[2024] EWHC 2164 (Ch)

IN THE HIGH COURT OF JUSTICE **Claim No: CH-2024-000002**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
ON APPEAL FROM DISTRICT JUDGE WILKINSON
IN THE COUNTY COURT AT CENTRAL LONDON (No. 1078 of 2018)
IN THE MATTER OF STUART GRAHAM CYNBERG
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

B E T W E E N :

Date: 23 August 2024

Before :

James Pickering KC
(sitting as a Deputy High Court Judge)

- -

Between :

(1) ANN NILSSON **Appellants/**

(2) EDWARD THOMAS **Second & Third Defendants**

(As the Joint Trustees in Bankruptcy of Stuart Graham Cynberg)

and

COLLETTE CYNBERG **First Respondent/Claimant**

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Samuel Parsons (instructed by **Brachers)** for the **Appellants**
Oliver Ingham (instructed by **Sternberg Reed LLP)** for the **First Respondent**

Hearing date: 23 May 2024

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APPROVED JUDGMENT

James Pickering KC (sitting as a Deputy High Court Judge):

PART I: INTRODUCTION

1. In ***Stack v Dowden*** [2007] UKHL 17, Baroness Hale said that an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel. One of the key questions in this appeal is whether "subsequent agreement" in the above context means only a subsequent formal agreement which complies with the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 ("**LP(MP)A 1989**") or whether it is also capable of including a subsequent informal common intention constructive trust.

2. The issue arises in the context of an appeal within a bankruptcy. In a nutshell, a husband and wife bought a property together in joint names; they separated; they reached an understanding of sorts in relation to the property; he later went bankrupt; and subsequently a dispute arose as to whether the husband's trustees in bankruptcy had an interest in the property or whether, as a result of the above understanding of sorts, it was now owned solely by the wife. At first instance, the district judge held that the property was now owned solely by the wife. The matter before me is the trustees in bankruptcy's appeal against that decision.

3. In this judgment, I start by setting out the background to the matter (Part II). I then go on to consider each of the four grounds of appeal (Parts III to VI), before ending with a brief conclusion (Part VII).

PART II: THE BACKGROUND

The start of the relationship

4. The bankrupt is Stuart Cynberg. The applicant is his former wife, Collette Cynberg.

5. In about 2000, Mr and Mrs Cynberg started a relationship together.

The purchase of the Property

6. On 28 February 2001, Mr and Mrs Cynberg bought the property at 9 Chippenham Road, Romford RM3 8EX ("**the Property**") in their joint names. The purchase price of the Property was £87,000. Of that, 5% came from their joint savings. The balance of 95% came from a mortgage in their joint names. On completion, they completed the Land Registry Form TR1. In relation to box 11 of that form (entitled "Declaration of Trust"), they ticked the box which declared that "The transferees are to hold the property on trust for themselves as joint tenants".

7. Following the purchase, both Mr and Mrs Cynberg worked and together paid the monthly mortgage repayments and the other expenses relating to the Property and the household generally.

8. In February 2003, Mr and Mrs Cynberg had their first child together. In June 2006, they married. In August 2008, they had a second child together.

The separation

9. In late January 2009, Mr and Mrs Cynberg separated. He admitted to an affair and moved out of the Property. At and around that time, there were a number of discussions between them, the gist of which was that he did not wish to retain an interest in the

Property and that he was content for her to have the whole Property so long as she left it to their two children in due course.

10. Following the separation, Mrs Cynberg paid for all expenditure relating to the Property. In particular, she paid all of the monthly mortgage repayments (when she could), council tax, utility bills and other household expenditure. Mr Cynberg, who as stated above, had said that he did not wish to retain an interest in the Property, contributed nothing.

The inheritance and the taking of legal advice

11. Several years passed. No formal divorce proceedings were begun, not least because of the expense involved.

12. In about August 2014, Mrs Cynberg received an inheritance of some £72,000 from her late mother. Following this, she carried out various relatively minor works on the Property including new windows (£3,804 in October 2014), new paving (£5,550 in November 2014), heating (£320 in September 2015), fencing (£220 in April 2016) and a shower (£475 on a date unknown).

13. With the benefit of her inheritance, Mrs Cynberg also consulted solicitors with a view to starting divorce proceedings. In 2015 and 2016, her solicitors wrote to her on several occasions pointing out that the Property was still in the joint names of her and Mr Cynberg and, further, that Mr Cynberg had "offered" to transfer the Property to her absolutely.

The divorce

14. On 9 March 2018, Mr and Mrs Cynberg formally divorced.

The bankruptcy

15. On 29 June 2018, a bankruptcy petition was presented (by HMRC) in relation to Mr Cynberg.

16. On 29 October 2018, Mr Cynberg was declared bankrupt.

17. On 4 March 2019, Ann Nilsson and Edward Thomas were appointed as Mr Cynberg's trustees in bankruptcy ("**the Trustees**").

The dispute

18. Following the Trustees' appointment, a dispute arose as to the beneficial ownership of the Property. It was of course uncontroversial that the legal title to the Property remained in Mr and Mrs Cynberg's joint names. Mrs Cynberg, however, pointed to the discussions which had taken place between her and Mr Cynberg at around the time of their separation and asserted that this gave rise to a common intention constructive trust and/or a proprietary estoppel such that the entire beneficial interest in the Property was now held by her alone. The Trustees, on the other hand, asserted that for various reasons those discussions could not have given rise to any such common intention constructive trust or proprietary estoppel such that, at the time of the bankruptcy order, Mr Cynberg still had a beneficial interest in the Property which now, upon their appointment, vested in them as his trustees in bankruptcy.

The present proceedings

19. In early 2020, Mrs Cynberg issued the present claim out of the Central London County Court by way of a Claim Form and Particulars of Claim. The first defendant to the claim was Mr Cynberg. The second and third defendants were the Trustees. By that claim, based on the discussions which she had had with Mr Cynberg at around the time of their separation, Mrs Cynberg asserted a common interest constructive trust and/or proprietary estoppel and sought declaratory relief that the beneficial interest in the Property was held for her alone (and that the Trustees had no interest in the same).

20. As for Mr Cynberg, he did not oppose the relief sought.

21. As for the Trustees, on 7 April 2020, they served a Defence and Counterclaim. By their Defence, they opposed the relief sought on various grounds including that by reason of

the express declaration of trust in the TR1 - and in the light of the decision in ***Stack v Dowden*** – no common intention constructive trust could have arisen; further, for various reasons, nor could there have been any proprietary estoppel. By their Counterclaim, the Trustees asserted that, if contrary to their Defence, there had been such a proprietary estoppel, any transfer effected by it would have amounted to a transaction at an undervalue for the purposes of section 339 of the Insolvency Act 1986 such that Mr Cynberg's share in the Property should be vested in the Trustees in any event.

22. On 12 March 2021, various directions were given including that the matter should be transferred to the Insolvency and Companies List within the Central London County Court.

23. On 16 September 2021, the Trustees issued a cross-application for an order for possession and sale of the Property.

24. On 9 September 2023, the trial of all matters (in other words, Mrs Cynberg's claim for declaratory relief, the Trustees' counterclaim under section 339, and the Trustees' application for possession and sale) took place before District Judge Wilkinson. At the trial, Mrs Cynberg relied on her witness statement and was cross-examined on behalf of the Trustees. Mr Cynberg (who was not represented) also relied on a witness statement (in which he effectively corroborated Mrs Cynberg's evidence) and was also cross-examined on behalf of the Trustees. As for the Trustees, they also relied on witness statement evidence but, given that they had no first-hand knowledge of the underlying matters, were not required to be cross-examined; instead, (and as commonly happens) they relied on the contemporaneous documents. Both Mrs Cynberg and the Trustees also relied on comprehensive skeleton arguments and extensive oral submissions.

25. On 29 November 2023, the District Judge delivered her judgment. In short, she accepted the evidence of each of Mr and Mrs Cynberg to the effect that at around the time of their separation there had been discussions leading to an understanding that the Property now belonged to Mrs Cynberg and, further, that she then acted on that understanding to her detriment by taking over the entirety of the monthly mortgage

payments and other household expenditure, as well as foregoing bringing ancillary relief proceedings and investing the above-mentioned monies in home improvements. On that basis, so the District Judge held, a common intention constructive trust had arisen as at 2009; alternatively, there was a proprietary estoppel, again dating from 2009. Further, given that the common intention constructive trust and/or proprietary estoppel had arisen in 2009, any transfer of beneficial interest from Mr Cynberg to Mrs Cynberg took place outside the statutory period of 5 years prior to the bankruptcy such that the Trustees' counterclaim pursuant to section 339 of the IA 1986 fell to be dismissed. In summary, therefore, the District Judge granted the declarations sought by Mrs Cynberg (including, in particular, that she was the sole beneficial owner of the Property) and dismissed the Trustees' application for an order for possession and sale.

The present appeal

26. On 3 January 2024, the Trustees issued an appellant's notice seeking permission to appeal on 4 grounds (as set out in more detail below).

27. On 15 February 2024, Trower J considered the application for permission to appeal on paper. He refused permission in relation to Ground 1 but granted permission in relation to Grounds 2, 3 and 4.

28. Subsequently, the Trustees sought to renew their application for permission to appeal in relation to Ground 1, following which that application for permission to appeal was listed to be heard at the same time as the substantive appeal in relation to Grounds 2, 3 and 4.

29. In short, therefore, the matter now before me is the Trustees' renewed application for permission to appeal in relation to Ground 1 and, if granted, the hearing of that appeal; and, further, the hearing of the appeals in relation to Grounds 2, 3 and 4.

PART III: THE FIRST GROUND OF APPEAL

The Ground of Appeal

30. The first ground of appeal provides:

> "2. **Ground 1:** The Judge wrongly decided that (i) the express declaration of trust gave rise to a rebuttable presumption in respect of the parties' beneficial interests in 9 Chippenham Road, Romford RM3 8EX (the "Property"); and (ii) that that presumption was rebutted by a common intention constructive trust: paras 9, 13-14, and 23…
>
> 3. The Judge was bound by the decisions in ***Stack v Dowden*** [2007] UHKL 17 (at [49] and [52]) and ***Pankhania v Chandegra*** [2012] EWCA Civ 1438 (at [13]). The express declaration of trust contained within the Form TR1 dated 28 February 2001 was conclusive; the parties held the Property as joint tenants in law and equity."

31. As prefaced at the start of this judgment, it is now well established that an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel. The question for the present appeal, however, is whether "subsequent agreement" in the above context means only a subsequent formal agreement which complies with the requirements of the LP(MP)A 1989[1] or whether it is also capable of including a subsequent informal common intention constructive trust.

The authorities

(a) *Stack v Dowden*

32. The starting point is, of course, ***Stack v Dowden***. In that case, Baroness Hale said (with underlining added):

[1] Section 2 of LP(MP)A 1989 provides:

"(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract."

And see also sections 52 to 53 of the Law of Property Act 1925.

> "49. In the olden days, before registration of title on certain events, including a conveyance on sale, became compulsory all over England and Wales, conveyances of unregistered land into joint names would in practice declare the purchasers' beneficial as well as their legal interests. No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel: see ***Goodman v Gallant*** [1986] Fam 106…
>
> 52. The Land Registry form has since changed. Form TR1, in use from 1 April 1998, provides a box for the transferees to declare whether they are to hold the property on trust for themselves as joint tenants, or on trust for themselves as tenants in common in equal shares, or on some other trusts which are inserted on the form. If this is invariably complied with, the problem confronting us here will eventually disappear. Unfortunately, however, the transfer will be valid whether or not this part of the form is completed. The form itself states that the transferees are only required to execute it "if the transfer contains transferee's covenants or declarations 7 or contains an application by the transferee (e g for a restriction)". So there may still be transfers of registered land into joint names in which there is no express declaration of the beneficial interests. However desirable such a declaration may be, it is unrealistic, in the consumer context, to expect that it will be executed independently of the forms required to acquire the legal estate. Not only do solicitors and licensed conveyancers compete on price, but more and more people are emboldened to do their own conveyancing. The Land Registry form which has been prescribed since 1998 is to be applauded. If its completion and execution by or on behalf of all joint proprietors were mandatory, the problem we now face would disappear. However, the form might then include an option for those who deliberately preferred not to commit themselves as to the beneficial interests at the outset and to rely on the principles discussed below."

33. In short, therefore, where the purchasers complete the relevant form and make an express declaration of trust (as happened in the present case) that declaration will be conclusive "unless varied by subsequent agreement or affected by proprietary estoppel".

34. As was pointed out by counsel for the Trustees in the present case, when referring to variation by subsequent agreement, Baroness Hale did not expressly refer to the same including a subsequent common intention constructive trust. Conversely, however, and

as pointed out by counsel for Mrs Cynberg, nor did Baroness Hale expressly state that any such subsequent agreement had to be one which complied with the formal requirements of the LPA 1925. Therein, of course, lies the issue.

(b) *Clarke v Meadus*

35. The next relevant authority is ***Clarke v Meadus*** [2010] EWHC 3117 (Ch) which related to an application to strike out a claim based on a common intention constructive trust (as well as an application for summary judgment on a claim based on proprietary estoppel).

36. At first instance, Master Bragge had struck out the claim based on a common intention constructive trust. Reference was made to ***Stack v Dowden***, following which the Master concluded that such a claim was not permissible where there had been an express declaration of trust.

37. On appeal, however, Warren J noted that the Master had not given any consideration to the question whether a constructive trust might have arisen as a result of matters which had taken place after an express declaration of trust. As was stated at [42]:

> "[The Master] did not address the question whether a constructive trust might have arisen after that date to displace the express trusts declared. Nothing in ***Stack v Dowden*** or ***Goodman v Gallant*** can be read as suggesting that this is not possible: it all depends on the facts."

38. I bear in mind that the above decision was in the context of a strike out (as opposed to a final determination). Nevertheless, as the above passage demonstrates, Warren J was clearly of the view that, in the right factual context, a common intention constructive trust was capable of arising out of matters taking place after the express declaration of trust in question (and that nothing in ***Stack v Dowden*** suggested to the contrary).

(c) *Pankhania v Chandegra*

39. The next case in time to which I was referred was ***Pankhania v Chandegra*** [2012] EWCA Civ 1438 – a case on which counsel for the Trustees placed some considerable reliance. In that case, Patten LJ held that in circumstances where the parties had made an express declaration of trust:

> "…there was no need for the imposition of a constructive trust or common intention trust of the kind discussed in ***Stack v Dowden*** nor any possibility of inferring one because, as Baroness Hale recognised in [49] of her speech in that case, such a declaration of trust is regarded as conclusive unless varied by subsequent agreement or affected by proprietary estoppel."

40. Importantly, however, in that case the dispute related to an alleged understanding between the parties at the time of the purchase of the property in question. This being the case, there can be little doubt that the above passage was of course an entirely correct application of the law as set out in ***Stack v Dowden***. There was no suggestion of a common intention constructive trust arising out of matters which had taken place subsequent to the express declaration of trust and accordingly no need for the court to consider the point. It is perhaps for that reason that no reference was made to ***Clarke v Meadus***.

(d) ***Bahia v Sidhu***

41. The matter next came up for consideration in ***Bahia v Sidhu*** [2022] EWHC 875 (Ch). In that case, having reviewed the relevant authorities, Joanna Smith J summarised the position as follows:

> "123. Drawing the threads of these authorities together, in my judgment:
>
> i) An express declaration of trust will be conclusive subject to rectification or recission (***Goodman v Gallant***).
>
> ii) A constructive trust cannot be relied upon to contract or override the terms of a subsequent declaration of trust (***Pink v Lawrence***).

> iii) Given that the facts needed to establish a constructive trust and a proprietary estoppel are analogous, there is no principled reason to treat a proprietary estoppel claim any differently from a claim of constructive trust in the context of determining the conclusiveness of a subsequent declaration of trust…
>
> however
>
> iv) An express declaration of trust may be overridden by an equity arising in light of representations and promises made after the declaration of trust (see ***Clarke v Meadus***)."

42. It is right to point out that the primary issue in that case was the extent to which an express declaration of trust was capable of being overridden by a prior equity (such as a proprietary estoppel or a common intention constructive trust) (see [123(iii)] above). As can be seen, however, Joanna Smith J also went on to express obiter a view, *obiter dicta*, as to whether (as in the present case) an express declaration of trust was capable of being overridden by a subsequent equity (see [123(iv)] above).

(e) ***Nanayakkara v Fernando***

43. I was also briefly referred to the unreported decision of HHJ Monty QC in ***Nanayakkara v Fernando*** (unreported, 9 June 2022). Given, however, that in this case the alleged agreement pre-dated the express declaration of trust, it is of no direct assistance to the present case.

(e) ***Re Iqbal***

44. The final case to which I should refer is ***Re Iqbal (Nilsson v Iqbal)*** [2024] EWHC 49 (Ch), a decision of ICC Judge Burton from earlier this year. Significantly, this was a case where an express declaration of trust had taken place by way of a TR1 (in 2003), with the conduct on which reliance was placed in support of giving rise to an equity having taken place subsequently (in 2017).

45. In her review of the relevant legal principles, the Judge started (unsurprisingly) by referring to ***Stack v Dowden*** and, in particular, Baroness Hale's statement that: "*No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel*". The Judge then went on to consider the above-mentioned passage of Patten LJ in ***Pankhania v Chandegra***. Having concluded her review, in a section of her judgment entitled "*Was the express declaration of trust set out in the TR1 varied by subsequent agreement?*", the Judge stated:

> "It appears to be Mrs Iqbal's case that the express declaration of trust set out in the TR1 was varied twice by agreement… Even setting aside the inconsistencies in her evidence, neither agreement is recorded in writing. There is consequently no agreement that meets the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 to supersede the express declaration of trust set out in the TR1"

46. In short, therefore, the Judge was clearly of the view that Baroness Hale's statement that an express declaration of trust could be varied by "subsequent agreement" meant that such a variation could only be effective where that subsequent agreement met the requirements of the LP(MP)A 1989 – in other words, a common intention constructive trust could never suffice.

47. The Judge then went on to consider whether a proprietary estoppel had been made out (the same having of course been expressly referred to by Baroness Hale in the above passage as a possible exception to the general rule of conclusiveness), albeit she found that no such case had been made out on the evidence. No consideration appears to have been given to why an equity arising by way of a proprietary estoppel could impact on a prior express declaration of trust but not one by way of a common intention constructive trust. Nor was any reference made to ***Clarke v Meadus*** or to Joanna Smith J's summary of the law in ***Bahia v Sidhu***.

Discussion

48. Having considered the above authorities, it seems to me that the position is as follows:

(1) An express declaration of trust (whether by way of a TR1 or otherwise) will be conclusive unless amenable to rectification or rescission (***Goodman v Gallant***) or varied by subsequent agreement or affected by proprietary estoppel (***Stack v Dowden***).

(2) It is therefore follows that an express declaration of trust is not capable of being overridden by (what would otherwise be) a common intention constructive trust which arises prior to, or at the same time as, the express declaration of trust.

(3) As stated above, an express declaration of trust is capable of being overridden by a subsequent agreement (***Stack v Dowden***). As to what is meant by "subsequent agreement", based on the reasoning and dicta in ***Clarke v Meadus*** and ***Bahia v Sidhu***, while of course this can include a formal agreement which complies with the requirements of LP(MP)A 1989, in my judgment it is not so limited and may include a common intention constructive trust. To this extent, therefore, I respectfully disagree with the view on this point reached by the Judge in ***Re Iqbal*** (where the court did not have the benefit of either ***Clarke*** or ***Bahia***).

49. Standing back, it also seems to me that this is a sensible outcome. Rhetorically, why should an express declaration of trust be capable of being overridden by way of a subsequent equity arising by way of a proprietary estoppel, but not by a subsequent equity arising by way of that very similar beast, a common intention constructive trust? The interpretation put forward on behalf of the Trustees in the present case would result in that somewhat arbitrary distinction – a distinction which certainly does not follow from either ***Stack v Dowden*** (Baroness Hale made no mention of the LP(MP)A 1989) or indeed ***Pankhania v Chandegra*** (which did not involve a common intention constructive trust allegedly arising subsequent to the express declaration of trust in question). The interpretation which I have preferred, however, avoids that arbitrary distinction, as well as being in line with ***Clarke v Meadus*** and ***Bahia v Sidhu*** as set out above.

Conclusion on Ground 1

50. In conclusion, therefore, in the present case, in my judgment, the Judge below was not wrong to find that the express declaration of trust contained in the TR1 was capable of

being overridden by a common intention constructive trust. I therefore dismiss the application for permission to appeal in relation to Ground 1.

PART IV: THE SECOND GROUND OF APPEAL

The Ground of Appeal

51. The second ground of appeal provides:

> "4. **Ground 2:** Further or alternatively, the Judge erred in law and/or fact in concluding that any detriment incurred by the First Respondent was (1) sufficient to give rise to any unconscionability; (2) not outweighed by the countervailing benefit obtained by her; and (3) related (in law and/or equity) to the assurances given by Mr Cynberg.
>
> 5. The Judge should have concluded that there was no unconscionability that could found a proprietary estoppel (or common intention constructive trust). On the contrary, she should have concluded that:
>
> (1) the 'detriment' experienced by the First Respondent was a minimal and necessary feature of her continuing to live in the Property, independently of how the beneficial interest was held;
>
> (2) there were significant countervailing benefits to the First Respondent, in that she (i) avoided the need to rent another property; and (ii) obtained the significant increase in the equity value of the Property; and
>
> (3) the true cause (in law and/or equity) of the First Respondent paying the instalments and expenses was her (and her children's) continued inhabitation of the Property and her pre-existing contractual liability to pay the mortgage. The Judge was wrong to conclude that the Respondent's conduct was caused by Mr Cynberg's assurances that the entirety of the beneficial interest was hers."

52. In short, therefore, the Trustees argue that the Judge was wrong to find that the detriment suffered by Mrs Cynberg gave rise to unconscionability sufficient to found a proprietary estoppel. In particular, so the Trustees say, (1) any detriment suffered was

minimal, (2) insufficient regard was given to the countervailing benefits enjoyed by Mrs Cynberg, and (3) there was an insufficient causal connection between, on the one hand, the promises and assurances made by Mr Cynberg and, on the other hand, the detrimental reliance in question.

Discussion

(a) Minimal detriment

53. The Trustees argue that the detriment suffered by Mrs Cynberg in the present case was of a wholly different magnitude to the detriment encountered in many of the leading cases.

54. Importantly, however, in making that submission, the Trustees focus on the home improvements to the Property which cost Mrs Cynberg a total of £10,396.

55. In fact, however, the detriment suffered by Mrs Cynberg was found to be much wider than that. Indeed, in paragraph 18 of her judgment, the Judge held that (with underlining added):

> "I find therefore that there was a clear and settled understanding or agreement in 2009 that the entire beneficial interest in the Property belonged to the Claimant. I further find that in reliance on the agreement she and the First Defendant had reached, the Claimant, to her detriment, took over the legal liability and obligations of the First Defendant in respect of the mortgage payments, did not pursue matrimonial financial remedy proceedings for many years, assumed the entire responsibility for all expenses in respect of her home and invested considerable sums into home improvements…"

56. It is right to point out that Mrs Cynberg's "Particulars of Detriment" within her Particulars of Claim referred only to the home improvements to the Property and to her foregoing issuing ancillary relief procedures. By the time that the matter reached trial, however, the issue of Mrs Cynberg having taken over the entirety of the mortgage repayments was squarely before the court. Indeed, during the present appeal, counsel

for the Trustees confirmed that no pleading point was being taken in relation to the same.

57. This being the case, it seems to me that the relevant detriment to be taken into account falls into 3 categories: (1) the home improvements, (2) foregoing bringing ancillary relief proceedings, and (3) taking over the entirety of the mortgage repayments.

58. As to the home improvements, if these were the only detriment suffered, I doubt that these would be sufficient to give rise to a proprietary estoppel. The sums involved are relatively small and, after some 15 years, were probably necessary on any basis.

59. As to foregoing bringing ancillary relief proceedings, on the other hand, this does seem to me to give rise to significant detriment. If in 2009 or shortly thereafter Mrs Cynberg had issued ancillary relief proceedings seeking the whole of the Property, it is highly likely (given that the same was supported by Mr Cynberg) that such an order would have been made. In fact, however, Mrs Cynberg did not do so. It is true that she thought the expense of bringing proceedings was too much; but it also appears that she was somewhat lulled into a false sense of security, believing that there was no real need to apply to court given the agreement she had reached with Mr Cynberg at the time of their separation. By not taking these steps, so it seems to me, she has suffered a non-minimal detriment.

60. As to taking over the mortgage repayments, counsel for the Trustees argued that this could not be properly characterised as a detriment because each payment had the effect of releasing part of the mortgage such that her equity position increased pro rata. In my judgment, however, this somewhat overlooks the reality of the situation. Following the separation, Mrs Cynberg began paying the entirety of the mortgage repayments; but on the Trustees' case she only received 50% of the benefit of those payments in terms of increased equity, with the benefit of the other 50% going to Mr Cynberg. In my judgment, this was a significant detriment suffered by her; moreover, the idea that some 15 years after stopping paying anything towards the mortgage Mr Cynberg could turn around and claim half of the equity in the Property (not that he ever did) would seem to be wholly unconscionable and (to use the expression used in ***Guest v Guest*** [2022]

UKSC 27) gut-wrenching. Of course, the Trustees (who now stand in the shoes of Mr Cynberg) can be in no better position.

61. Overall, therefore, it seems to me that no criticism can be made of the Judge's finding that the detriment suffered by Mrs Cynberg was sufficient to found a proprietary estoppel. Indeed, it seems to me that such detriment was far from minimal.

(b) Countervailing benefit

62. The Trustees' next criticism of the Judge was that, in determining the question of detriment, insufficient regard was given to the countervailing benefits enjoyed by Mrs Cynberg. In short, it is said that account should have been taken of the fact that following the separation Mrs Cynberg was able to continue enjoying the benefit of the mortgage which she and Mr Cynberg had originally obtained in circumstances where, following their separation, she would not have been able to get a mortgage had she applied alone. In short, but for the original mortgage, Mrs Cynberg would have had to have rented somewhere to live; but instead, so it is said, she has gained the benefit of an asset worth (on the Trustees' case) in excess of £117,000.

63. In my judgment, however, this argument once again misses the reality of the situation. As pleaded in her Particulars of Claim, over the years since the separation she had "*formed an emotional attachment to the Property and developed a home for her and her children. Had she been aware that she did not in fact own the whole property, and that the property may need to be sold, she could have made alternative arrangements at an earlier time to vacate and minimise the disruption and upset caused by such a change".* Moreover, any supposed benefit accruing to Mrs Cynberg by having the continued benefit of the original mortgage is, in my judgment, significantly outweighed by the fact that for many years she paid the entirety of the mortgage herself yet (on the Trustees' case) half of the equity in the Property continued to belong to Mr Cynberg. Again, therefore, no criticism of the Judge can be made in her assessment of the relevant detriment.

(c) Insufficient causal connection

64. Finally, on this point, the Trustees correctly refer to the need for there to be a causal link between, on the one hand, the relevant assurance and, on the other hand, the relevant detriment. Their complaint, however, is that the test applied by the Judge was too wide and that in particular she did not consider the counterfactual, i.e. what Mrs Cynberg would have done but for the assurances from Mr Cynberg at around the time of their separation.

65. Again, however, in making this submission, the Trustees focus on the home improvements, arguing that such expenditure was incurred by her, not because of any assurances from Mr Cynberg but instead that they quite simply needed to be done – in other words, so it is said, she would have gone ahead with such works anyway.

66. Once again, however, this ignores the other (and more significant) detriment suffered by Mrs Cynberg by taking over the entirety of the mortgage repayments. Indeed, it was clear from the evidence that Mrs Cynberg's decision to stay in the Property and pay the entirety of the mortgage repayments was wholly related to Mr Cynberg's assurance that the Property was now hers alone. One can perhaps test it this way: if, rather than make the assurances that he did, Mr Cynberg had instead told Mrs Cynberg that she could take over the entirety of the mortgage repayments but, if she did so, in years to come he would still claim 50% of the equity in the Property, would Mrs Cynberg have acted as she did? The answer is clearly no and, in my judgment, the Judge cannot be criticised for making the findings that she did.

Conclusion on Ground 2

67. In conclusion, I see no reason to interfere in the Judge's determination on detriment (which I find to be correct in any event) and therefore dismiss the appeal in relation to Ground 2.

PART V: THE THIRD GROUND OF APPEAL

The Ground of Appeal

68. The third ground of appeal provides:

"6. **Ground 3:** Further or alternatively, the Judge erred in law and/or fact in concluding that the assurances given by Mr Cynberg to the First Respondent were sufficient to found a proprietary estoppel (or common intention constructive trust).

7. The Judge should have concluded from the evidence that the understanding or agreement between the First and Second Respondents was that:

(1) Mr Cynberg would remain on the title and jointly liable for the mortgage for as long as the First Respondent was unable to obtain a mortgage in her own name.

(2) Mr Cynberg had only "offered to" (and had not already transferred) the Property to the First Respondent, as recorded in the letters from Moss & Coleman dated 29 April 2015 and 11 March 2016.

8. The understanding in relation to the ownership of the Property therefore related to a contingent (or future state of affairs). The evidence was that, up to the date of the bankruptcy order, the First Respondent was content to take the risks associated with Mr Cynberg continuing to be a joint tenant in law and equity.

9. There is a further compelling reason why this ground of appeal should be heard and allowed, which is that – if correct as a matter of principle – the decision would appear to signal a permissive approach towards parties simultaneously holding contrary private intentions and public intentions."

69. In short, therefore, this third ground of appeal is an attack on the Judge's finding that the agreement or understanding between Mr and Mrs Cynberg was to the effect that the Property was now hers alone; instead, so it is said, any such discussion amounted merely to an offer which was never in fact acted upon.

Discussion

70. In relation to this part of their argument, the Trustees rely heavily on the correspondence to Mrs Cynberg from her own solicitors in which they noted that Mr Cynberg had "offered" to transfer the Property to her absolutely, and then went on to advise her as to the risks of remaining a joint tenant (stating, in particular, that if she were to die her interest would pass to him) thereby suggesting that they, at least, considered that Mr Cynberg still had a beneficial interest to give. As the Trustees note, Mrs Cynberg did not disagree with that position; in particular, so the Trustees say, Mrs Cynberg did not write back saying that the Property was *already* hers.

71. In my judgment, however, this is placing too much reliance on how Mrs Cynberg's solicitors viewed the position. She clearly gave them certain instructions including, presumably, as to the discussions which she and Mr Cynberg had discussed at the time of their separation. Her solicitors then formed a view – apparently to the effect that no transfer of the beneficial interest had yet taken place – hence the correspondence to which I have been referred.

72. Importantly, however, whatever instructions Mrs Cynberg gave to her solicitors in around 2015, and whatever advice those solicitors then gave, cannot of course impact upon the true position in fact and law as at 2009. At the trial, the Judge heard the evidence of both Mr Cynberg and Mrs Cynberg – both of whom were the subject of cross-examination – and formed the view that the discussions which took place back in 2009 had been "clear and straightforward" with Mr Cynberg having told Mrs Cynberg that "the house is yours". In forming that view, the Judge clearly took into account the subsequent correspondence between Mrs Cynberg and her solicitors but found that the evidence of both Mr and Mrs Cynberg (to the effect that he had said that the Property "is yours") was clear and unequivocal – a finding which she was entitled to make. As everyone knew, the legal title still remained in their joint names – hence, perhaps, the subsequent "offer" to transfer – but, as the Judge found, back in 2009 Mr Cynberg had agreed that the Property was now Mrs Cynberg's alone.

73. In short, the fact that Mrs Cynberg's solicitors may have seen things differently is a factor which the Judge should have considered as part of the mix – but she did do so. Having heard the evidence of both Mr and Mrs Cynberg first hand, however, she

effectively formed the view that the solicitors had not fully understood the position – a view which was fully entitled to take and one which was, in my judgment, clearly correct in any event.

Conclusion on Ground 3

74. In conclusion, I see no reason to interfere in the Judge's findings on the nature of the common understanding of the parties (which I find to be correct in any event) and therefore dismiss the appeal in relation to Ground 3.

PART VI: THE FOURTH GROUND OF APPEAL

The Ground of Appeal

75. The fourth and final ground of appeal provides:

> "10. **Ground 4:** Alternatively, if a proprietary estoppel arose, the Judge erred in law and/or fact in concluding at paras 17-18 and 23-24 that it arose in January 2009.
>
> 11. The Judge should have concluded that, if a proprietary estoppel arose at all, it was when it became inequitable for Mr Cynberg to renege on his assurances to the First Respondent, which was after the improvements were made to the Property in 2014 and 2015.
>
> 12. The Judge should consequently have held that the transaction was a transaction at an undervalue within the meaning of section 339(3) of the Insolvency Act 1986 and ordered that 50% of the beneficial interest in the Property vested in the bankruptcy estate of Mr Cynberg."

Discussion

76. By this Ground, the Trustees complain that the Judge did not differentiate between the tests of constructive trust and proprietary estoppel in that the Judgment concluded that

the parties reached their common understanding in January 2009 and that the proprietary estoppel was also "founded in 2009".

77. As to this, the Trustees point out, correctly, that any proprietary estoppel could not arise until the detriment was present such that it would be unconscionable for Mr Cynberg to renege on his assurances. They then go on to point out, again correctly, that the home improvements all took place within the 5-year lookback period under section 341(1)(a) of the IA 1986 such that the Judge should have gone on to consider the Trustees' counterclaim based on a transaction at an undervalue for the purposes of section 339 of the IA 1986. On this basis, the Trustees invite me to consider their counterclaim (or alternatively remit it to the County Court for determination).

78. Again, however, the Trustees fall into the trap of focusing only on the home improvements. If the home improvements were the only detriment, then there would be some force in their argument. As explained above, however, the Judge found that the relevant detriment included not only the home improvements but also the foregoing of the bringing of ancillary relief proceedings and, most significantly, the taking over of the entirety of the mortgage repayments. While the home improvements took place over 2014 to 2016 (and therefore within the 5-year lookback period), the detriment suffered by Mrs Cynberg by, in particular, paying all of the mortgage repayments each month began in 2009.

79. It is clear therefore that the elements of the cause of action of proprietary estoppel were made out at around the time of or very shortly after the separation such that the Judge was entirely correct to conclude that the proprietary estoppel was also "founded in 2009". It also therefore follows that the Judge was right to conclude that, on that basis, the Trustees' counterclaim necessarily fell away.

Conclusion on Ground 4

80. In conclusion, the Judge's analysis in relation to when the cause of action of proprietary estoppel was founded and the subsequent dismissal of the Trustees' counterclaim under section 339 of the IA 1986 was entirely correct such that I also dismiss the appeal in relation to Ground 4.

PART VII: CONCLUSION

81. In conclusion, therefore:

(1) in relation to Ground 1, I dismiss the application for permission to appeal; and

(2) in relation to Grounds 2, 3 and 4, I dismiss the appeal.

82. I conclude by expressing my gratitude to all counsel and their respective instructing solicitors.

JPKC, August 2024