust;

86.2. the Deed of Trust is very disadvantageous to Mrs Berresford in that she gives the entire beneficial ownership of the Property to the Respondents while maintaining sole legal responsibility for discharge of the mortgage debt. The Applicant contends that *"it is extremely unlikely that any solicitor acting for an elderly lady would have allowed her to enter into an agreement so manifestly against her interest. This raises doubts, at the very least, that Mrs Berresford was properly advised."*

86.3. the Deed of Trust should be regarded as an attempt to put the Property beyond the reach of the Applicant's ability to impose a statutory charge. In the Applicant's view the Deed of Trust was an attempt at deprivation of capital which was made "*to put this asset beyond the Applicant's reach in order that the care would be financed by the public purse.*" The Applicant relies on the fact that Mrs Berresford was 83 at the time the Deed was executed and that just over 2 years after the date of execution Mrs Berresford in fact needed permanent residential care. The Applicant contends that "*it is disingenuous for the Respondents to suggest that it could not have been anticipated that permanent residential care would be required.*"

87. The Respondents argue that the Deed of Trust should not be regarded in this way:

87.1. the Respondent's primary case is that the Deed of Trust did not vest the beneficial interest in the Property in the Respondents but was merely declaratory of their already existing beneficial ownership;

87.2. the Deed of Trust was made at the same time as Mrs. Berresford made her will and should be seen as part of her general desire to formally record her wishes rather than as a step taken in contemplation of the future need for residential care. It is the essence of writing a will to seek to dispose of property retained and it is therefore unsurprising that a deed was executed to confirm that the Property would not form part of the assets devised by her will;

87.3. although there is no direct evidence of the advice given to Mrs Berresford in 2007 in relation to the execution of the Deed of Trust there is a clear benefit in recording the position agreed between the parties in writing rather than relying on proving an oral constructive trust at a later date;

87.4. in the alternative the Respondent's argue that if a previously existing trust of the Property is not accepted the Deed Of Trust was effective to vest beneficial ownership in them;

87.5. the Respondent's say that Mrs Berresford's capacity at the time of the execution of the Deed of Trust should be assumed in the absence of evidence to the contrary. The only evidence of her capacity at the time was that of Mr Berresford who was clear that she had capacity in his view. In addition, the solicitor responsible for the preparation of the Deed of Trust would have had a responsibility to satisfy himself as to Mrs Berresford's capacity to give instructions and execute the document;

87.6. it was not appropriate to draw the inference from the available evidence of the circumstances of the execution of the Deed of Trust that it was executed to deprive Mrs Berresford of capital that would otherwise be used to pay for accommodation provided under the 1948 Act. The Applicant's age at the time of the execution of the Deed of Trust is an insufficient basis and there is no other evidence suggesting that this was Mrs Berresford's intention in executing the Deed of Trust. Mrs Berresford did not foresee the need for residential care at the time she executed the Deed of Trust.

88. I have found that the Agreement gave rise to a constructive trust and that the Deed of Trust in 2007 reflected the terms of the Agreement. There is no support for the Applicant's suggestion that Mrs Berresford lacked capacity in 2007. Mrs Berresford's solicitor was under a professional obligation to satisfy himself that she had the relevant capacity. In addition, Mr Berresford has given evidence, which I accept, that his mother was still spritely in 2007.

89. I do not accept the submission that it is extremely unlikely that Mrs Berresford could have been advised to enter into the Deed of Trust. As I have found, the Deed of Trust simply recorded the already agreed beneficial ownership of Property. On the contrary, had Mrs Berresford been advised to execute a document contrary to the terms of the Agreement she would have been acting unconscionably. I consider that there is a shortcoming in the Deed of Trust in that it does not record that Mrs Berresford was to be entitled to a right to live in the accommodation for as long as she wished/needed. It would have been preferable for this to have been included to reflect the Agreement but I do not consider that its omission casts doubt on the Agreement or the Deed of Trust.
90. I accept that the responsibilities assumed by the Respondents are those which in some cases may be assumed by children towards an elderly parent in any event. That this is sometimes the case does not, in my view, call into question the clear evidence given as to the existence of the Agreement by Mr Berresford.
91. As to the suggestion that the Deed of Trust was executed to deprive Mrs Berresford of capital which would otherwise be used to pay accommodation fees, for reasons explained below it is not necessary for me to make a finding on whether this is a conclusion which it was open for the Applicant to reach. I do, however, make the following observations:
- 91.1. it is clear from the correspondence set out above that the Statutory Charge was not declared on the basis of a finding by the Applicant that there had been a deprivation of capital. The Statutory Charge was declared on 11 November 2009 but on 15 December 2009 the Applicant stated that it was “*looking into*” whether there had been a deprivation of capital;
- 91.2. it is not clear from the evidence before me if and when the Applicant reached any decision that there had been a deprivation of capital or who the decision-maker was. As late as 25 June 2010 the Applicant stated that the timing of the Deed of Trust “*suggests*” it was an attempt at deprivation of capital but this is not a decision that there had been a deprivation of capital. The Statement of Case clearly states that the Deed of Trust was an attempt at deprivation of capital but it does not identify who made this decision, when it was made or how it was communicated to the Respondents and Mrs Berresford;
- 91.3. any determination that the Deed of Trust was executed as a deprivation of capital is or would be inconsistent with my finding that an express bargain constructive trust existed since 1995, 14 years before Mrs Berresford required residential accommodation.

Applicant’s entitlement to declare the Statutory Charge

92. The Applicant contends that even if the Respondents successfully establish complete or partial beneficial ownership of the Property their failure to register their beneficial ownership is fatal to their objection to the Applicant’s application to register a legal charge over the Property. The Applicant argues:
- 92.1. it is entitled to rely on the register as showing a “*complete picture of interests in the registered title.*” Save in the case of statutory exceptions such as overriding interests, the purpose of registration is to make it unnecessary for third parties to

speculate on whether beneficial interest is different from legal ownership. If this is not the case it “*makes a nonsense*” of the system of land registration.

- 92.2. in reliance on Land Registry Practice Guide 19, paragraphs 4.4.4 and 8.4, the Respondent’s alleged beneficial interest under a trust of land was capable of protection by registration of a restriction on the register;
- 92.3. a third party trust is not an overriding interest within the meaning of Schedule 3 of the Land Registration Act 2002 and can only therefore be protected by registration;
- 92.4. it is agreed that none of the Respondents live in the Property and therefore they cannot argue that their interest is protected by actual occupation;
- 92.5. The failure to register such a restriction means that the Applicant was entitled to assume, pursuant to paragraph 2.3 of Guide 19, that the Property was free from any such beneficial interest and act accordingly. Paragraph 2.3 states “*someone dealing with the proprietor can assume that their powers are unlimited except for any restriction reflected by an entry in the register*”;
- 92.6. the Applicant is clearly providing “valuable consideration” in respect of its charge in that it is providing care which Mrs Berresford would otherwise have to pay for.

93. The Respondents’ position:

- 93.1. if it is accepted that the Respondents became the beneficial owners of the Property in 1995/2007 then Mrs Beresford had no remaining beneficial interest in the Property in 2009 for the Applicant to charge;
- 93.2. section 22 of the 1983 Act does not, on a proper interpretation, give the Applicant the power to set aside an effective disposition of a beneficial interest previously made. The Applicant’s case is effectively that it is entitled to expropriate unregistered beneficial interests. This is a radical power and clear statutory language would be required to support such a power of expropriation. There is no such clear statutory language in this case;
- 93.3. the Applicant misunderstands the purpose of registration. While it is correct that a purchaser could have obtained title to the Property from Mrs Berresford in 2009 without being fixed with knowledge of the Respondents’ beneficial interest, the proceeds of any such sale would be held on trust for the Respondents as beneficial owners;
- 93.4. the Applicant as a local authority is not in the same position as purchaser for valuable consideration. The Applicant is a third party purporting to use its statutory powers not a purchaser for value.

94. The Applicant and the Respondents accept that I have jurisdiction to consider whether the statutory conditions for the exercise of the section 22 power to declare the Statutory Charge existed in this case.

95. I am satisfied that the conditions set out in s.22(1)(a) existed as the Respondents concede that there has been an assessment, demand for payment and a shortfall between the amount demanded and the sum paid.

96. The condition set out in s. 22 (1)(b) is that Mrs Berresford have a beneficial interest in the Property at the time that the Statutory Charge. I have found that since 1995 Mrs

Berresford has not had a beneficial interest in the Property and accordingly I find that the second condition for the exercise of section 22 power did not and does not exist.

97. The Applicant's argument is that even if Mrs Berresford had no beneficial interest in the Property the Applicant is entitled to proceed as if she did provided that the actual beneficial owners had not registered their beneficial interest.
98. This submission is contrary to the language of section 22. A local authority may only exercise its power under section 22 if the person receiving accommodation "*has a beneficial interest in the land.*" The section does not state that a charge can be raised provided that no third party interest is registered against the title and in my view the section cannot be read as if it so provided.
99. The Applicant's position is based on a misunderstanding of the function of the Register. The Register is primarily a record of legal estates in land, as referred to in sections 2 and 3 of the 2002 Act. The position is briefly and helpfully stated by Baroness Hale at paragraph 50 of her opinion in *Stack v Dowden*:

"The Land Registry is not concerned with equities"

100. It follows that the issue of whether any third beneficial interest exists in respect of a property cannot be resolved simply by carrying out a Land Registry search. Many beneficial interests are not registered and the fact of non-registration does not mean that those interests do not exist or should be treated as not existing.
101. The Applicant's position is also based on a misunderstanding of the effect of registration of a Legal Charge. Subject to the question of whether the Applicant can be considered as providing valuable consideration (discussed below), it is correct that if the Applicant was entitled to register the Statutory Charge then the Charge would postpone any interest whose priority requires protection and is not protected pursuant to section 29 of the 2002 Act. Section 29 does not, however, purport to extinguish any non-registered interest. Thus the priority provisions of section 29 do not assist in answering the question posed by section 22(1)(b).
102. I was addressed on whether a local authority declaring a charge under section 22 of the 1983 Act should be treated as providing "*valuable consideration*" within the meaning of section 29 of the 2002 Act. It is not necessary for me to determine this issue as, for the reasons I have set out in the preceding paragraph, even if the local authority is regarded as providing valuable consideration by the provision of accommodation to Mrs Berresford, this will only afford priority rather than determine the question of whether Mrs Berresford had a beneficial interest.
103. I have considered the sections of CRAG, which has the status of guidance, to which I have been referred. They give very limited assistance on the questions I have to consider. Paragraph 7.015 confirms that a local authority should not take into account property unless the legal owner has a beneficial interest in it. This paragraph is therefore based on the requirements of section 22 of the 1983 Act. I note that CRAG does not suggest that the question of beneficial ownership can be resolved simply by inspection of the Register. Indeed at paragraph 7.020 CRAG, in the context of joint beneficial ownership, states that

where there is a dispute over ownership “*the law of equity may operate to resolve doubts about beneficial ownership of property.*”

104. For the reasons set out above I find that the condition set out by section 22(1)(b) was not satisfied and accordingly the Applicant was not entitled to declare the Statutory Charge and is not entitled to registration of the Legal Charge.

105. As I have found that since 1995 the Respondents have been the beneficial owners of the Property it is not necessary for me to make any findings in respect of the Applicant’s contention that the 2007 Deed of Trust was executed to deprive Mrs Berresford of capital. Even if it is assumed that the Applicant has made such a determination and that, as a matter of public law, the determination was properly made, this would merely allow the Applicant to disregard the Deed of Trust. The constructive trust created by the Agreement in 1995 would, as a matter of law, remain effective to confer entire beneficial ownership on the Respondents and would accordingly prevent the Applicant from declaring the Statutory Charge.

106. For the reasons I have set out above I will therefore direct the Chief Land Registrar to cancel the Applicant’s application to register the Statutory Charge.

COSTS

107. I direct that the parties are to make written submissions on costs supported, where the party seeks an order for costs in its favour, by a Statement of Costs in form N260 or in substantially similar form. Copies of all submissions and Statements of costs are to be filed with the Adjudicator’s office and served on the other representatives. In view of my decision the Respondents are ordered to file their written submissions as to costs and any Statement of Costs by 22 April 2011. The Applicant is ordered to file its written submissions as to costs and any Statement of Costs by 13 May 2011. The Respondents are to file any additional written submissions as to costs limited to commenting on the Applicant’s submissions and any Applicant’s Statement of Costs by 27 May 2011.

108. Pursuant to Rule 21 of The Adjudicator to HM Land Registry (Practice and Procedure) Rules 2003, if the parties fail to comply with the direction set out in the immediately preceding paragraph I will proceed to determine the question of costs on the first suitable occasion after the 1st June 2011 in any event.

109. A decision on costs will be made in accordance with Rule 42 of The Adjudicator to HM Land Registry (Practice and Procedure) Rules 2003. The decision will be made without a further hearing and a final order recording my direction to the Chief Land Registrar and my decision as to costs will then be prepared.

Dated this 30th day of March 2011

BY ORDER OF THE ADJUDICATOR TO HM LAND REGISTRY