NEW SQUARE Chambers

TRUSTS OF LAND/COHABITATION

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Hudson v Hathway – No Detriment, No Problem? [2022] EWHC 631 (QB)

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Introduction

This appeal concerns a point of fundamental legal importance to those conducting co-habitation/TLATA litigation and for those dealing with domestic trusts of land in a wider context.

The issue for determination was framed on appeal as follows:

"Must a party claiming a subsequent increase in her equitable share necessarily have acted to her detriment? Or does a common intention alone suffice to alter the beneficial shares? And if the former, was the judge right to decide that the requirement of detriment was met?"

Both sides argued about what was and, more centrally, what was not said in the defining cases of Stack v. Dowden [2007] 2 AC 432 and Jones v. Kernott [2012] 1 AC 776 on the question of detriment.

I.BACKGROUND FACTS AND FIRST INSTANCE DECISION

The parties started a relationship in 1990. The pair bought Picnic House in 2007 with a mortgage and registered the same in joint names. There was no declaration of trust.

In 2009 the relationship broke down, Ms Hathway stayed at Picnic House with the two sons. The mortgage was converted to an interest only basis. It was paid, as before, from the joint bank account into which both their salaries were paid. Over the years, Mr Hudson substantially paid the mortgage; the amount he contributed far exceeded Ms Hathway's contributions.

The starting point at the time of acquisition was the presumption of equal beneficial ownership. Neither party sought to rebut this presumption to suggest a different shared intention at the time of acquisition or at any point save for a later express agreement.

During the course of 2013 the parties negotiated a separation of their affairs. Mr Hudson was to retain sole ownership of his shares and pension with Ms Hathaway getting the equity from the house, the house contents, savings and income from endowments. The judge found the parties had reached a "deal"/express agreement but one which did not comply with the statutory formalities for transferring an interest in land or a declaration of trust of land.

At first instance the court rejected the submission that no detrimental reliance at all needed to be shown as the cases featured *"activity resulting in a change of position*." The court accepted the need for a change of position or detrimental reliance in a joint name case where A contends that a variation has been promised by B in A's favour". Otherwise, equity would be aiding a *"pure volunteer"*.

II. APPEAL REASONING

Appeal Issues

On appeal Mr Hudson contended that detriment is necessary to make the agreement enforceable in equity and that Ms Hathway had not proved nor even properly pleaded that she had irrevocably changed her legal position for the worse in reliance on the agreement. [1] Mr Hudson relied upon Henderson LJ's dicta in *O'Neill v Holland*[2] that:

"Detriment" in this context is a description, or characterisation, of an objective state of affairs which leaves the claimant in a substantially worse position than she would have been in but for the transfer into the sole name of the defendant."

By respondent's notice Ms Hathway contended it was unnecessary to show detriment at all in the joint name context and without an express declaration of trust. [3]

Ms Hathway submitted that the presumption of beneficial joint tenancy applied but may be rebutted by proof of a contrary intention to alter the beneficial shares, without any detrimental reliance or change of position. The latter proposition, it was argued, was implicit in *Stack v. Dowden* and *Jones v. Kernott* from the absence of any mention of detriment in the majority judgments.

Ms Hathway relied heavily upon the notion of an "ambulatory" constructive trust introduced during argument in Stack to reason that once the claimant has established entitlement to a share in equity, the amount of her share may vary, or ambulate, following a change in the common intention, without the need for any detriment to be shown.

Ms Hathway made two further arguments are to why detriment should be absent in joint name cases, namely:

1) Because the House of Lords and Supreme Court had so ordained;

2) Because in a joint names case (but not a sole name case), a third party purchaser is not prejudiced. The purchaser can see both names on the title documents and the adjustment between the beneficiaries need not concern the purchaser.

[1] The basis for this being that the sole instance of detriment found at first instance, abandoning a claim against Mr Hudson's shares, was no claim at all so was incapable of constituting a valid instance of detriment.

[2] A sole name case

[3} This is a curiously framed ground of appeal when both parties accepted that there was in fact an express agreement. One must take the court to mean no effective express declaration for want of statutory formality.

Kerr J's Reasoning

Kerr J held that:

"61. On the issue of detriment, I conclude that on the whole, I prefer the submissions of Mr Horton. By not dealing with the issue of detriment in Jones v. Kernott , the Supreme Court either omitted mentioning for completeness that it did not need to be proved in the case before them, or omitted to mention a crucial element of the relevant principles to be applied. In my judgment, the latter is less likely than the former."

Going on to hold that:

"It is consistent with principle for the law to permit a constructive trust to be established by whatever evidence is necessary to show that it would be unconscionable for the party denying the equitable interest to do so."

67. I remind myself that the issue is always ultimately one of unconscionability, in the broadest sense. The question in each case or each kind of case is what factors and what kind of evidence will satisfy, or not satisfy, the requirement of unconscionability, i.e. persuade the court that the party denying the equitable interest is not permitted to do so"

"70. In a case where there is a clear express agreement, the question of detriment does tend to merge with the agreement itself. It is obvious that an express agreement evidences the necessary common intention. It seems otiose to superadd a detriment requirement where the common intention – and unconscionability if the agreement is broken - is already shown by the existence of the agreement; at any rate if the agreement is more than a gratuitous promise."

Finally reasoning that:

"79. In the domestic consumer context, an express agreement as to beneficial shares, provided it is not a unilateral oral declaration of trust making the putative beneficiary a mere volunteer, can itself supply the necessary detriment or, as I prefer to put it in the light of the formulation in Jones v. Kernott at [51] [4], satisfy the requirement of unconscionability without the need to establish separately that the beneficiary has acted in detrimental reliance on or changed her position in reliance on the promise."

80... the judge could just as well have found that the deal itself provided all the necessary requirements for the constructive trust asserted by Ms Hathway. It provided all the evidence needed to make it unconscionable for Mr Hudson to resile from it. Applying the formulation of the principles by Lord Walker and Lady Hale in Jones v. Kernott , the deal was sufficient to establish the common intention and the common intention was sufficient to establish the constructive trust."

III.CASE COMMENT

Third Party Protections

An initial brief observation may be made regarding the protection of third parties. The second point of distinction between sole and joint names cases raised by Ms Hathway above is unconvincing as regards the relevance of detriment between the registered owner and those claiming an interest. Trusts are protected by restrictions (if registered) or actual occupation under the LRA 2002.

[4] This reference seems misplaced as the word unconscionable does not appear in Jones

The presence or absence of detriment as a requirement in establishing an interest appears to have no relevance to purchaser protection. The position of the third party purchaser is going to be the same whether or not a detriment requirement is introduced behind the closed doors of the relationship to establish or vary a beneficial interest.

Unconscionability

The appeal decision in *Hudson* adopts a somewhat internally inconsistent line of reasoning. On the one hand Kerr J reasons that the court in *Stack* and *Jones* did not address detriment on the basis that it is not a requirement in joint name cases. On that premise a mere agreement to vary beneficial shares should suffice without more.

On the other hand, the court then goes on to state that the watch word is unconscionability and the court must look at the factors which persuade it that the party denying the beneficial interest claimed is not able to do so. This language and reasoning parallels proprietary estoppel which *does* include a detriment requirement and introduces unconscionability where it does not appear either referenced decision.

Paragraph 70 of Kerr J's decision deserves particular note and raises a timing point that appears relevant to joint name cases, namely whether the court is identifying the intentions *at the time of acquisition* or a later variation of intentions/shares. If there is an express agreement to *vary* shares this presupposes an existing and different shareholding and, arguably, a transfer of beneficial interests or the variation of the terms of the trust.

This has much to align it with a disposition of beneficial interests between the co-owners.[5] If the basis for the change is an express agreement without more this appears to run into the formality bars under the Law of Property Act 1925, S.53. The "something more" typically required is detrimental reliance or a sufficient change of position to create the unconscionability in resiling from the agreement and circumvent the statute.

The court noted that there would be unconscionability if the agreement were broken. Without more English law does not hold parties to gratuitous agreements and the court was right to further observe that gratuitous agreements would not qualify. The issue in Hudson on this aspect of the appeal, putting to one side the later findings regarding detriment[6], is that without any detriment or referable change of position it is extremely difficult to move promises or agreements out of the realm of the purely gratuitous.

The court gave an example:

"[I]f the parties agree that "you will have sole beneficial ownership of the house because of the love and comfort you give our children", it would be difficult to spell out a binding contract."

But:
"[T]he promisor would be hard pressed to deny the promisee's beneficial interest, applying the criterion of unconscionability, even though it is difficult to characterise as a detriment or change of position the continuation of love and comfort that would no doubt be given voluntarily anyway."

[5] The option of treating this arrangement as a simple direction to the trustees to hold on alternative trusts does not seem to be available as such directions are best construed as involving a transfer of interests (Underhill & Hayton Law of Trusts and Trustees at [14.26]

[6] As the judge did as the first ground of appeal was decided without regard to the determinations on detriment

This reasoning is highly conclusionary. The court does not explain what is said to be unconscionable in backtracking on a promise where the promisee continues to act as they always have.

Virtually all other areas of our law holding parties to informally expressed intentions require a change of position or detriment to make the promise stick: proprietary estoppel, promissory estoppel, the *Pallant v Morgan* equity and the *Bowstead v Reynolds* form of constructive trust are but a few examples.

The point is well made by HHJ Matthews in *Dobson v Griffey* (with which Kerr J disagreed):

"It is the detrimental reliance that makes it unconscionable for the defendant landowner to resile from their otherwise unenforceable agreement."

Kerr J, whilst cautioning against an over-reliance upon contractual comparisons, had regard to the general sufficiency of bi-lateral promises in establishing contracts as part of reasoning to the agreement itself supplying detriment. In the contractual sphere the party securing performance typically undertakes an obligation (incurring at least the burden of carrying out the obligation) or provides a benefit to the counterparty (itself the mirror of detriment to the provider) to secure performance.

The difference with a general agreement to vary shares in a joint name property is that the party claiming the benefit of the increased share has provided no value or counter-performance. The standard requirement that consideration must move from the promisee is not respected in such a scenario.

The Comparison with *Stack* and *Jones*

The court considered that applying the principles formulated in *Jones* and *Stack* the "deal" was itself sufficient to establish the constructive trust. However, the exercise conducted by Baroness Hale from [86] to [95] in *Stack* was an examination of differential financial contributions and the shared lives of the parties to infer an alternative common intention as to ownership shares.[7]

Stack was therefore not a case of a bare express agreement without more. Nor was there a suggestion of either party seeking to enforce a later express agreement as to ownership shares. The questions of how an "ambulatory" trust operates, whether detriment is required and what qualifies as detriment therefore did not arise. The conduct reviewed by the House largely centred around unequal financial contributions, themselves indicia of detriment.

In *Jones,* Lord Collins cautioned against construing the court's words as a statute. The absence of direct reference to detriment in both cases is understandable given the context and questions the court was considering. The absence of detriment is not notable by its omission.

The context is this, the paragraph 51 summary in Jones was expressly confined to "*where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests*" and thus a case where the inference exercise must be conducted and the courts look for acts which, this author suggests, constitute detriment or at least found relevant unconscionability to make an agreement bite.

[7] Conduct reviewed included differential purchase contributions, a larger share of the capital repayment of the mortgage, contributions to property improvements, payments facilitating Ms Dowden to increase her saving ability

As Nicholas Strauss QC said of *Stack*[8]: *"the "very unusual" circumstances which led the majority to conclude that the parties did not intend to pool their resources 50:50 was in essence the combination of different capital contributions and the fact that they otherwise kept their finances entirely separate."*

The inference drawn from this context was an intention not to hold equally in the face of differential contributions with the finding of unequal contributions forming both the background to the intention and the detriment on the part of the greater contributor.

In *Jones*, Mr Strauss QC held that:

"*He ceased to contribute to the mortgage or to any other outgoings related to the property, but instead used his resources to finance the purchase of his own separate property, to which Ms. Jones in turn did not contribute…In my view, the judge was quite right to infer from these facts that they no longer intended equal beneficial ownership, or to impute to them such a change in intention. Thus far there was no need for him to invoke fairness: the change in intention can easily be inferred or imputed from the parties' conduct."*

Jones, which reviewed *Stack*, was again a case concerned with inferring/imputing common intention as to shares by reference to the whole course of conduct but largely looking to differential contributions towards the parties' shared life and the property. Once more, the Supreme Court was not concerned with an express agreement.

Lord Walker and Baroness Hale in *Jones* referred directly to the first instance findings to identify why a different intention could be inferred and noted "*the life insurance policy was cashed in and Mr Kernott was able to buy a new home for himself. He would not have been able to do this had he still had to contribute towards the mortgage, endowment policy and other outgoings on 39 Badger Hall Avenue*."

Therefore, in neither of *Stack* nor *Jones* was there an express agreement as to ownership. In both there was joint legal ownership necessarily leading to a trust of land and the only task was to infer shareholdings from conduct.

What one can conclude from a review of *Stack* and *Jones* is that the inference exercise, if it is to surmount the burden of moving a party away from a 50/50 division must demonstrate conduct tending in that direction, most commonly an over or under contribution (whether financial or otherwise) to the parties' shared lives. From such conduct shares can potentially be inferred or, if not, imputed but such conduct in itself will in most cases be irreversible and carry some weight. [9]

Maintaining a detriment requirement for joint name cases retains a normative component that allows an unequal shareholding to bind the new minority shareholder and retains the notably close alignment with proprietary estoppel. The discussion by Kerr J has much in common with the estoppel approach of measuring detriment if the representor/promisor is allowed to resile from their promise but, as Kerr J held, there is no inequity in resiling from a gratuitous promise.[10]

The remaining divergence in the two doctrines comes from a recognition that in the shared home context the courts have fashioned an approach to varying beneficial ownership that takes intention as its lead, not detriment.

[8]In his first instance judgment in Jones v Kernott at [47]

[9] Albeit not necessarily achieving the heights of the test derived from the sole name cases where there is the additional hurdle to overcome of demonstrating a beneficial interest at all and acquiring a property right the claimant would not otherwise have

[10] In the author's view, this determination as to gratuitous promises alone carries with it the implication that there must be "something more" to make a promise or agreement bind (i.e. not gratuitous) whether one describes this as unconscionability or detriment.

The court is not concerned with "*the minimum equity to do justice*" but to respect (in cases of inference) what the parties themselves have chosen as equity between them, provided there is some qualifying element of detriment that allows the new majority owner to bind the minority owner and depart from the natural conception of equality as equity in this context.

Ambulatory Constructive Trusts

The court regarded the decision in *Barnes v Phillips*[11] as an "ambulatory" constructive trust case with no express declaration of trust and two changes in the shareholdings[12] supposedly without any suggestion that the claimant needed to establish that she had relied on the changed common intention to her detriment to establish her right in equity to a share increased from 75 to 85 per cent.

Kerr J found it difficult to explain by reference to a detriment requirement the recognition by the Supreme Court of ambulating beneficial interests after acquisition of a property, of which *Barnes v. Phillips* was considered an example. Kerr J held that the notion of detriment does not appear to have played any part in the second ambulation, whereby Ms Phillips' share increased from 75 per cent to 85 per cent. [13]

However, the Court in *Barnes* held of the first instance reasoning:

"The judge considered that a further adjustment was required. Bearing in mind the repayments made in respect of the mortgage, the payments in respect of repairs and contributions of both parties towards the children and the sums outstanding due from appellant to the Child Support Agency, he concluded that it was fair to determine that the property was held with the respondent having an 85 per cent share and the appellant having a 15 per cent share. He granted a declaration to that effect."

The judge inferred a common intention to vary shares and imputed the extent of the variation based on the above factors.

The example of an ambulatory trust in *Stack* was also linked with an inherent act of detriment, namely:

"70. There may also be reason to conclude that, whatever the parties' intentions at the outset, these have now changed. An example might be where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then."

The example is an inferred agreement for changed ownership but derives the inference from a detrimental act. Once again the precise role of detriment did not require addressing.

CONCLUSION

The decision in *Hudson* should be treated with care. In this author's view the conclusion that an express agreement to vary shareholdings (lacking statutory formalities) itself supplies the relevant unconscionability to bind is highly questionable. If unconscionability is required this is really a by-word for detriment, albeit one can argue about the threshold for qualifying detriment.

[11] [2015] EWCA Civ 1056

[12] from 50-50, to 75-25 and then 85-15 in the claimant's favour

[13]Mr Nicholas Strauss at first instance in Jones held the trust was ambulatory and also found that ambulation directly linked to contributions "*The parties' interests were "ambulatory": their respective interests could be quantified at any given time, but until this was done they changed over time to take account of the increasing contribution of Ms. Jones and the ever more distant relationship between Mr. Kernott and the property.*"

It is also difficult to see why resiling from a gratuitous promise would be in any way unconscionable (as Kerr J in fact held it would not be).

The reliance upon *Stack* and *Jones* is, in the author's view, misplaced. Neither case concerned an informal express agreement to vary shares. Both decisions concerned inferred/imputed agreements as to unequal shareholdings where the conduct reviewed by the court and which led to an unequal outcome was by its nature detrimental to one or the other party.

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