Appeal number UT/2015/0056

PROCEDURE –New evidence-whether such evidence should and could have been adduced before the First-tier Tribunal-whether it is likely to have an important influence on the case - overriding objective- appeal allowed – case remitted to First-tier Tribunal

[2015] UKUT 688 (TCC)
UT/2015/0056

IN THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
ON APPEAL FROM THE FIRST-TIER TRIBUNAL
(PROPERTY CHAMBER)

Between :

LAURA JANES **Appellant**

- AND -

HENRY JANES **Respondent**

TRIBUNAL: HIS HONOUR JUDGE JARMAN QC

Sitting in public at Cardiff Civil and Family Justice Centre 2 Park Street Cardiff CF10 1ET on 16 November 2015

Daniel Hodge (instructed by **MD Law**) for the **Appellants**
Julian Reed (instructed by **Spencer Skuse and Potter**) for the **Respondent**

DECISION

RELEASE DATE: 8 January 2016

Tribunal Judge
HH Judge Jarman QC :

1. By a decision notice dated 20 January 2015 I gave permission to Laura Janes to appeal a decision of Timothy Cowen sitting as a judge of the First-tier Tribunal (the FTT) Property Chamber dated 10 March 2014 which directed the Chief Land Registrar to allow the application of her son Henry Janes for the entry of a restriction on the register relating to property at 5 The Avenue Cardiff CF3 3EG (the property) on the basis that he was the sole beneficial owner of the property. I did so on one ground only, namely that a letter dated 19 February 2007 from Mr Janes' solicitors to his mother and a statement dated 30 January 2010 filed on his behalf of Mr Janes in proceedings under the Proceeds of Crime Act 2002 (POCA) gave rise to an arguable case that the presumption of resulting trust which the FTT had applied to transfers in 2007 from Mr Janes to his mother and himself and then to his mother should not apply or should be rebutted. Neither the letter nor the statement was before the FTT.

2. The property was purchased on 18 October 1996 and registered in the name of Mr Janes. It was his case before the FTT that the purchase monies came from his father Wisdom Janes and that the property was put into his name as a wedding gift, that his signature on a purported transfer from him to himself and his mother dated 5 January 2007 had been forged, and that a further transfer dated 23 February 2007 into his mother's sole name had been signed by him under duress exerted on him by his father.

3. The evidence before the FTT focussed upon the claims of forgery and duress. Because this was the way Mr Janes then put his case he did not rely in the alternative of resulting trust arising from the undisputed fact that both the 2007 transfers were made for no monetary consideration. He and his wife and two of his employees gave evidence. He summonsed his father to the hearing and he attended but neither party called him to give evidence.

4. The case of Mrs Janes was set out in a witness statement dated 5 April 2013, which was signed by her solicitor underneath a statement of truth. She did not give evidence. The FTT accepted written medical evidence filed on her behalf that she suffers from significant cognitive impairment, but was also assured that she was capable of giving effective instructions to her lawyers. In her statement she said that she had provided the purchase monies for the purchase of the property in 1996, that it was always intended that she and her husband would live there, and that her son transferred the property to her voluntarily. She did not in that statement give the reason why the property had been registered in the name of her son upon purchase. However, to that statement she attached a further statement dated 15 September 2010 which she had made in the POCA proceedings in which she said she did not make a will because the travelling community of which she is a member prefers to make lifetime gifts. She was told by her solicitor that if her husband outlived her the property would go to him. She didn't want this to happen, so she decided to put the property in her son's name. She also said in the latter statement that in 2006 she fell out with her son and was concerned that he could sell her home or force her out and that is why the property was transferred into their joint names, and after the relationship deteriorated still further, into her sole name.

5. The parties, at the invitation of the FTT judge, made closing submissions on the issue of resulting trust. In his decision, he said he did not know whether he could attach any weight to the strength of Mrs Janes' POCA statement because the medical evidence showed that by then Mrs Janes had already suffered cognitive impairment. Even if that were accepted, the judge said that it made no clear sense in terms of her intentions as to the beneficial interest. Other than her statement, there was no evidence that the purchase money came from her. The judge concluded that the only feasible explanation for the property being registered in the name of Mr Janes in 1996 was that it was a wedding gift from his father, and that the same result would arise from the application of the presumption of advancement whether the purchase price was provided by his father or his mother. The judge found therefore that Mr Janes was the sole beneficial owner of the property from 1996 until 2007, that Mrs Janes offered no evidence to rebut the presumption that the 2007 transfers gave rise to a resulting trust in favour of her son.

6. The letter dated 19 February 2007 which has since come to light is from a firm of solicitors Oakley & Davies to Mrs Janes and says this:

> "I have been instructed to act on behalf of Henry Janes in the transfer of …the property into your sole name and perhaps you would be good enough to telephone me upon receipt of this letter to arrange a mutually convenient appointment to see me to sign the necessary documentation."

7. The reason the letter was not before the FTT is said to be that because of her cognitive impairment Mrs Janes had forgotten about it and it was found amongst her papers after the hearing by her daughter. Mrs Janes had however annexed to her statement in the FTT proceedings a statement from Mr Oakley who said that he had received instructions from Mr Janes in both the 2007 transfers. In respect of the latter, he said this:

> "I can recall that a short time thereafter I again received a visit from Mr Janes at my offices requesting that the property be transferred from the joint names of himself and his mother into the sole name of Laura Janes. I accepted the instructions and advised Mr Janes that he and his mother would need to attend to sign the transfer documentation."

8. The statement dated 30 January 2010 (the section 17 statement) was made under section 17 of POCA in reply to the prosecution's statement under section 16 of that Act after Mr Janes pleaded guilty in 2009 to offences relating to unlawful money lending and money laundering. The prosecution alleged that because the property was transferred in 2007 and within the period of 6 years before the date of charge in March 2009, and because the Crown Court at Cardiff had found that Mr Janes led a criminal lifestyle, the 2007 transfers were tainted gifts within the meaning of section 77 of POCA so as to be brought into account in determining his realisable assets under the Act. On the 13 June 2011 the court determined that

the value of the property was £130,257.98 and that such value was included in the schedule of realisable assets.

9. The section 17 statement was not before the FTT but the matter was relied upon on behalf of Mrs Janes and the judge dealt with it in paragraphs 16 to 20 of his decision including these passages:

> "A significant amount of time was spent during the hearing before me trying to establish what had happened during the POCA proceedings; in particular whether Henry had asserted to the court that the Property was not his. Henry admitted in cross examination before me that he had considered telling the criminal court that the Property was not his, but decided not to. He said that the POCA proceedings were resolved by consent between him and the prosecution. There was no hearing at which oral evidence was taken on the issue. There was no evidence before me that Henry had ever said in court or stated in a witness statement or other court document that the Property was not his.
>
> Henry's solicitors' complete file of papers relating to the POCA proceedings was not available in court. Each side asked me to make inferences based on what was available. Henry says that he borrowed the sum of £130,000 in 2012 in order to pay the part of the POCA order which related to the Property.
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> After hearing counsel's submissions on the tainted gift issue, I have reached the conclusion that it is not relevant to the issues I have to decide on this reference. The POCA order declaring the 2007 transfers were a tainted gift is a consequence of those transfers being disposals by Henry at an undervalue within a prior 6 year period. The Crown Court did not make an express finding as to the beneficial interest in the Property. Neither party suggested that there was any such finding to which I was bound.
>
> In those circumstances, it seems to me that I must decide the issues concerning the beneficial and legal ownership of the Property and the "tainted gift" order in the POCA proceedings does not affect that decision. "

10. In a witness statement dated 6 January 2015 in the present appeal, Liz Beach who is the solicitor with conduct of the case on behalf of Mrs Janes said that the reason the section 17 statement was not before the FTT at the hearing in March 2014 was because it was not disclosed to her until June 2014 and that extensive enquiries prior to that date had proved fruitless. Ms Beach was present at the appeal hearing

and was tendered for cross examination on her statement but that was an offer which Mr Reed, counsel for Mr Janes, did not take up.

11. The section 17 statement has at the end the typed names of leading and junior counsel who represented Mr Janes in the Crown Court proceedings and it is not in dispute that it was filed on his behalf in the POCA proceedings. In paragraph 10 this is stated:

> "As to 5 The Avenue, the prosecution avers that Mr Janes purchased it in 1995. The property was purchased by Laura Janes (Henry Janes' mother) from another traveller (Tom Price/Ruby Price). The property was in poor repair and with the help of her family the purchase price of £25,000 was raised. Mrs Janes did not have a will (wills are not commonly used by the travelling community) and as she did not want the house to pass to her husband she put it in her favourite son's name so it would pass to him (Henry Janes). Henry Janes did not contribute to the purchase or the upkeep of the property. In 2006 he and his mother fell out and Mrs Janes became concerned at it being in his sole name. She therefore consulted a solicitor (Stephen Oakley) and was advised to put the house in joint names which was done. The relationship deteriorated and the property was transferred."

12. Mr Reed submits that there needs to be finality in litigation and that the letter and the section 17 statement could and should have been obtained before the FTT hearing and the latter is a matter of public record. Before the Civil Procedure Rules 1998 the principle was that special grounds must be shown for receiving fresh evidence including that such evidence could not have been obtained with reasonable diligence for use at the trial and it must be such that it would probably have an important influence on the result of the case. It must also be apparently credible, although it need not be incontrovertible (see *Ladd v Marshall* [1954] 1 WLR 1489 at 1491).

13. That principle must now be considered in light of the overriding objective. In *Hamilton v Al-Fayed (Joined Party)* [2001] EMLR 15, Lord Phillips MR giving the judgment of the Court of Appeal said at paragraph 11:

> "We consider that under the new, as under the old, procedure special grounds must be shown to justify the introduction of fresh evidence on appeal. In a case such as this, which is governed by the transitional provisions, we do not consider that we are placed in the straitjacket of previous authority when considering whether such special grounds have been demonstrated. That question must be considered in light of the overriding objective of the new CPR. The old cases will, nonetheless remain powerful persuasive authority, for they illustrate the attempts of the courts to strike a fair balance between

> the need for concluded litigation to be determinative of disputes and the desirability that the judicial process should achieve the right result. That task is one which accords with the overriding objective."

14. The overriding objective applies to the FTT (see rule 3 of The Tribunal Procedure (First-tier Tribunal)(Property Chamber) Rules 2013) and to the Upper Tribunal (see rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and require that cases are dealt with fairly and justly which includes dealing with the case in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties, and avoiding delay so far as compatible with proper consideration of the issues.

15. In considering whether the letter and the section 17 statement should have been before the FTT, in my judgment it is relevant that both these documents were documents written on behalf of Mr Janes. In my judgment the cognitive impairment of Mrs Janes provides a good reason why the letter was not put before the FTT on her behalf, and the fact that extensive enquiries as to the section 17 statement did not bring forth a copy until June 2014 provides a good reason why that was not before the FTT on her behalf.

16. Mr Reed also submits that neither document would have made any difference to the decision of the FTT. I accept that the letter, taken on its own, would not appear on the face of it to add a great deal to the information before the FTT including the statement of Mr Oakley. I also accept that the finding of the Crown Court that the 2007 transfers amounted to tainted gifts and that the property should be included in the schedule of realisable assets does not of itself have an impact upon the issue of whether Mr Janes is entitled to have a restriction entered on the registered title on the basis that he is the sole beneficial owner.

17. However, what was stated in paragraph 10 of the section 17 statement in my judgment is likely to have had an important influence on the issues of the purchase of the property and resulting trusts arising from the 2007 transfers. First, it provides some support for the case of Mrs Janes that she provided the purchase monies in 1996. This is important in light of the observation of the judge that she called no other evidence oral or documentary that the 1996 purchase money was hers. Second, it provides some support for her case that the reason the property was put into the name of her son in 1996 was to ensure that it did not pass to her husband if she predeceased him. As the judge observed, that does not of itself provide a clear answer to beneficial ownership, but in my judgment it is likely to have an important bearing on his finding that the only "feasible" explanation for the property being registered in the name of Mr Janes in 1996 was that it was a wedding present from his father. Third, it provides some support for the reasons given by Mrs Janes for the 2007 transfers. Again, this in my judgment is likely to have an important influence on the resulting trust issue, given that the judge found that Mrs Janes did not offer any evidence to rebut the presumption of resulting trust and specifically observed that there was no evidence before him that Mr Janes had stated in the POCA proceedings that the property was not his.

18. To the extent that the section 17 statement supports the evidence of Mrs Janes, in my judgment it is capable of belief. As Mr Janes accepted in cross examination

before the FTT that he was thinking of saying in the POCA proceedings that he did not own the property, it will come as no surprise if his case is that the he was not telling the truth in the section 17 statement. That as Mr Hodge, counsel for Mrs Janes, accepts is a matter of credibility but he emphasises that the 2007 transfers were found by the Crown Court to be a tainted gift because of the operation of section 77 of POCA.

19. Having regard to the overriding objective and the balance between finality and a just result, in my judgment the letter and the section 17 statement should be admitted into evidence on the issues of purchase monies and resulting trusts. The fresh evidence issue was raised fairly promptly after the FTT hearing as part of a timely notice of appeal. Mr Hodge in a skeleton argument filed on the afternoon of the last working day before the appeal hearing submitted that I as a judge of the Upper Tribunal should direct the Chief Land Registrar to remove the entry on the register, or alternatively the matter should be remitted to the FTT for further findings following cross examination of Mr Janes on the new material.

20. During the appeal hearing, the possibility was canvassed of dealing with such cross examination as part of the appeal so as to avoid the further cost time and stress which a further hearing before the FTT is likely to entail. Mr Reed resisted that course on two grounds. The first is that his client cannot read or write and had not come to the appeal hearing expecting to be cross examined on the new material. The second was that his client may wish to obtain further evidence, such as how precisely the section 17 statement was dealt with in the POCA proceedings. Given that it is the content of the statement which is important rather than how it was dealt with, I do not consider the latter to be a strong ground. It may be said that the possibility that the Upper Tribunal would deal with the fresh evidence as part of the appeal hearing should have been foreseen. However, I have come to the conclusion that the risk of such a course depriving Mr Janes of a fair hearing on these issues is too great. As these issue do involve credibility in my judgment the proper course is to remit to the FTT to hear further evidence, including the letter and the section 17 statement, on the 1996 purchase and the resulting trust issues in respect of the 2007 transfers.

21. Mr Reed then submitted that if the matter is to be remitted, it should be remitted for rehearing on all issues before the FTT including the forgery and duress issues. I do not accept that submission. There was no appeal or cross appeal in respect of those issues and the letter and section 17 statement if anything give further support for the dismissal by the FTT of the claims of Mr Janes in this regard.

22. Plainly however, the matter should now proceed with no undue delay. I direct that the parties shall within 14 days of receipt of this decision file proposed directions for the rehearing in the FTT and written submissions on any consequential matters. I will then make a determination on the basis of those submissions.

HH JUDGE JARMAN QC signed on the original

Released 8 January 2016