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Quantifying a Beneficial Interest in Non-Marital Cohabitation

Oxley v. Hiscock [2004] EWCA Civ 546

Unlike under a resulting trust, where the courts required to quantify the interest of the beneficiary in accordance with the contribution made to the purchase price, under a constructive trust the court is required to give effect to the common intention of the parties. It is generally understood the exact size of the interest depends on what was expressly agreed by the parties, or in the absence of such express agreement, the inferred agreement between them. Where there is no express agreement as to the size of the beneficial interest in the land, the court is required to look at the whole course of dealings in order to determine what the parties intended in so far as the size of the respective beneficial interests. It is equally clear that, unlike under a resulting trust, the court can have regard to both direct and indirect contributions in deciding the extent of the interest.

Recently in *Oxley v. Hiscock*¹ the Court of Appeal had to consider the extent of the respective beneficial interests in the proceeds of sale of a house in circumstances where there was no evidence of discussions between the parties. The decision of the Court of Appeal suggests that, contrary to what many believed might happen post *Midland Bank v. Cooke*,² the courts are not necessarily manufacturing and giving effect to agreements that the parties never made. Furthermore, neither are they inclined to treat the mere fact that the parties intended to live in the property as a family home, albeit unmarried, necessarily conclusive that they were intended to be owners equally.

The Facts

Alan Hiscock and Elayne Oxley had been residing at 35 Dickens Close since 1991. The title to the house was in Mr Hiscock's name alone. According to Mrs Oxley she did not appear on the title because Mr Hiscock had told her that this might prejudice any claims by her former partner. The house was purchased for £127,000 and the purchase price can from a number of sources. Firstly, there was a mortgage of £30,000 secured over the house. Secondly, £35,000 of Mr Hiscock's own savings. Finally, a sum of £61,500, which represented the sale of a certain 39 Page Close, this being the house that Mrs Oxley had formerly occupied as a secure tenant but which she acquired sometime in 1987 by the exercise of her rights under Part V of the Housing Act 1985. The value of 39 Page Close was put at £45,200, however, because of the right to buy legislation, Mrs Oxley was entitled to a discount of £20,000 and as such was entitled to purchase the property for a sum of £25,200. The purchase price money for 39 Page Close was provided by Mr Hiscock through the sale of his former house. The evidence before the court was that the sale of Mr Hiscock's former home was directly linked to the purchase of 39 Page Close. 39 Page Close was never transferred in the joint names of Mr Hiscock and Mrs Oxley, instead the title was in

¹ [2004] EWCA Civ 546.

² [1995] 4 All E.R. 562.

Mrs Oxley sole name. Mr Hiscock did, however, put a charge on the title to 39 Page Close so as to secure the monies he had provided for its purchase. The net effect of this was that [out of from](#) out of the £61,500 provided by Mrs Oxley for the purchase 35 Dickens Close, Mr Hiscock contributed £25,200 representing his initial outlay in the purchase of 39 Page Close. This also meant that Mrs Oxley's contribution to the purchase of the 35 Dickens Close was £36,300 and Mr Hiscock's £60,700 (that being his initial £35,500 own savings and the £25,200 which he had provided for the purchase of 39 Page Close).

Mr Hiscock and Mrs Oxley resided at 35 Dickens Close from 1991 to 2001 until the relationship broke down. The mortgage on the house had been paid off some time ago. In March 2001 the house was sold for £232,000 and Mr Hiscock and Mrs Oxley purchased separate properties. In November 2002 [Mr](#) Oxley brought proceedings under s14 of the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) seeking a declaration that Mr Hiscock was holding the proceeds of sale of 35 Dickens Close on trust for himself and Mrs Oxley in equal shares. The application of [14](#) of the TLATA 1996 was apparent because Mr Hiscock had an express agreement with Mrs Oxley that she would have a beneficial interest in the property, albeit not quantified, thereby giving rise to a constructive trust. Section 14 of the Act allows a court *inter alia*, to make any order it thinks fit declaring the nature or extent of a person's interest in the property subject to a trust.

The Decision at First Instance

At first instance the judge held that both Mr Hiscock and Mrs Oxley were entitled to an equal share in the disputed property. The basis for this finding was that, where there was an absence of agreement as to the precise extent of the beneficial interest in the land, the court was required to look at the whole course of dealings in order to come to a conclusion. In support of this the judge cited the decision in *Midland Bank v. Cooke*³ where Waite LJ commented that 'where the court is proceeding in cases like the present where [the](#) partner without legal title has successfully established an equitable interest [thorough](#) direct contribution, to determine (in the absence of express evidence of intention) what proportions the parties must have intended for their beneficial ownership, the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages.'⁴ On the present facts the judge came to the conclusion that the course of dealing beginning with the purchase of 39 Page Close and the eventual purchase and occupation of 35 Dickens Close was part of a long term plan whereby Mr Hiscock and Mrs Oxley were equal owners of both properties.

In particular, the purchase of 39 Page Close by the exercise of the right to buy was advantageous from both Mr Hiscock's point of view as well as Mrs Oxley's. The

³ [1995] 4 All ER 562.

⁴ *Ibid.* at 574.

discount would entitle them to sell the house at a profit and this would enable them to buy a better house where they could live together. Furthermore, in continuing with this long-term plan Mrs Oxley decorated the property, did the gardening and contributed to other outgoings. In other words, there was a pooling of resources sufficient to evince an intention that they were jointly responsible for the benefits and burdens of the property because regarded themselves as equal owners.

The judge at first instance refused to follow the decision in *Springette v Defoe*⁵ where the court held that where two or more persons purchased property without declaring the trusts upon which the property was being held, the property was held on resulting trust for the persons who provided the purchase money in the proportion in which it was provided. It will be recalled that in this case a sitting tenant was entitled to a discount in the purchase price of her council house. The court held that this was a sufficient contribution to the purchase price entitling her to an interest under a resulting trust. On this basis it was argued on behalf of Mr Hiscock that Mrs Oxley's share in the disputed property was 22% as representing the discount she received in the purchase of 39 Page Close.

The Decision of the Court of Appeal

The main issue in the Court of Appeal was whether the judge at first instance was required to follow the decision in *Springette v. Defoe*⁶ in that where there was an absence of intention as to the exact extent of the beneficial interest in the property, the property was held on resulting trust by the legal owner in proportion to the contributions made the parties. Or was the judge correct to follow the decision in *Midland Bank v. Cooke*⁷ and look at the course of dealings in order to ascertain the true extent of the beneficial interest in the property. In answering this question Chadwick LJ undertook a comprehensive review of the law pre *Midland Bank v. Cooke* and post. Having reviewed the existing law, his Lordship came to the conclusion that 'in cases of this nature', that is, (i) property is purchased by unmarried cohabitantes; (ii) each having made some contribution to the purchase; (iii) the title is taken in only one of their names; (iv) there is no express declaration of trust; the court was required to answer two questions.⁸ Firstly, whether there is evidence from which to infer a common intention that each shall have a beneficial interest in the property and that such intention has been communicated to each other. In answering this question his Lordship took the approach adopted by Lord Bridge in *Lloyds Bank Plc v. Rosset*⁹ where Lord Bridge held that a common intention could either be found expressly or by implication. In so far as an express common intention, that is, where the parties had some discussion at the time of the purchase, then that would be settle the matter. In the present case of *Oxley v. Hiscock* Chadwick LJ explained that both Mr Hiscock and Mrs Oxley had an express common intention that both would have a

⁵ [1992] 2 FLR 388.

⁶ [1992] 2 FLR 388.

⁷ [1995] 4 All ER 562.

⁸ [2004] EWCA Civ 546 at paragraph 68.

⁹ [1991] 1 AC 107.

beneficial interest in the disputed property. It will be remembered that Mr Hiscock advised Mrs Oxley not to go on to the title because it might prejudice any claims by her former partner.¹⁰ In the absence of an express common intention, an implied common intention will be readily found by some financial contribution to the purchase price.

Having answered the first question, Chadwick LJ proceeded to answer the second question which was 'what is the extent of the parties' respective beneficial interests in the property?' His Lordship identified three strands of law that were capable of answering this second question. Firstly, that the parties are taken to have agreed at the time of the purchase that their respective shares are to be decided not at the time of the purchase but when the relationship breaks down and the property is sold. In such a case the court is required to come to a conclusion as to what is fair having regard to the whole course of dealings.¹¹

Secondly, the strand taken by the Court of Appeal in *Midland Bank v. Cooke*¹² whereby the court looks at the whole course of dealings between the parties relevant to their ownership and occupation of the property and then decide what the parties must have assumed to have intended from the outset. In *Midland Bank v. Cooke* it will be remembered that the Mrs Cooke, who did not feature on the legal title to the property, nevertheless received a joint wedding present of some £1100. The Court of Appeal held that, whilst Mrs Cooke was entitled to a 6.47% interest in the property by reason of her financial contribution, she was entitled to 50% interest by virtue of the whole course of dealings, which evidenced an intention that she was entitled to an equal share from the outset. The Court looked to Mrs Cooke's acts of looking after the house, raising the children and indirectly contributing to the household expenses. The decision is not without problems. In the first place the court does not make it very clear whether the basis of the quantification of the interest is under a resulting trust or a constructive trust. Secondly, it is not altogether clear why subsequent conduct is used to imply an intention that was never agreed from day one.

The final strand identified by Chadwick LJ was that identified in cases such as *Grant v. Edwards*¹³ and *Yaxley v. Gotts*¹⁴ where the court gives effect to the expectation that has been conveyed by the legal owner to the non-legal owner. This being the approach in the proprietary estoppel cases, which in the opinion of Chadwick LJ were not different to the constructive trust cases in terms of their final outcome.

¹⁰ This is consistent with the decision in *Grant v. Edwards* [1986] 1 Ch 638 where the court found an express common intention on the grounds that the only reason why the non-legal owner did not appear on the title was because it might effect claims be her former partner in divorce proceedings. Although it is questionable whether pretexts of this nature are conclusive of any common intention at all, for example, it has been argued that such pretexts are evidence that the legal owner did not the non-legal owner to have any interest at all; see, S. Gardner (1993) 109 LQR 263.

¹¹ As suggested by Lord Diplock in *Gissing v. Gissing* [1971] Ac 886 at 909 and Lord Justice Nourse in *Stokes v. Anderson* [1991] 1 FLR 391 at 399.

¹² [1995] 4 All ER 562.

¹³ [1986] 1 Ch 638.

¹⁴ [2000] Ch 162.

In the opinion of his Lordship, the strand taken in *Midland Bank v. Cooke* was the least satisfactory of all. His Lordship explained that it was ‘artificial and an unnecessary fiction- to attribute to the parties a common intention that the extent of their respective beneficial interests in the property should be fixed as from the time of the acquisition, in circumstances in which all the evidence points to the conclusion that, at the time of the acquisition, they had given no thought to the matter’.¹⁵ In the opinion of the court each case had to be decided on the basis of what was fair having regard to the whole course of dealing between the co-habitees in relation to the property. This required the court to look at the arrangements made between them with regards to the outgoings such a mortgage contributions and council tax. On this basis the court concluded that Mr Hiscock was entitled to a 60% interest in the property and Mrs Oxley 40%. Looking at the whole course of dealings, it could not be said that when Mr Hiscock sold his own house and advanced the proceeds to purchase 39 Page Close (the house which Mrs Oxley brought under her right to buy at a discount) he intended to be a equal owner of that property with Mrs Oxley. Indeed, Mr Hiscock had put a charge on that property for the sums advanced to Mrs Oxley. This naturally meant that when 35 Dickens Close was purchased in Mr Hiscock’s name, it could not be imputed that Mr Hiscock and Mrs Oxley were equal owners of that property. Much more of Mr Hiscock’s money was used in the purchase of that property, for example the £35,000 of his savings and the £25,200 which he had advanced to Mrs Oxley for the purchase of the her council house.

Commentary and Conclusion

The decision of the Court of Appeal in *Oxley v. Hiscock* is to be welcomed in removing the somewhat artificial approach adopted by the Court of Appeal in *Midland Bank v. Cooke*.¹⁶ The approach taken in *Midland Bank v. Cooke* involved imputing an intention that the parties never had at the time of the acquisition. Whilst it is fair to say that Mrs Cooke’s wedding present was sufficient to give her a 6.47% interest in the house purchased by Mr Cooke, it is questionable whether at that time Mrs Cooke truly regarded herself as an equal owner of the property. A further problem with the decision related to justifying and explaining the difference between cases of the *Midland Bank v. Cooke* nature and the *Lloyds Bank v. Rosset*.¹⁷ For example both Mrs Cooke and Mrs Rosset were married and both intended to live with their husbands in the property purchased by their husbands. Both Mrs Cooke and Mrs Rosset made indirect contributions to the property, in Mrs Cooke’s case it was looking after the house and the children and meeting other outgoings; in Mrs Rosset’s case it was helping with renovations. However, Mrs Rosset received no interest in the property purchased by her husband but Mrs Cooke received a 50% interest in her husbands house simply because she was fortunate to have received a wedding present of £1100 which went to into the purchase of the property.

¹⁵ [2004] EWCA Civ 546 at paragraph 71.

¹⁶ [1995] 4 All ER 562.

¹⁷ [1991] 1 AC 107.

The decision in *Oxley v. Hiscock* does not, however, answer all of the questions relating to indirect contributions. For example, it is clear that once a claimant has made some direct contribution to the purchase price, which is sufficient to find an implied common intention, the court can look to indirect contributions such as paying the bills in order to ascertain the extent of the beneficial interest in the property. What, however, is not clear is a situation where the claimant has no express common intention with the legal owner and neither does he or she contribute directly to the purchase price. In such a situation, what would be the position if the claimant agrees to pay the bills and other indirect expenses simply to enable the legal owner to discharge the mortgage. Providing there was a causal relationship between the ability to discharge the mortgage only by reason of the claimant paying the bills, would the claimant have an interest in the property? The existing line of authorities would suggest a negative answer.

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