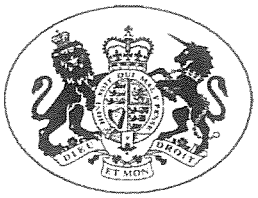

[2018] UKFTT 388 (PC)

REF/2017/0198

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

GARY ROBERT CANAVAN

APPLICANT

and

KIRSTY ANN MILLWARD

RESPONDENT

Property Address: 44 Gloucester Road, Chesterfield, Derbyshire, S41 7EG
Title Number: DY406967

Before: Judge Malcolm Sheehan QC
Sitting at: Wakefield Civil & Family Justice Centre
On : 10 April 2018

Applicant Representation: None
Respondent Representation: Ms Karen Lennon, instructed by Graysons solicitors

---

DECISION

KEYWORDS: Engaged couple; whether beneficial interest arising as a result of contributions to the improvement of property; whether an express or implied agreement that contributions should not create a beneficial interest; proceeding in the absence of a party; approach to evidential disputes where a party is absent

LEGISLATION AND CASES REFERRED TO: Section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970; Section 37 of the Matrimonial Proceedings and Property Act 1970; Jones v Kernott [2011] UKSC 53, Stack v Dowden [2007] UKHL 17, Oxley v Hiscock [2004] EWCA Civ 546; Whitehouse v Jervis Ref/2016/0498; R v IRC ex parte T.C. Coombs & Co [1991] 2 AC 283

Decision

1. For the reasons set out herein I direct that the Chief Land Registrar is to cancel the Applicant's original application for the entry of a restriction dated 29 September 2016.

The Reference

2. I am concerned with the Applicant's application ("the Application") for the entry of a restriction on the title of the property known as 44 Gloucester Road, Chesterfield, Derbyshire, S41 7EG ("the Property"). The Respondent is the registered proprietor of the Property which has the registered title number DY406967. The Applicant alleges that he has a beneficial interest in the Property by reason of his contribution in money and money's worth to the cost of renovation works carried out to the Property in 2015. The Applicant applied for a restriction against the Respondent's title in September 2016.

3. The Respondent objects to Application. Although she accepts that the Applicant made some financial contributions to improvements made to the Property in 2015, she denies that the Applicant has acquired an equitable interest in the Property as result of these contributions. The parties could not reach a resolution and the dispute was referred to the First-tier Tribunal by the Chief Land Registrar pursuant to s.73(3) of the Land Registration Act 2002 on 14 February 2017 ("the Reference").

The non-attendance of the Applicant

4. Until 18 July 2017 the Applicant was represented in these proceedings by Shipton, Hallewell & Co, solicitors. On that date they informed the Tribunal that they were without instructions and understood that the Applicant would proceed as a litigation in person. Shipton Hallewell & Co gave an address in Gladstone Road, Chesterfield for all further correspondence with the Applicant. This address is the same one given by the Applicant in his witness statements dated 26 September 2016 and 13 April 2017. The Tribunal was not

provided with any email or telephone contact details for the Applicant but since July 2017 the Tribunal has corresponded with the Applicant at his Gladstone Road address.

5. Since Shipton Hallewell & Co came off the record the Tribunal has not received any communication from or on behalf of the Applicant. The Applicant has not provided the Tribunal with any additional or alternative contact details. The parties were notified by letter dated 23 January 2018 that the Refence would be heard on the 10 and 11 April 2018 at the Wakefield Civil & Family Justice Centre. Directions were given for the parties to prepare and file skeleton arguments, lists of issues and chronologies in the usual way. The Applicant failed to comply with these directions. Although this non-compliance was noted the Tribunal was unable to contact the Applicant to find out the reason for this non-compliance.

6. The Applicant failed to attend the hearing of the Refence on 10 April 2018. Although the hearing was due to commence at 10.30 am, additional time was allowed for the Applicant to arrive and checks were made with the Tribunal and with Wakefield Civil & Family Justice Centre staff to see if the Applicant had been in communication or could be contacted. In open court I asked Ms Lennon, acting for the Respondent, to take instructions on when her instructing solicitors and the Respondent had last had contact with the Applicant.

7. I resumed the hearing after 11.30 am and Ms Lennon informed me that the last contact the Respondent had with the Applicant was an exchange of text messages in 2015 following the break down of their relationship. Correspondence relevant to the end of the relationship and evidencing the Respondent's wish to have no further contact with the Applicant was included in the trial bundle. Ms Lennon also informed me that her instructing solicitor had not received any communication from the Applicant since notification from Shipton Hallewell & Co on 19 July 2017 that they were no longer acting. The Respondent's solicitors had written to the Applicant at the Gladstone Road address on 26 March and 3 April 2018 concerning the hearing. On each occasion they had noted the date, time and location of the hearing of the Refence in their correspondence. This was also clearly stated on the frontispiece to the trial bundle which was supplied to the Applicant under cover of one of the Respondent's solicitor's letters.

8. In light of the Applicant's failure to attend, an application was made on behalf of the Respondent requesting that the Tribunal proceed to hear the Refence in the absence of the

Applicant. Rule 34 of Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013 ("the 2013 Rules") states:

> *"If a party fails to attend a hearing the Tribunal may proceed with the hearing if the Tribunal –*
>
> *(a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and*
>
> *(b) considers that it is in the interests of justice to proceed with the hearing."*

9. After hearing submissions on behalf of the Respondent I granted the Respondent's application to proceed in the absence of the Applicant. I was satisfied that reasonable steps had been made to notify the Applicant of the hearing. The Applicant had been informed about the date, time and venue of the hearing on at least three occasions. The notifications were given to the correspondence address provided by the Applicant's former solicitors when they came off the record. This address is also the address given in the Applicant's witness statements. Although the Applicant was aware of these proceedings he has not provided the Tribunal or the Respondent's representatives with any alternative contact details since his former instructing solicitors came off the record.

10. I was also satisfied that it was in the interests of justice to proceed. Although the Applicant had instigated these proceedings by the making the Application, he had latterly failed to prosecute them. The Applicant had not taken any step in the proceedings since his former solicitors came off the record and had failed to comply with the Tribunal's pre-hearing directions. The Applicant was provided with the opportunity to have his claim to an equitable interest in the Property determined but he did not attend to take advantage of that opportunity.

11. By contrast, the Respondent complied with the pre-hearing directions, was fully prepared for the hearing and had incurred costs in the process. The Application was made in September 2016 and therefore the Property's title had been affected by the Application for more than 18 months by the time of the hearing. In addition, two days of precious court time had been set aside for the hearing of the Reference. Finally, it was my view that, given the lack of any other contact details for the Applicant, there was every likelihood that adjourning the hearing would simply produce the same result at the adjourned hearing date.

The Issues & Relevant Law

12. Prior to hearing the evidence, I clarified the issues in dispute as they emerged from the statements of case and the from the Respondent's skeleton argument and list of issues. Although I was properly referred to a number of the leading authorities dealing with the acquisition of a beneficial interest in property, such as *Jones v Kernott* [2011] UKSC 53, *Stack v Dowden* [2007] UKHL 17, *Oxley v Hiscock* [2004] EWCA Civ 546, it was accepted on behalf of the Respondent that she had been engaged to the Applicant at the time that he made financial contributions which were used for the improvement of the Property. As the parties were engaged at the time of the relevant contributions, it was also accepted that section 2 of the Law Reform (Miscellaneous Provisions) Act 1970 applied.

13. Section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970 states:

> *"Where an agreement to marry is terminated, any rule of law relating to the rights of husbands and wives in relation to property in which either or both has or have a beneficial interest, including any such rule as explained by section 37 of the Matrimonial Proceedings and Property Act 1970, shall apply, in relation to any property in which either or both of the parties to the agreement had a beneficial interest while the agreement was in force, as it applies in relation to property in which a husband or wife has a beneficial interest"*

14. Section 37 of the Matrimonial Proceedings and Property Act 1970 provides:

> *"It is hereby declared that where a husband or wife contributes in money or money's worth to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest, the husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest of such an extent as may have been then agreed or, in default of such agreement, as may seem in all the circumstances just to any court before which the question of the existence or extent of the beneficial interest of the*

husband or wife arises (whether in proceedings between them or in any other proceedings).

15. The effect of section 2(1) of the Law Reform (Miscellaneous Provisions) Act 1970 and section 37 of the Matrimonial Proceedings and Property Act 1970 is that there is a "rule of law" that during an engagement a contribution to the improvement of real property which is of a substantial nature will give rise to a beneficial interest on the part of the contributor unless there an express or implied agreement between the parties that this should not be the case.

16. As I discuss below, there is a dispute on the evidence between the Applicant and the Respondent about the extent of his financial contribution to the improvements carried out to the Property in 2015. It was accepted on behalf of the Respondent in opening that contributions in the region of £10,000 were made by the Applicant. It was properly conceded on behalf of the Respondent that a contribution in that sum was sufficient to be considered a contribution *"of a substantial nature"* within the meaning of section 37 of the Matrimonial Proceedings and Property Act 1970.

17. Accordingly, it was also accepted on behalf of the Respondent that, as it was not disputed that a contribution of a substantial nature had been made to the improvement of the Property during the period when the Applicant and Respondent were engaged, the Applicant would have acquired by a beneficial interest in the property by reason of that contribution unless there was an express or implied agreement to the contrary. The existence or otherwise of such an express or implied agreement is therefore the principal issue that arises for determination in respect of this Reference. If a beneficial interest is established by the Applicant, then the Applicant would be entitled to the entry of a restriction in the terms sought in the Application. The Respondent confirmed in opening that no issue was taken with the wording of the restriction applied for.

18. In her skeleton argument the Respondent objected to the Tribunal seeking to quantify the extent any beneficial interest arising from the contributions made by the Applicant. The Respondent argued, on the basis of the decision of Judge Dray in *Whitehouse v Jervis* Ref/2016/0498, that as it was not necessary for the Tribunal to quantify the extent of the beneficial interest it would be out with the Tribunal's jurisdiction to do so. For the reasons

I set out below, on the facts of this case this issue does not arise for determination. I none the less note that in some cases it can be of great assistance to the parties to make evidentiary findings about the extent of a beneficial interest and that the Tribunal is sometimes invited to do so by the parties. Making such findings can promote dispute resolution and help avoid the need for further proceedings.

The Evidence

19. As noted above, the Applicant did not attend the hearing of the Reference and did not give oral evidence. The Applicant submitted two witness statements to the Tribunal dated 26 September 2016 and 13 April 2017. These exhibit various documents in support of his case on financial contribution and the acquisition of a beneficial interest. The Applicant's second witness statement was stated to stand as his statement of case. I consider the appropriate approach to the disputed aspects of this evidence below.

20. There are some areas of agreement between the parties that can be identified in their respective statements of case/witness statements. It is accepted that:

    20.1. The Respondent purchased the Property in 2006 for £76,000. The purchase was pursuant to Part V of the Housing Act 1985, more commonly known as the right to buy legislation;

    20.2. The Respondent discharged the mortgage payments in respect of the Property at all relevant times and the Applicant did not make any mortgage payments;

    20.3. The parties met in the summer of 2014 following the Applicant's separation from his wife. For a period the Respondent moved into the Applicant's former matrimonial home in Kirkdale Close, Chesterfield, whilst the Respondent's son lived at the Property;

    20.4. The Applicant and Respondent became engaged on 22 December 2014;

    20.5. Works were carried out on the Property in the first half of 2015 but the extent of the works is in dispute as is the basis upon which the works were carried out;

    20.6. The Applicant and Respondent moved into the Property in 2015 but the relationship between the Applicant and the Respondent broke down and the Applicant moved out of the Property in August 2015. Their relationship lasted for approximately 14 months.

21. The only oral evidence given at the hearing was that of the Respondent. Her statement of case dated 21 April 2017 contained a statement of truth and was relied on as her witness statement. The Respondent confirmed the truthfulness of the content of her statement of case and, with my permission, gave additional evidence in chief in response to limited further questions. While the Respondent was distressed at times during her evidence she was able to give clear and coherent evidence.

22. The Respondent's evidence was that in addition to the mortgage payments, she also paid for all regular outgoings associated with the Property including utility bills and council tax. The Respondent accepts that the Applicant paid for food during their relationship.

23. As far the renovation works to the Property are concerned, the Respondent's evidence was that the Property did not require renovation and she did not have funds to carry out any renovation works. The Respondent stated that it was the Applicant who wished to carry out renovations to the Property because he was used to a higher standard of accommodation and was going to be living at the Property.

24. On the key question of whether there was an express or implied agreement that the Applicant should not acquire a beneficial interest in the Property, the Respondent's witness statement states that *"the Applicant repeatedly reassured the Respondent that in the event that the relationship ended he would not want anything from the property, monetary or material only his personal belongings."*

25. In her oral evidence the Respondent expanded on the context of these discussions. She stated that she raised the issue of what the Applicant wanted in return for his financial contributions to renovations at the Property because the Property was her only significant asset. She explained that she had worked hard to be able to obtain a mortgage on the Property and that she intended it to be an asset for her and her children. Her words in oral evidence were that she *"needed to make sure my house was mine and his apartment was his and that was it."*

26. The Respondent's evidence was that although she was engaged to the Applicant, she had reservations about him in light of disputes that existed between the Applicant and his wife and previous girlfriends. She stated that the Respondent sought to gain her trust by

reassuring her that the money that he was going to spend on the Property was a gift to her. She stated in her oral evidence that she had discussed what would happen if the relationship broke down and he had reassured her that he would only want the return of his personal belongings.

27. The Respondent accepted in her witness statement evidence that the Applicant had paid for renovations at the Property in 2015. These included the removal of two walls, the installation of a kitchen and new doors and windows along with a radiator, some new wiring, lighting, plastering and redecoration. In the garden some decking was installed and some garden furniture was purchased.

28. In the absence of the Applicant I questioned the Respondent about the allegations made by the Applicant. In particular I put to her the allegation that there was a common intention between them that he would acquire a beneficial interest in the Property as a result of his payment for renovations to the Property, which the Applicant's witness statement described as an investment in the Property which was made in order to make it saleable before a planned move to Bulgaria.

29. The Respondent denied that there was any such common intention. On the contrary, there had been express discussions between them that the Applicant was not going to obtain an interest in the Property. She stated that these conversations took place before any renovations commenced and were repeated on several occasions while the renovations took place. I suggested to the Respondent that the Applicant would have expected to gain an interest in the Property given that he had made a contribution to the renovations which was, if disputed in extent, none the less accepted to be substantial. The Respondent said that this was not the case. The parties had been clear going into the renovations that the Applicant had his own property and did not expect to receive an interest in the Respondent's property as a result of his contribution to the cost of renovations. She explained that the Applicant was wealthier than her, had a higher standard of living and wanted to improve the Property as a means of gaining her trust and showing his affection for her.

30. I discuss my views of the Respondent's evidence below. As far as the Applicant's witness statement evidence is concerned, his 13 April 2017 witness statement says:

30.1. That he agreed with the Respondent that they would renovate the Property to a good standard in order to sell it at a profit and then move to Bulgaria;

30.2. The refurbishment was a *"joint exercise with the full backing"* of the Respondent;

30.3. There was a common intention between the Applicant and Respondent that the Applicant should acquire a beneficial interest in the Property;

30.4. The Applicant paid the entire capital cost of the renovations of the Property;

30.5. The renovations were more extensive than acknowledged in the Respondent's evidence, cost £30,000 and increased the value of the Property by *"at least £20,000-£30,000."*

Conclusions

31. On the central issue in this Refence I find that there was an express agreement between the Applicant and the Respondent that the Applicant should not acquire a beneficial interest in the Property by reason of his contribution to the cost of carrying out renovations to the Property in 2015. I accept the evidence given by the Respondent that there were discussions between her and the Applicant before and during the renovations to the effect that neither party intended that the Applicant would acquire a beneficial interest in the Property.

32. I found the Respondent to be a convincing witness. Her oral evidence both in chief and in response to my questioning was both internally consistent and consistent with the content of her statement of case. Although many couples do not discuss beneficial interests in co-occupied property, the Respondent gave a clear explanation as to why she sought to clarify this issue with the Applicant even before the commencement of the renovation works. In my view it is not surprising that, having exercised the right to buy and paid all the outgoings on her home for the best part of a decade, the Respondent would have discussed with the Applicant the question of whether he expected to gain an interest in her home in return for paying for renovations to be carried out. I accept her evidence that these discussions occurred in the terms set out above.

33. I invited submissions from Ms Lennon as to how I should treat the Applicant's witness statement and other documentary evidence given his failure to attend to give oral evidence.

She submitted that the witness statement and documentary evidence was admissible and I could take it into account. However, in doing so, she submitted that the Tribunal must keep in mind that it had not had the opportunity to hear and test the Applicant's evidence. Accordingly, she invited me to give greater weight to evidence of the Respondent which had been given and tested at the hearing. Ms Lennon also invited me to draw adverse inferences in respect of the Applicant's evidence from his failure to attend.

34. In *R v IRC ex parte T.C. Coombs & Co* [1991] 2 AC 283 Lord Lowry considered the approach of the court where a party to the proceedings does not give evidence before the court. He stated at page 300:

> *"In our legal system generally, the silence of one party in the face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the evidence a prima facie case may be become a strong or even overwhelming case. But, if the silent party's failure to give evidence (or to give the necessary evidence) can be credibly explained, even if not entirely justified, the effect of his silence in favour of the other party, may be either reduced or nullified."*

35. I have considered the Applicant's witness statements and documentary evidence and I have taken them into account in reaching my conclusions. I am unable to accept the Applicant's witness statement evidence that there was a common intention that he should acquire a beneficial interest in the Property. This key issue is one which, in the words of Lord Lowry, the Applicant *"could be expected to give evidence"* about but he did not do so orally, nor was a credible explanation for this failure to do so provided. The Applicant's assertion of a common intention that he should acquire a beneficial interest in the Property is entirely inconsistent with the Respondent's evidence that the Applicant told her on several occasions that he did not expect to obtain any such interest.

36. In rejecting the Applicant's witness statement evidence on this point, I also take into account the following matters:

36.1. The Applicant's first witness statement dated 26 September 2016 is similar to the version dated 13 April 2017 but contains material differences. Importantly, the first witness statement does not include the allegation that there was a common intention that the Applicant would acquire a beneficial interest in the property. This was added to paragraph 3 of the second witness statement but does not feature in the first witness statement;

36.2. The first witness statement summarises the relief sought by the Applicant. Paragraph 11 states that the Applicant sought the return of items owned by him and *"reimbursement of all my expenditure to include tool, materials and payment of contractors. I am seeking a lump sum of £30,000 and the return of my possessions/furniture to represent the value of the investment and enhancement carried out by me"*. Notably the first witness statement does not state that Applicant asserted a beneficial interest in the Property. This claim was made in his second witness statement in April 2017;

36.3. I also note that there are a number of inconsistencies between the schedules attached to each witness statement. These seek to summarise the expenditure incurred in relation to the renovations but a number of items are referred to in one schedule as falling into one category of expenditure while being recorded as relating to another form of expenditure in the other schedule;

36.4. I also note an apparent contradiction in the manuscript document presented in support of alleged expenditure of £6,778 by the Application with a Mr A Knowles. The document is dated both 15 June 2015 and 31 March 2017 and it is not clear why the document has contradictory dates;

36.5. Further, some of the items claimed as renovations expenses appear to have been incurred after the breakdown of the relationship between the Applicant and the Respondent.

37. All of the above matters are ones that I would have expected the Applicant to be cross-examined about had he given evidence. In particular, the lack of any initial claim to the existence of a mutual intention to acquire a beneficial interest in the property, in a witness statement prepared in support of an application to register a restriction, is a matter that would require some explanation but no such explanation is provided in the Applicant's witness statement evidence.

38. For the reasons given above I find that the express agreement between the parties that the Applicant should not acquire a beneficial interest in the Property means that the Applicant does not benefit from the "rule of law" set out in section 37 of the Matrimonial Proceedings and Property Act 1970. The Applicant has not established any other basis by which he may have acquired a beneficial interest in the Property and accordingly he is not entitled to a restriction in the terms sought in the Application.

39. I have made reference above to the existence of a dispute between the parties about the extent of the Applicant's financial contribution to the renovations at the Property in 2015. Given my finding that the parties agreed that these contributions would not give rise to a beneficial interest in the Property, it is not necessary for me to seek to quantify the extent of these contributions for the purposes of determining the Reference. Indeed, it is not clear to me that there is now any legal purpose in my doing so. In the circumstances I do not consider it appropriate for me to make findings on this issue.

Costs

40. I have set out my conclusions on the principal issues that arise on this Reference above. I have found that the Applicant does not have a beneficial interest in the Property and is not entitled to the entry of a restriction against the title to the Property. Accordingly, the Respondent has successfully opposed the Application. At the hearing I informed the Respondent that following the determination of the issues raised by the Reference the Tribunal would consider the question of costs based on written representations subject to consideration of any objection made by any party. I also gave the Respondent's counsel the opportunity to address me orally on the Respondent's position on costs in either event.

41. The parties were informed in writing at the start of the proceedings that the general rule in this Tribunal is that the losing party will pay the successful party's costs as well as his own. I have found that the Respondent has succeeded and the application of the general rule in this case would result in an order that the Applicant pay the Respondent's costs.

42. 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 (which can be easily obtained on the internet) or in substantially similar form. Copies of all submissions

and Statements of costs are to be filed with the Tribunal office and served on the other party. The submissions should address the incidence of costs including whether there are any reasons for departing from the general rule described above, the basis of the assessment (whether standard or indemnity) and the quantum of costs that should be awarded.

43. As the successful party I direct that the Respondent shall file her written submissions as to costs and any Statement of Costs by 25 May 2018.

44. Although it is uncertain whether the Applicant will play any further role in these proceedings, in the interests of fairness I direct that the Applicant is to file his written submissions as to costs and any Statement of Costs by 15 June 2018.

45. The Respondent is 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 6 July 2018. The Tribunal will consider the materials received pursuant to these directions and issue a written determination on costs.

46. In the event that there is non-compliance with the directions given for the determination of costs the Tribunal gives notice that it may give a direction debarring the defaulting party from taking any further part in the determination of costs and may proceed to determine the costs issues without further reference to the defaulting party.

BY ORDER OF THE TRIBUNAL

Malcolm Sheehan

DATED THE 3RD DAY OF MAY 2018