



[2019] UKFTT 0024 (PC)

PROPERTY CHAMBER
FIRST –TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY
LAND REGISTRATION ACT 2002

REF NO 2017/1099

BETWEEN

MICHAEL EDWARD CONWAY

Applicant

and

INNA OKULSKAYA

Respondent

Property addresses: 28 Boycroft Avenue, London NW9 8AP and 70 Kingsmead Avenue,
London NW9 7NN

Title number: NGL220556 and NGL287124

Before: Judge Gary Cowen

ORDER

1. The Chief Land Registrar is hereby directed to
 - (i) Accede to the Applicant's application dated 2 March 2017 in respect of the property known as 70 Kingsmead Avenue registered under Title No. NGL287124 as if the Respondent's objection had not been made;
 - (ii) Dismiss the Applicant's application dated 2 March 2017 in respect of the property known as 28 Boycroft Avenue registered under Title No. NGL220556.
2. The parties shall be entitled to make written representations concerning the costs of this reference or any other consequential application. Any such representations should

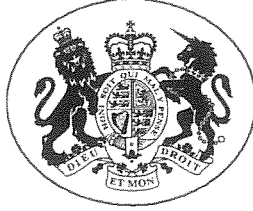
in the first instance be submitted by 4pm on 17 December 2018 following which further directions shall be given as necessary.

Gary Cowen

Judge Gary Cowen

Dated this 20th day of November 2018





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DECISION

1. Peter Conway (who I shall refer to in this decision as “Peter” for ease of identification) was born on 19 July 1944, the eldest of three sons of Martin and Sarah Conway, who lived, at that time, in Ireland. Peter had two younger brothers, Sean born on 22 October 1945 and Michael born on 29 September 1947. Michael Conway is the Applicant in this reference.
2. The Conway family moved to the United Kingdom in the 1950’s and 1960’s. Peter moved in 1960 and Sean and Michael moved with their mother in 1961. Initially they

lived in rented accommodation but in 1963, the family purchased a property in Parkfield Road, Willesden, London.

3. In or around 1967, the family then purchased a property in Wrotesley Road, Harlesden, London and rented out the property in Parkfield Road. At around that time, Sean Conway moved out of the family home, later getting married and moving to Birmingham. In 1970, the Applicant also moved out of the family home and got married. In his Statement of Case, the Applicant says that he later purchased the former family home at Parkfield Road though no further evidence was provided concerning that purchase.
4. In 1975, Martin Conway passed away. The Applicant contends that thereafter, Peter became the 'man of the house' and lived at Wrotesley Road with his mother.
5. In 1976, the family home at Wrotesley Road was sold and one of the properties with which I am concerned in this reference, 70 Kingsmead Avenue, London NW9 ("Kingsmead") was purchased mortgage free. I was told in opening by Counsel for the Applicant that the property was purchased for a sum in the region of £12,000 to £15,000 but that there was no evidence to support that figure. The property was purchased in the sole name of Peter and he was registered as the proprietor of the property on 6 August 1976.
6. At some time in 1986, Peter became interested in purchasing another property, 28 Boycroft Avenue, Kingsbury, London NW9 ("Boycroft") which was to be sold at auction. It is the Applicant's case that this property was to be purchased as a joint venture between himself and Peter with a view to refurbishing the property and re-selling it at a profit. On 12 May 1986, Kingsmead was inspected by a surveyor for the Abbey National Building Society with a view to Kingsmead being mortgaged. Whether Peter was already aware that the property which he wished to purchase at that time was Boycroft is not clear. Kingsmead was valued at £60,000. It appears that Peter mortgaged Kingsmead in 1986 with a view to purchasing Boycroft and the Respondent states in her Statement of Case that the sum of £48,900 was borrowed from Abbey National. Boycroft was then purchased mortgage free at auction in or around October 1986. Once again, the property was put into the sole name of Peter

and he was registered as the proprietor of Boycroft on 29 October 1986. It is common ground that the purchase price of Boycroft was £56,500.

7. There is in the bundle a letter dated 11 November 1986 and from Barclays Bank addressed to the Applicant which refers to the bank marking a limit of £25,000 to enable the Applicant to clear his borrowing with Lloyds Bank in Kingsbury and “complete your share of the balance due on 28 Boycroft Avenue. You will be renovating this jointly with your brother although repayment of the overdraft here will come from the sale proceeds of one of the two flats at 55 Wakeman Road, Kensal Green”. I was not provided with any information concerning the properties at Wakeman Road.
8. In 1986 and early 1987, Boycroft was renovated. In 1987, Peter and his mother moved from Kingsmead into Boycroft.
9. On 19 July 1988, Peter granted a mortgage over Boycroft in favour of the Bank of Scotland through Skandia Financial Services Limited in the sum of £62,662. The sum was assured by a life policy in the sum of £62,000.
10. Conversion work to Kingsmead then took place to convert that property into two flats which were then sold by Peter on long leases. The first lease was dated 14 December 1990 and was sold for £57,500. The second lease was dated 7 February 1991 and was sold for £55,000. A letter from Whatley & Co solicitors to Peter dated 14 December 1990 suggests that the sale proceeds of the first flat were used to discharge the Abbey National mortgage on Kingsmead and that the balance of a little under £5,000 was sent to Peter. The Applicant says that the proceeds of the second flat were paid to him and he relies upon a paying-in slip dated 28 March 1991 in the sum of £52,875 as evidence of this payment.
11. In 1993, Peter applied for assistance from the DSS in paying the mortgage on Boycroft. The balance outstanding on the mortgage at that time was said to be £63,893.86. The application form records that when applying for the mortgage, Peter had indicated that “there was no previous existing mortgage commitment”.

12. On 23 May 1994, Peter was interviewed by the Inspector of Taxes and a note of this meeting, prepared by the Inspector, was relied upon in evidence by the Respondent. The interview appears to have taken place because the Inspector was concerned that Peter's accountants had filed accounts on his behalf for the period ending 30 November 1989 which purported to show that he had ceased trading as a carpenter. The Inspector was concerned to know whether Peter had really ceased trading during the period 1 December 1989 to 6 September 1991. Peter told the Inspector that he had not ceased trading during that period but had been unable to find work as a carpenter. He said that he believed that his accountants had merely assumed that he had ceased work.

13. The notes are more relevant for what Peter told the Inspector about the two properties with which I am concerned. First, he told the Inspector that the mortgage on Boycroft had been acquired to fund the conversion of Kingsmead. Second, he told the Inspector that the mortgages on each property were paid using the capital received from the mortgage on Boycroft. Third, he told the Inspector that although his name was on the title, his mother had an interest in the properties based on an "informal understanding between himself and his mother". When asked about the work which had been carried out to Kingsmead, Peter stated that he had received assistance from the Applicant who, he said, had worked on the property for two months without any pay. He maintained that electrical and plumbing works had been carried out by subcontractors who had been paid approximately £1,500 each in cash but when pressed, he could not provide their names. Finally, when asked why the Applicant's name appeared as the owner of the second flat at Kingsmead, Peter "could not provide any explanation".

14. The Applicant says that In December 2000, the Applicant made a payment of £671.50 to Birmingham Midshires Building Society ("BM") in respect of Peter's mortgage over Boycroft. A bank statement showing a cheque for that sum being debited from the Applicant's account was produced though there is no documentary evidence as to the recipient of the cheque. It appears that this is the same mortgage which Peter took out with Skandia Financial Services Limited in 1988 or a mortgage obtained as a replacement of that mortgage. The Applicant contends that he then made payments of £671.50 each month until March 2001.

15. The Applicant then says that he made a payment of £20,000 to reduce Peter's mortgage over Boycroft. He says that he made a bank transfer of £15,000 to Peter and that he paid the remainder of the £20,000 to Peter in cash. He has produced a bank statement showing a payment to Peter of £15,000 on 30 March 2001 and a letter dated 13 April 2001 which the Applicant states that he drafted for Peter and in which Peter recounts to BM that he has paid a sum of £20,000 off the mortgage and requests that he be moved to a lower interest rate. There is no evidence as to whether that letter was ever sent by Peter.
16. Thereafter, it appears that the Applicant made payments to BM by direct debit during the period March 2001 until December 2005. There is evidence that the Applicant made payments to BM during this period. The Applicant also contends that he made payments of monthly insurance premiums in respect of the buildings insurance for Boycroft during the period August 2004 until August 2016.
17. On 24 April 2009, Peter married the Respondent. At the time, Peter was 64 years of age and the Respondent was 25 years of age.
18. In or around August 2011, Peter was diagnosed with cancer and began treatment.
19. I have seen correspondence concerning the mortgage over Boycroft with BM. On 31 May 2013, the balance outstanding on the mortgage was £40,033.00. On 6 September 2013, some four months later, the balance was £14,739.21. The difference appears to be accounted for by the maturity of an endowment policy maintained by Peter which accounted for £25,000 of the balance outstanding. Whilst I saw no documentation concerning this policy, the timing of the maturity of the policy ties in with the earlier chronology; Peter's mortgage over Boycroft commenced in July 1988, some 25 years before the summer of 2013 when, it appears, the policy matured.
20. In May 2014, Sarah Conway passed away.
21. On 7 April 2016, the redemption sum for the BM mortgage on Boycroft was £10,505.69. A payment in that sum is shown coming from the Respondent's bank account on 15 April 2016.

22. On 19 May 2016, Peter entered into a TR1 by which he transferred Boycroft by way of gift to himself and the Respondent jointly as joint tenants in equity. They were registered as joint proprietors of Boycroft under Title No. NGL220556 on 24 May 2016.
23. By a further TR1 dated 7 July 2016, Peter transferred the freehold interest in Kingsmead by way of gift to the Respondent. The Respondent was registered as the sole proprietor of Kingsmead under Title No. NGL287124 on 19 July 2016.
24. On 19 January 2017, Peter passed away. On his death certificate, Peter's cause of death was given as metastatic prostate cancer. It is common ground that because they were joint tenants in equity, the Respondent became the sole legal owner of Boycroft upon Peter's death by survivorship.
25. There was at least one meeting following Peter's death between the Applicant and the Respondent to discuss Peter's financial position. The Applicant contends that the final such meeting took place on 8 February 2017. During the course of February 2017, the Applicant became aware that Peter had transferred the properties to (himself and) the Respondent.
26. On 2 March 2017, the Applicant applied to the Land Registry to register restrictions against the titles of Boycroft and the freehold interest in Kingsmead. On 16 May 2017, the Respondent indicated her objection to the restrictions.
27. The Applicant contends that he has a beneficial interest in the freehold interest in Kingsmead and in Boycroft, in each case amounting to 50% of the beneficial interest in the properties. He relies upon (i) oral agreements which he contends were entered into at the time of purchase of each of the properties whereby it was agreed between the Applicant and Peter that even though the properties would be purchased in the sole name of Peter, they would be held beneficially in equal shares by Peter and the Applicant, (ii) financial contributions to the purchase of both properties, (iii) financial contributions to the mortgage and insurance premiums of Boycroft and (iv) financial

contribution to both properties by way of building work carried out to both properties by the Applicant and the Applicant's contractors.

28. The Respondent contends that the Applicant has no beneficial interest in either property.
29. Of course, the Tribunal is placed into difficulty by the fact that the one person who could doubtless shed some light on the matters which are disputed between the parties, Peter himself, is deceased and unable to assist. Such evidence as there was which purported to shed some light on Peter's thought processes, particularly the note of the interview with the Inspector of Taxes in 1994 and the transcript of a telephone call between Peter and the Respondent said by the Respondent to have taken place on 16 June 2016 was not altogether helpful though it cannot be dismissed. As the Applicant submitted, the notes of the interview with the Inspector of Taxes have to be read against the background that Peter may have been somewhat defensive given the nature of the procedure to which he was being subjected at the time. I therefore treat the notes with a degree of caution.
30. The transcript of the telephone call is confusing and difficult to follow. The Applicant contended that towards the end of his life, Peter was suffering blackouts and that his memory of events was not as good as it should have been. I was not provided with any medical evidence concerning Peter's state of mental health towards the end of his life though it is only fair to note that the Applicant was keen that the Tribunal should have the benefit of such evidence but the Respondent, as Peter's personal representative, was not prepared to disclose his medical records. In any event, whether Peter was forgetful or not, I did not regard the transcript of the telephone call as terribly helpful. It is, as I have noted above, confusing and difficult to follow. What is more, it does appear at first blush that it contains statements by Peter which are not borne out by the documentary evidence. At one stage, for instance, Peter appears incredulous at an allegation made by the Applicant at a meeting which they had just had that the Applicant had been paying the mortgage on Boycroft, something which appears to be borne out by the Applicant's bank statements. If it was the Respondent's case that the Applicant had not been paying the mortgage on Boycroft during the period 2000 to 2005 and that, for instance, the reference to BM in the Applicant's bank statements

was to an unrelated property, it was incumbent upon her to advance that case. She did not do so and despite being pressed to do so by the Applicant, chose not to put in evidence any statements from BM relating to the mortgage at Boycroft which, as Peter's personal representative, she was uniquely able to do.

31. Nor do I place much weight upon the various allegations concerning the relationship between Peter and the Respondent. I was told in opening that whilst the Applicant took issue with the validity of the transfers between Peter and himself and the Respondent, for the purposes of this reference, I was entitled to assume that the transfers were validly executed. I therefore make that assumption. In his evidence, the Applicant alleges that the marriage between Peter and the Respondent was, essentially, a marriage of convenience for the purposes of securing the Respondent's immigration status and that they did not live together, at least before 2016 once Peter became very unwell. The Respondent denies that that was the case and maintains that she lived with Peter throughout their relationship. She was cross-examined on that issue to a certain extent but the point was, sensibly, not pressed. If Peter and the Respondent did not live together and were no more than friends or acquaintances, that might shed some light on the question of whether the transfers were validly executed but given that I have been told to assume that they were, I do not need to delve deeply into that question or, it seems to me, make any findings of fact on the issue. The relevant relationship in this case is that between Peter and the Applicant. Given that the Applicant bases his claim to beneficial ownership on facts which very largely pre-date the Respondent's involvement with Peter, the relationship between Peter and the Respondent is of secondary relevance. The Applicant and Peter are the parties who would have reached any agreement in relation to the beneficial interest in the properties. I note in passing only that certainly towards the end of Peter's life, there is evidence of the Respondent's involvement in his financial affairs; there is a letter addressed to Peter and the Respondent dated 1 September 2016 from a firm of solicitors, Lynch Hall & Hornby concerning a dispute which had arisen between Peter and one of the lessees at Kingsmead. The first paragraph of the letter suggests that both Peter and the Respondent had attended a meeting with the solicitors to discuss the issue with the lessee. In addition, it will be recalled that the monies to redeem the mortgage on Boycroft, a sum of over £10,000 came from the bank account in the name of the Respondent.

32. In Stack v Dowden [2007] UKHL 17 Baroness Hale said at [56] that “Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest”.
33. At [68], Baroness Hale continued “The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs”. I add here that the same is often true in family disputes not involving the break-up of partners.
34. At [69], Baroness Hale considered some of the factors to be taken into account in determining the intention of the parties. She said “In law, “context is everything” and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is

owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection. At the end of the day, having taken all this into account, cases in which the joint legal owners are to be taken to have intended that their beneficial interests should be different from their legal interests will be very unusual”.

35. Of course, this is not a co-habitation case and therefore some of the factors referred to by Baroness Hale will not be applicable to this case. In the present case, the relevant parties to any express, implied or imputed agreement are Peter and the Applicant.

36. With that in mind, I turn to consider the witnesses who gave evidence before me. The Applicant gave evidence. Perhaps understandably, given that he was being cross-examined by the Respondent, who appeared in person, his evidence was sometimes infected by his irritation and there were many occasions where his evidence became subsumed by argument. There were, however, occasions during his evidence when his evidence was less than satisfactory. At one stage, he raised a point concerning a sum of £6,000 which he said had derived from the sale by his mother of a smallholding in Ireland. The £18,000 sale proceeds realised from that sale were to be divided between the three sons and the Applicant gave evidence concerning the use of his share to purchase a property at 2 Flamborough Street, London E14. It was also suggested that the Applicant had kept Peter's £6,000 share in lieu of works which the Applicant had carried out on Peter's behalf. None of this material, which had, to my mind, the effect of clouding an already complicated factual narrative, was included in the Applicant's Statement of Case or Witness Statement. The inclusion of this evidence left me with the distinct impression that there was a considerably more involved narrative than had been revealed by the Applicant's written evidence. I therefore treat the Applicant's evidence with some caution. Where it is unsupported by contemporaneous

documentary evidence, I have taken the view that I should not simply accept that evidence unless there are compelling reasons why I should do so.

37. The Respondent's evidence was, to an extent, much more straightforward because she could not give evidence concerning the crucial interaction between Peter and the Applicant. However, in cross-examination, she was uncooperative and argumentative. Accordingly, I also treat her evidence with considerable caution.
38. In my view, I must try to do the best I can with such evidence as is supported by the contemporaneous documentation.
39. In his written evidence, the Applicant contends that there was a specific oral agreement in relation to each of the properties that although, on each occasion, the property was to be put into the sole name of Peter, it would be held beneficially for Peter and the Applicant. There is no contemporaneous documentary evidence before me which supports the contention that there was an express agreement between the parties concerning the beneficial ownership of the two properties. Indeed, the only written evidence I have is contained in the record of the interview with the Inspector of Taxes in 1994 in the course of which Peter told the Inspector that his mother had a beneficial interest in both of the properties with which the Tribunal is concerned. There was no mention of the Applicant having a beneficial interest in the properties; the Applicant could not explain why Peter had told the Inspector that his mother had an interest in the properties and had not mentioned the Applicant's supposed interest.
40. When the Applicant was asked why the properties had been put into Peter's sole name, he told me that it was because, after their father died, Peter, as the oldest son was seen as the "head of the family" and because they all trusted each other, there was no issue concerning the properties being in Peter's sole name.
41. So far as Kingsmead is concerned, the evidence which I heard about the purchase of that property was that it was funded largely from the proceeds of sale of the family's previous property in Wrottesley Road with a contribution of £3,000 towards the purchase price coming from the Applicant. I was told that following the death of Martin Conway in 1975, Sarah Conway was the beneficial owner of Wrottesley Road.

Given that, on any view, the vast majority of the purchase price of Kingsmead was funded by Sarah Conway, it is perhaps not a surprise that when asked about the properties by the Inspector of Taxes in 1994, Peter was more inclined to mention his mother in the context of beneficial ownership of the properties than the Applicant.

42. There is no contemporaneous documentary evidence that the Applicant contributed £3,000 towards the purchase of Kingsmead. Furthermore, there is no obvious reason why the Applicant would have done so at that time. He had been married for six years and had not lived in the family home for that period. Peter was 32 years of age and was, as far as I am aware, able to work. For the reasons outlined above and especially due to the lack of contemporaneous documentary evidence, I therefore am not prepared to find as a fact that the Applicant made such a contribution.
43. The position in relation to Boycroft at the time of its purchase appears to fall into a different category. Whereas Kingsmead was purchased for the purposes of providing a family home for Peter and his mother, Boycroft was expressly purchased as an investment for the purposes of renovating the property, splitting it into two flats and then selling the flats on the open market at a profit. It was not intended that Sarah Conway or the Applicant or Peter should occupy the property as their home.
44. In the case of Boycroft, there is evidence both that the Applicant contributed towards the purchase price and other expenses associated with the purchase of the property and that he did so in the context of a business partnership with Peter. As to the former, there is evidence that the Applicant paid the deposit of £5,650 and he maintains that he also contributed the sum of £3,033.40 upon completion although there is no direct evidence concerning that payment. As to the latter, the letter dated 11 November 1986 from Barclays Bank plc states in terms that, in relation to Boycroft, “you will be renovating this jointly with your brother”.
45. The remainder of the £56,500 purchase price was funded by the mortgage which Peter took out over Kingsmead with Abbey National. This mortgage was for £48,900 which ties in with the purchase price and the sums contributed by the Applicant. Given that this was a joint purchase by the Applicant and Peter, the Applicant would have been

well aware that the balance of the purchase price for Boycroft was being raised by Peter by way of mortgage over Kingsmead. The Applicant never contributed towards the Abbey National mortgage which continued to be the sole concern of Peter. In my judgment, this arrangement is much more reflective of the likelihood that there was an express agreement between the parties that they would each be beneficially entitled to a share in the property though given the inequality in the sums contributed, it is far from clear that those shares would be equal. It was intended that both would contribute to the price and that both would benefit from the profits when the property was renovated.

46. I bear in mind that like Kingsmead, Boycroft was placed into the sole name of Peter. In the case of a joint business venture between the Applicant and Peter, there is far less justification for the Applicant simply to accept that as “head of the family”, the property should go into the sole name of Peter. Yet that is what appears to have happened.
47. The Applicant then says that he paid for the vast majority of the costs of renovation of Boycroft. He says in evidence that he contributed approximately £25,000 of the costs of renovation. He was unable to produce any documentation to support that evidence. The small number of documents produced which related to work at Boycroft related to carpet fitting in 1990 and plumbing, heating and roof works carried out to the property in 2000. None of the documents submitted descends into detail about the value of the work carried out. Whilst I am satisfied that the Applicant was involved in carrying out works to Boycroft, there is simply no evidence which would enable me to attach a value to those works. The fact that the Applicant carried out works to Boycroft is consistent with the fact that, on the face of it, Peter was contributing the significantly greater share of the purchase price of Boycroft through the mortgage on Kingsmead.
48. Having converted Boycroft in 1987, Sarah Conway decided that she would prefer to live in Boycroft. It was then decided that she and Peter would move to Boycroft. In his Statement of Case, the Applicant asserts that it was agreed at that time that Boycroft would be sold when Sarah died and the proceeds of sale shared equally between Peter and the Applicant. There is no contemporaneous documentary record of such an agreement. I do not accept that it was agreed at that time or subsequently that Boycroft

would be sold and the proceeds of sale shared between Peter and the Applicant after their mother's death.

49. In my judgment, the position up to this point is relatively clear. There is insufficient evidence to persuade me that there was an agreement between the Applicant and Peter concerning the beneficial ownership of Kingsmead at the time that it was purchased. It was purchased as a family home for Peter and his mother and whilst the Applicant says that he contributed to the purchase price, there is no contemporaneous evidence to support this proposition and I do not accept it. The purchase of Boycroft was entirely different; it was purchased as a joint business venture between the Applicant and Peter with each contributing towards the project. The Applicant contributed the deposit and part of the sum required for completion as well as his time and expertise in converting Boycroft and Peter contributed the vast majority of the purchase price of Boycroft by mortgaging Kingsmead. If it had been the case that Kingsmead was held beneficially by the Applicant and Peter, one might have expected the Applicant to contribute towards the mortgage of Kingsmead or towards its redemption. As we will see, he did neither. When the Applicant was asked about the fact that he had not contributed to the mortgage on Kingsmead his answer was that "the borrowing on Kingsmead was to finance Boycroft. That was for Peter's investment. How he financed that wasn't my responsibility" Later, he said that Peter had financed the purchase of Boycroft. I put my money elsewhere. I put £25,000 into Boycroft and £30,000 into Kingsmead by contribution but I used my money to pay the mortgage on my own house".

50. The Applicant and Peter then agreed to alter the position to effectively swap the properties so that Kingsmead would now be the property to be redeveloped and sold and Boycroft the property retained for the family. That agreement altered the legal position. Whereas the Applicant had not, in my judgment, formerly had any interest in Kingsmead, he was, as a result of the further agreement between himself and Peter, to acquire an interest in that property equivalent to that which he had formerly had in Boycroft. As a quid pro quo, in my judgment, it was also part of that agreement that the Applicant should transfer to Peter any beneficial interest to which he would formerly have been entitled in Boycroft.

51. Neither of those transfers of beneficial interest was completed formally in writing but I do not see any reason why the beneficial ownership of property should not continue to be governed, where appropriate, by constructive trust after it has first been acquired. In my judgment, that is the correct analysis here. By agreeing to use Kingsmead as the joint investment property in place of Boycroft, Peter was effectively creating a constructive trust over that property to hold the property on trust for himself and the Applicant.
52. As noted above, I do not accept that it was agreed that Boycroft should continue to be held in the same manner as it was being held before. There would be no obvious reason for Peter to have agreed such a proposal. He was being asked to give up a share of Kingsmead in order to effect the development of that property for the Applicant's benefit. To facilitate that agreement, the Applicant was giving up any interest which he might have had in Boycroft. This was a genuine swapping of the properties.
53. What is more, almost everything which happened subsequently is consistent with that analysis. Peter mortgaged Boycroft in July 1988 at a time when both Peter and the Applicant were aware that Kingsmead was to be redeveloped. The Respondent says that the purpose of that loan was to fund the works which were carried out to Kingsmead. The Applicant says that that was not the case because he did the vast bulk of the works to Kingsmead. The Applicant says that he did not know about Peter's mortgage over Boycroft at that time and that Peter had, in his view, mortgaged Boycroft in order to fund his lifestyle. The details of that lifestyle and why it would be necessary to borrow over £60,000 to fund that lifestyle were not explored in evidence. The Applicant said in evidence that Peter was profligate with money but the Bank of Scotland with which the mortgage was taken would have required some evidence that the money was being used for a specific purpose. Given that, at that time, there was still an outstanding mortgage on Kingsmead, it seems unlikely that an additional £60,000 would have been lent without more explanation. In any event, I do not need to resolve that issue of fact. Kingsmead was redeveloped. Again, there is some evidence that the Applicant contributed towards that redevelopment although again, there is very little documentary evidence in support of the £30,000 which the Applicant claims to have spent on Kingsmead. The fact that the Applicant was prepared to expend time

and money in carrying out works to Kingsmead is entirely consistent with the agreement that the joint venture was effectively being swapped over to Kingsmead.

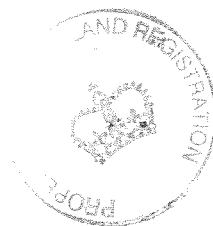
54. When the two flats which had been created at Kingsmead were then sold, the first was sold and the proceeds were retained by Peter. He used the proceeds to redeem the mortgage with Abbey National. If it had been the case that the Applicant had a beneficial share in Kingsmead from the start, one might, as I have noted, have expected him to have contributed to the redemption sum for that mortgage but he did not do so and explained in evidence why he did not do so.
55. The second flat was sold and the proceeds went to the Applicant. That is consistent with the new arrangement between the parties; the flats were worth approximately the same amount and the Applicant received the proceeds of sale of one flat and Peter received the other. As the sales comprised the grant of new leases over the flats, Peter retained the freehold reversion in the property.
56. The Applicant then placed much reliance on his payment of mortgage payments towards the mortgage of Boycroft as evidence of his beneficial interest in that property. There is documentary evidence which supports the Applicant's contention that he made a payment of £671.50 to Birmingham Midshires in December 2000, that company having taken over the mortgage over Boycroft. The Applicant also contended that he made a payment of £20,000 to Peter to enable him to reduce the size of his mortgage to Birmingham Midshires. He produced evidence of a bank transfer to Peter in March 2001 in the sum of £15,000 and says that he paid the remainder in cash. The continued use of cash to make payments which appears throughout the narrative does little to aid investigation of the true position. The Applicant relies on a letter dated 13 April 2001 which he says that he sent to Birmingham Midshires which refers to a cash payment of £5,000 but there is no evidence of any response to this letter confirming any such payment. It is undoubtedly the case that the Applicant made payments to Birmingham Midshires for the whole of the period 2000 to 2005 and that smaller payments which the Applicant says are payments of buildings insurance premiums were made from August 2004 until August 2016.

57. We know from the fact that Peter was applying for help to pay the mortgage from the DSS in 1993 that he had difficulty paying that mortgage. It is not clear from the evidence why it took until 2000 for the Applicant to step in to assist with the mortgage and why he ceased paying in 2005. The Respondent asked the Applicant about this issue in cross-examination and in my view, he answered candidly. He said in evidence that he became aware that Peter was in arrears with the mortgage and that part of the problem was that the rate of interest which Peter was being asked to pay was very high. Asked specifically why he paid the mortgage in 2000 and made lump sum payments towards the outstanding mortgage, the Applicant told the Tribunal that “They allowed me to reduce the mortgage. I did it because I could. Because I loved my brother. I could afford to do it and I hope that he would do the same for me”. He revealed that “My wife wasn’t aware that I was paying the mortgage. She would have been unhappy if she had known. She would have preferred that we would have had the benefit of that money rather than someone else.”. Finally, he added “I wanted to protect my interest”. Two things do not come across from that rather dry recitation of the evidence. First, that there was what appeared to me to be genuine emotion in the Applicant’s evidence concerning these payments which he said were designed to help out his brother. Second, that the final line of that passage of evidence concerning protecting his interest was said after a long pause. In my judgment, the Applicant’s somewhat emotional evidence revealed the true character of those payments; they were made out of filial affection because, at that time, the Applicant could afford to make them and Peter, it appears, could not. They were not made because the Applicant was paying his share of the mortgage, being a beneficial owner of the property. If that had been the true purpose of the payments, there seems no obvious reason why they should have stopped in 2005 and there would be no good reason for the Applicant to keep the payments secret from his wife. The evidence given after a long pause was, in my judgment, given when the Applicant realised that the evidence which he had just given was contrary to his interests.

58. In my judgment, whilst the many payments of mortgage instalments and the lump sum payments and the insurance premium payments were undoubtedly generous and commendable, they are not evidence that the Applicant had a beneficial interest in Boycroft at that time.

59. Ultimately, the £40,000 outstanding on the Boycroft mortgage was paid by the maturity of the endowment policy taken out by Peter and, so far as I am aware, funded solely by him and by payments by the Respondent.
60. As noted above, Peter transferred the transferred the freehold interest in Boycroft to himself and the Respondent as joint tenants in equity on 19 May 2016 and transferred the freehold interest in Kingsmead to the Respondent on 7 July 2016. For the purposes of this hearing, I have made no decision concerning the validity or otherwise of those transfers.
61. In my judgment, therefore, the evidence in this case supports the Applicant's case in support of his having a beneficial interest in Kingsmead but, as a result of the arrangement between the Applicant and Peter in 1987, does not support his case in respect of Boycroft. In my view, the Applicant has a beneficial interest in the freehold interest in Kingsmead. His application to register a restriction in that property should succeed and I shall direct that the Chief Registrar accedes to his application in relation to Kingsmead as if no objection had been made to that application. In relation to Boycroft, for the reasons which I have outlined above, I shall direct that the Chief Registrar rejects the Applicant's application for registration of a restriction.
62. If either party wishes to make any application consequential upon this decision including any application concerning the costs of this reference, they should send any such application to the Tribunal to arrive by 4pm on 17 December 2018 following which I shall seek representations concerning any application from the other party.

Gary Cowen



Judge Gary Cowen

Dated this 20th day of November 2018.