[2018] UKFTT 323 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF/2017/0327

BETWEEN

Michelle Leanne Harris

Applicant

and

Michael William Trigg

Respondent

Property address: 82 Gwilym Road, Cwmllynfell, Swansea
Title number: CYM36452

Before: Judge Wear

ORDER

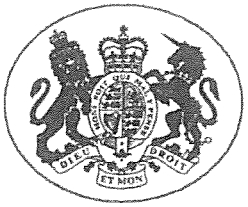
UPON hearing counsel for the Applicant at Civil Justice Centre, Port Talbot on 1-2 February 2018, the Respondent appearing in person

IT IS ORDERED that:-

1. The Registrar shall give effect to the Applicant's application dated 7 September 2016 as if the Respondent had not objected to it.
2. There be liberty to apply.

Michael Wear

Dated 18 April 2018



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DECISION

Form A restriction - purchase of dwellinghouse in name of Respondent - whether Applicant has a beneficial share – common intention constructive trust

Cases referred to:-

Jayasinghe v Liyanage [2010] 1WLR 2106

Jones v Kernott [2012] AC 776

Stack v. Dowden [2007] 2 AC 432

Glaister-Carlisle v Glaister-Carlisle (1968) 112 SJ 215

Thomson v Hurst [2012] EWCA Civ 1752

1. On the 5th of September 2016 the Applicant in this case applied to enter a Form A restriction against the freehold title to 82 Gwilym Road ("the Property"). The Applicant alleged a constructive or resulting trust under which she had a beneficial interest.

2. On the 13th of October 2016 the Respondent as the registered proprietor of the property objected to the application. He denied that there was a shared intention to hold the property jointly and denied that there had been any contributions to the purchase of the property.

3. On the 24th of March 2017 the Land Registry referred the issue to the Tribunal and the case was heard by me on 1-2 February 2018. Mr Hill of Counsel appeared for the Applicant. The Respondent appeared in person.

Background

4. The Applicant and the Respondent had cohabited for some years before the Respondent bought the Property. The Applicant has two children by her former husband, Liam and Bethan. She separated from her husband and with the Respondent moved into 3 Herbert Thomas Way, Birch Grove, Swansea in early 2007.

5. After the Applicant left her husband the former matrimonial home was repossessed by the lender. This had the effect of blighting the Applicant's credit history.

6. The parties lived together at 124 Heol Hafdy, Llansamlet after they left 3 Herbert Thomas Way. After the birth of their daughter, Lily, the parties realised that 124 Heol Hafdy was too small for them and their three children so the Respondent bought the Property in March 2012 and they moved into it.

7. The parties lived at the Property until the Respondent moved out in January 2016. The Property was bought with the assistance of an advance from Halifax, a division of Bank of Scotland plc, which, I was told, was secured by a legal charge. In May 2014 the parties approached HSBC plc because they wished to re-finance. One of the attractions was that they could reduce the repayments under their loan and give themselves more disposable income.

8. The parties were interviewed by a Ms Natalie Calo on behalf of HSBC on the 5th May 2014. The terms of the offer made by HSBC were accepted by the parties and a first legal charge in favour of HSBC was executed by the Respondent on the 3rd July 2014. That charge was registered in the 14th July 2014 and the legal charge to Halifax was removed from the registered title.

9. Unfortunately relations between the parties deteriorated and in January 2016 the Respondent moved out of the Property. He left behind some of his possessions and equipment needed for his business as an electrician. This arrangement did not work satisfactorily and the locks at the Property were changed on several occasions. Matters came to a head in November 2016 when the Respondent in effect evicted the Applicant and her children.

The Application

10. The issue referred is whether the application for the restriction made pursuant to section 43(1)(c) Land Registration Act 2002 should be given effect to by the registrar. That restriction, if entered, will secure that any beneficial interest of the Applicant capable of being overreached will be overreached on a disposition of the registered estate. See further section 42(1)(b) ibid. The Applicant is, on her version of events, within Rule 93(a) of Land Registration Rules 2003. This gives her an interest within section 43(1)(c) sufficient to mean that she can apply.

11. The sad background to this case is the breakdown of the relationship between a co-habiting couple but the Tribunal is only concerned to see whether there is a beneficial share in the Applicant which entitles her to the restriction. The Tribunal has no jurisdiction to rule on the quantum of the share or to order a sale of the Property.

12. Mr Hill puts his case on the basis of either a constructive trust or proprietary estoppel. Mr Hill initially submitted that the Applicant had only to show a claim to a beneficial interest in order for the restriction to be entered. In his view the restriction was a form of interim protection which should remain on the register until the quantum of the share (which might be nil) could be determined by another court. Counsel accepted, after reference to *Jayasinghe v Liyanage* [2010] 1WLR 2106 was made, that it was open to the Tribunal to conduct an evaluation of the Applicant's case based on the evidence put before it. That is the course which the Tribunal will take in this case subject to the constraints on its jurisdiction identified at paragraph 11 above.

13. To succeed on the constructive trust point, the Applicant has to establish a common intention that she would acquire an interest in the Property and that she has acted to her detriment in reliance on that common intention. Such a trust was referred to as "a common intention constructive trust" by the Supreme Court in *Jones v Kernott* [2012] AC 776 at paragraph 17 and the burden of establishing that it has arisen is on the Applicant.

14. The Applicant said that the common intention was to be inferred from certain payments she had made (see page 11 of trial bundle) viz.

    a. £3,500 paid towards repairs to the roof of the Property

    b. £2,000 for the purchase of a boiler to heat the Property

    c. £1,500 for a bathroom suite at the Property.

    She invited the Tribunal to conclude that she would not have made these payments had there not been an understanding that the Property was to be jointly owned. See further page 76 of the trial bundle.

15. There were other payments by the Applicant to which I shall return when making the findings of fact.

16. To succeed on proprietary estoppel, the Applicant has to show, first, a representation made (or a belief encouraged) by the Respondent to the Applicant that she has or would obtain a beneficial share. Secondly, that in reliance on that representation or belief that Applicant has acted to her detriment to the knowledge of the Respondent and, thirdly, that it would be unconscionable for the Respondent to deny the Applicant her share.

17. In his skeleton argument Counsel relied on some text messages sent between the parties in January 2016 as proving an agreement as to the shares and on the meeting held when the parties were interviewed in connection with the re-mortgage of the property with HSBC. In my judgement there is a difficulty with alleging a case on proprietary estoppel in the Tribunal. This follows from the distinction drawn in *Stack v. Dowden* [2007] 2 AC 432 at paragraph 37 by Lord Walker where he said:

"Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the "true" owner. The claim is a "mere equity". It is to be satisfied by the minimum award necessary to do justice (Crabb v Arun District Council [1976] Ch 179, 198), which may sometimes lead to no more than a monetary award. A "common intention" constructive trust, by contrast, is identifying the true beneficial owner or owners, and the size of their beneficial interests."

18. *Stack* was a case involving a dwelling where the legal title was registered in the joint names of the protagonists so it is not directly in point in this case but there has been recent judicial activism in the context of property rights between unmarried couples and, in my judgment, the Tribunal is entitled to have regard to general observations made in the House of Lords. Lord Walker's speech was part of the majority decision in that case. At paragraph 11.032 of Megarry and Wade "The Law of Real Property" 8th Ed. the equity is described thus:

"...the precise nature of the claimant's right remains in limbo until the court determines how best to give effect to it, although the equity itself is proprietary. Although the court will often grant the claimant the interest that he was intended to have, it is not bound to do so and has discretion as to how the equity should be satisfied."

19. In my judgement the Tribunal on a reference from the registrar under Section 73 (7) of the 2002 Act is not competent to determine what is required to satisfy the equity. I am reinforced in this conclusion by the jurisdiction in section 110(4) ibid. The fact that it was thought necessary to confer express powers in relation to proprietary estoppel in the context of adverse possession leads one to think that such powers are not otherwise available to the Tribunal. I will therefore, if either party requests it, refer this question into court under section 110(1).

The Case for the Applicant

20. The Applicant gave evidence to the Tribunal at the hearing. She was challenged about the existence of a family pool of assets and whether she had made any payments out of her own resources (rather than from the funds provided to her by the Respondent).

The Applicant was a credible witness the greater part of whose account of matters I am able to accept. When pressed, however she was unable to remember some of the detail regarding payments made in cash.

21. The Applicant's children, Liam and Bethan, both gave unchallenged evidence regarding their life after the Respondent moved into live with them and the Applicant. The breakdown of the relationship between the Applicant and the Respondent was difficult for both of them. After January 2016 there was a sequence of occasions when each side denied the other access to the Property. They were questioned about this but it has little to do with the issues which the Tribunal has to address.

22. The Applicant's uncle, David Morris, gave evidence of a loan of £3,000.00 to the Applicant on 4th April 2012. This was done to help pay for repairs to the roof of the Property. The Applicant was in the habit of caring for Mr Morris' 90 year old mother in Mumbles, but I do not accept that the payment was made for those services. I accept Mr Morris' evidence that it was a loan between family members to be repaid when the Applicant could afford to do so.

23. The Applicant's grandmother, Beryl Morris, made a witness statement in which she said she was in the habit of paying the Applicant £50.00 in cash every week. Mrs Morris was too ill to attend the hearing. In the absence of cross-examination the Tribunal can place very little weight on her evidence.

Case for the Respondent

24. The Respondent gave evidence himself and was cross-examined. He was a truthful witness but, in my judgment, had convinced himself that his cohabitation with the Applicant had to be viewed in commercial terms. He accepted that he had been engaged to the Applicant for 8 years and they have a daughter together but invited the Tribunal to regard the purchase of the Property as an investment by the Respondent and his mother: in his words: "my involvement with the Applicant was purely emotional and not financial".

25. The Respondent said that the Applicant's contributions were either nothing more than what she would have had to pay by way of daily expense for her own needs or that in making the payments the Applicant was simply acting as the agent of the Respondent who had given her the money to make the purchase. This approach perhaps owes something to the acrimony which surrounded the breakdown of the parties' relationship. In answer to a question from the Tribunal the Respondent said he would have no objection to a restriction in Form A being placed on the register by his mother but he did not want the Applicant to have an identical restriction.

26. The Respondent's mother, Christine Bellis, gave evidence that she had advanced £8,200.00 to help the Respondent with the purchase of the Property. There was a conflict of evidence about the basis on which the advance was made. Mrs Bellis signed a document in which she disclaimed any interest in the Property. The document was passed to the solicitor acting for the Respondent in the purchase. The

firm was referred to in the evidence as JCP solicitors. She said that the document was signed simply in order that the Respondent could obtain a mortgage. It was, she said, understood between her and the Respondent that the document did not represent their intentions. Mrs Bellis insisted that she had done the same for her daughter when she had brought a property and saw nothing wrong with her actions.

27. Mrs Bellis could not remember when she discussed the financial arrangement with the Respondent or whether the Applicant had been present when the discussion took place. She could also not remember any of the content of the document notwithstanding she thought she drew up the document herself rather than signing a pre-printed form. She thought she signed it at her home but could not remember to whom she gave it when she had done so.

28. Mrs Bellis did her best as a witness but her evidence was incomplete. The document itself was not in evidence and was not produced by either party following the hearing, notwithstanding liberty to do so given by the Tribunal. Mrs Bellis said that the advance was not a gift to the Applicant or to the Respondent.

Findings of fact

29. The Tribunal makes the following findings of fact:

(i) The Respondent began a relationship with the Applicant in 2006. With the Applicant's two children they moved into rented accommodation at 3 Herbert Thomas Way in April 2007.

(ii) In 2009 they moved into rented accommodation at 124 Heol Hafdy. Lily, their daughter, was born while they lived there.

(iii) They cohabited at both these properties and the outgoings were paid by both parties as needed but there was no formal arrangement of who paid what.

(iv) After Lily was born it was agreed that Heol Hafdy was too small for the family. The parties agreed to look for a larger property to buy outright.

(v) Offers were made on two other properties before they found the Property. The first of these was structurally unsound and the second was sold to a higher bidder. Both properties were in need of modernisation.

(vi) In order to buy the Property the Respondent needed a mortgage advance. To this end a mortgage advisor visited the Respondent at Heol Hafdy in the middle of 2011. The Applicant was present.

(vii) Completion of the purchase of the Property took place on the 5th March 2012. The price was £82,000.00 and this was paid, as to £8,200.00 from money provided by Mrs Bellis and, as to the balance by an advance from the Halifax secured by a first legal charge.

(viii) There was no discussion by the parties (still less with JCP) of the shares in which the Property was to be held. The Applicant's credit history meant that the purchase and mortgage were taken solely in the Respondent's name. The Tribunal accepts that the Applicant spoke with JCP and dealt with the selling agents when she collected the keys but she has not proved that there was any discussion of how the Property was to be held.

(ix) The money provided by Mrs Bellis was transferred into the Respondent's bank account on the 21st February 2012. I accept Mrs Bellis' evidence on this point.

(x) It is more likely than not that Halifax advanced the funds to the Respondent against a written representation made by Mrs Bellis that she had provided the funds to assist with the purchase but claimed no interest in the property. That representation was either made by her to the lender or by JCP acting for the Respondent and in reliance on the document she had signed. It is impossible to say more than this from the available evidence.

(xi) The document signed by Mrs Bellis was given to the Applicant and scanned by her to JCP. Mrs Bellis had no convincing explanation of what happened. I prefer the evidence of the Applicant on this point.

(xii) The Applicant said that this document was evidence that the contribution made by Mrs Bellis was a gift to her and the Respondent. I have found this point difficult but in the end do not think this is enough to prove a gift to the parties jointly. The evidence establishes it was drawn up with the express purpose of satisfying the Halifax's requirements and was addressed to them or to JCP in their professional capacity. All of the money was paid to the Respondent outright. The Applicant has not discharged the burden of proof on this question.

(xiii) Mr Hill relied on *Glaister-Carlisle v Glaister-Carlisle* (1968) 112 SJ 215 to submit that clear words or conduct was needed to establish a gift of property. That case involved the circumstances surrounding the gift of a family pet between spouses. It does not assist with ascertaining whether a party has made a gift of money towards the deposit on the purchase of a dwelling.

(xiv) Counsel then submitted that the document operated as an estoppel against Mrs Bellis. It is open to the Applicant to argue this point but it is far from clear on the limited evidence available (in particular in the absence of the document) that the representation made in the document was made to the Applicant. If it was not made to her it would be impossible, in my judgement, to show that she relied on it. The most that can be said from the evidence was that the Applicant acted as the means by which the representation was transmitted from Mrs Bellis to Halifax.

(xv) The parties cohabited at the Property with their children but after discussion decided there would be more disposable income if they varied the terms of the mortgage. On the balance of probabilities the Respondent initiated the discussion and arranged an interview with a Mortgage and Protection Manager at HSBC. This took place in early 2014 and culminated in a written report prepared on the 5th May 2014 and which was signed and accepted by both parties on 14th May 2014.

(xvi) I accept the Applicant's evidence that she met the following expenditure out of her own resources.

Date	**Description**	**Amount**
A. 9.2.2012	Professional fees in connection with purchase of Property	£200.00
B. 23.2. 2012	Professional fees in connection with purchase of Property	£600.00
C. 4 April 2012	Roof windows and slate flashing	£361.47
D. April 2012	Building material for roof	£656.42
E. May 2012	Building materials	£ 56.40
F. February/March 2013	Blinds	Not less than £600.00
G. November 2013	Pipe and sundry other items used in connection with the wood burner at the property	£400.00
H. 2 July 2014	Arc roll top bath with shower and associated fittings	£916.92
I. 10 monthly instalments beginning in April 2012	Water rates	£ 21.65 per month
J. 10 monthly instalments beginning April 2013	Water rates	£ 25.60 per month
K. 10 monthly instalments beginning on April 2014	Water rates	£ 26.20 per month
L. 10 monthly instalments beginning on April 2015	Water rates	£ 27.50 per month
M. 7 March 2015	Shower enclosure with tray and fittings and tiles	£282.96

(xvii) The evidence shows that these payments were made. Other payments were made by the Applicant drawing cash from her account which she handed to the

supplier. The Applicant's recollection of these transactions was insufficiently detailed and the Tribunal makes no finding about them.

(xviii) The Respondent accepted that the Applicant had made the payments at A and B above but said they were in respect of bills arising from their time together at Heol Hafdy. He did not specify which bills. Reviewing the pattern of payments out of the Applicant's current account in the 2 years ending with February 2012, the sums disbursed on household items are rarely in excess of £100. The contrast with the payments A and B is striking. Given the imminent purchase in March 2012 and the parties' knowledge that there would be expense associated with this, I prefer the evidence of the Applicant on this point.

(xix) I do not accept the Respondent's submission that the Applicant simply acted as a conduit for payment with funds supplied by him. The following instances of funds being transferred by the Respondent to the Applicant's account are proven but they do not directly correspond with expenditure made then or subsequently.

Date	**Amount**
25.6.2012	£ 10.00
06.08.2012	£ 26.00
24.09.2012	£ 10.00
01.03.2013	£ 30.00
17.05.2013	£ 20.00
15.10.2013	£265.00
05.11.2013	£117.00
15.11.2013	£ 40.00
18.12.2013	£ 30.00
20.12.2013	£ 20.00
24.01.2014	£ 30.00
25.04.2014	£ 13.00
20.05.2014	£ 40.00
09.06.2014	£ 25.00
16.06.2014	£ 90.00
28.07.2014	£ 80.00
22.12.2014	£ 70.00
20.10.2014	£ 10.00
07.04.2015	£ 20.00
28.04.2015	£237.00
30.04.2015	£ 40.00
17.06.2015	£ 21.28
27.06.2015	£ 10.00
17.09.2015	£350.00

(xx) The Tribunal cannot accept that the purchase of the Property is correctly characterised as an investment, as the Respondent urged. It is clear that it was intended that the Applicant should live there from the start with the Respondent

and children. The intention that it should be a full time home for the Applicant is also recorded in Miss Calo's report (trial bundle page 47).

(xxi) I accept that the parties were intending to improve the Property but there is nothing in Miss Calo's record of the discussion that she held with the parties that they wished to let the Property at any point in the future. Nor is there any projection of how the value of the Property might increase, as it was improved. Nor was there any reference to the Respondent's mother being concerned in the increase in the value of the Property. These are points which would have been addressed if the Property was a true investment

Decision

30. It is impossible to draw out of these findings of fact an express agreement between the parties as to the shares in which the Property was to be held. The Applicant referred to the "the family pool" and said that all expenses were shared on an equal basis. But this was not formally acknowledged or structured. For example, there was no joint account into which both parties paid. Even if there had been, this would not lead automatically to the conclusion that the Property as an asset was equally shared.

31. It is therefore necessary to ask whether a common intention by the parties that the Applicant should have a beneficial share should be inferred: *Thomson v Hurst* [2012] EWCA CIV 1752. As to this, Mr Hill relied on a text message between the parties on the 13th January 2016 in which the Respondent stated that "....the house is yours and the kids as well". He also relied on a text message sent by the Respondent after he had left the Property in which he stated "we always said that if things changed or we did separate then we would do things fairly and split it down the middle".

32. It is difficult to place great weight on what a party puts in a text message at a time when the relationship is in its terminal stages. The context of the messages make it plain, first, that there was very little in common between the parties at that point and, secondly, that both parties were suffering with the pressure of the break up.

33. There is, however, evidence in the report prepared by Miss Calo that by that time the parties shared the assumption that the Applicant was someone with a stake in the Property. First, there is the fact that she was invited to the meeting at all. Secondly, it was made clear that (page 48) she was someone who would have to waive or release her rights in order that HSBC's security could be perfected. Thirdly, she was regarded as having an interest in seeing the mortgage repaid because she took out a Life Choice Protection Plan guaranteeing repayment of the sum borrowed from HSBC on the death of the Applicant before the term had run. Both parties signed the report in the knowledge of what it stated.

34. These considerations in my judgement are enough to mean that a shared intention may be inferred on an objective basis. The question then is whether the Applicant acted to her detriment in reliance on the common intention. In my judgement, there is evidence to show that this happened. First, the Applicant took up the offer of insurance cover

which was put forward in the report, paying a monthly premium of £6.64. There would no point in doing this if she was not to have some interest in the Property. Secondly, there is the purchase of the bath at H and the shower and fittings at M. Together these were, for someone in the Applicant's position, substantial payments to have made.

35. It is not necessary for the purpose of this decision to assess the quantum of the Applicant's share and, as stated at paragraph 11 above, the Tribunal's jurisdiction to rule on the question is non-existent. It may be, however, that there will have to be an assessment of what is fair having regard to the whole course of dealing between the parties with regard to the Property. It is to be hoped that some of the findings of fact in this decision will assist with that process.

36. There will be an Order that the Registrar gives effect to the Applicant's application as if the Respondent's object dated 13th October 2016 had not been made.

37. The Applicant as the successful party is, subject to submission, entitled to receive her costs. The Tribunal will allow her until the 27th April 2018 to file her application with the Respondent having until the 11th May 2018 to respond.

Michael Wear

Dated this 18 April 2018