[2016] UKUT 0358 (TCC)

Appeal number: UT/2015/0027

Common intention constructive trust – decision on the admissibility of fresh evidence - matter remitted to the First-tier Tribunal for re-hearing

UPPER TRIBUNAL

TAX AND CHANCERY CHAMBER

LUKE ISEAL DAVIS

Respondent

AND

WAYNE PETER WIGGETT

Appellant

TRIBUNAL : JUDGE ELIZABETH COOKE

Sitting in public in London on 17 June 2016

DECISION

1. Luke Davis is the registered proprietor of 68b Queen's Road, a flat in Cheltenham; it was bought in 2008 for £137,500. In 2010 Wayne Wiggett applied for restrictions to be entered on the register of title to the flat to protect the beneficial interest that he claims in it; in 2011 Mr Davis became aware of the restrictions and applied for them to be cancelled. Mr Wiggett objected and in due course the matter was referred to the Land Registration Division of the First-tier Tribunal ("the FTT"). On 4 December 2014 the FTT directed the registrar to cancel Mr Davis's application to remove the restrictions, and gave written reasons for that direction.

2. Although it was Mr Davis who applied to cancel the restrictions, Mr Wiggett was the Applicant in the FTT because he had the burden of proof; the flat was held in Mr Davis' sole name and so it was for Mr Wiggett to prove that he had a beneficial interest in it. So Mr

Davis was the Respondent in the FTT, but in his appeal he is the Appellant and Mr Wiggett is the Respondent. For the avoidance of confusion I shall refer to the parties by name.

3. After the FTT had delivered its decision in December 2014 Mr Davis wanted to adduce further documentary evidence. He asked for a review of the decision pursuant to rule 51 of the Tribunal Procedure (First-tier Tribunal) (Property Chamber) Rules 2013, on the basis that "a document relating to the proceedings was not received by the Tribunal at the appropriate time" (rule 51(2)). In a decision of 21 January 2015 the FTT refused to review its decision under rule 51. Mr Davis then sought permission to appeal to the Upper Tribunal, which was refused by the FTT on 9 March 2015 but granted by the Upper Tribunal on 9 December 2015 after an oral hearing. I heard the appeal in 17 June 2016 at the Royal Courts of Justice. Mr Davis was represented by Mr McLeod of counsel, and Mr Wiggett by his solicitor Mr Mason.

4. Mr Davis' application for permission to appeal set out seven grounds, and the Upper Tribunal granted permission to appeal on all the grounds. In his argument before me Mr McLeod grouped those grounds slightly differently. In the paragraphs that follow I first summarise the facts, and the decision of the FTT, and then I go through the grounds as Mr McLeod presented them, re-numbered to follow the order taken at the appeal hearing. I allow the appeal on two grounds, namely the fresh evidence point and the inconsistency introduced into the FTT's reasoning by the later decisions in January and March 2015. I would not have allowed the appeal on any of the other grounds. I deal with the other grounds only briefly, particularly those that relate to the reasoning and the findings of fact made by the FTT, because the matter must now be remitted to the FTT for rehearing and it is important that I should not appear to pre-judge the substantive outcome of this dispute.

The facts and the decision in the FTT

5. Mr Davis employed Mr Wiggett in his building business from 2007 to 2011. As well as working together, they were very good friends, as were Mrs Wiggett and Mr Davis' partner. The flat was bought in the summer of 2008 and let to tenants from December 2008. The dispute about its ownership arose when Mr Davis decided to sell it.

6. Mr Wiggett says that the intention, when the flat was bought, was that he and Mr Davis should own it together. They agreed this expressly before the purchase. They were going to do it up, and let it out; it was bought in Mr Davis' sole name because Mr Wiggett already had a mortgage. By virtue of the parties' express agreement, on which he relied to his detriment by contributing to the purchase price and by working on the property, he is a beneficial co-owner under a common intention constructive trust and entitled to 50% of the equity. Mr Davis, on the other hand, says that the flat was his; that Mr Wiggett did some

work on it and paid for some materials. He says that he paid the rent into a joint account so that Mr Wiggett could see that funds were becoming available to repay him, and that Mr Wiggett has been paid his entitlement, being £4,100, from the joint account and that that ends his involvement in the matter.

7. At the hearing before the FTT Mr Wiggett was unrepresented. He arrived with some unexpected witness statements and also a recording, on his phone, of a conversation between Mr Davis and Mrs Wiggett. Unsurprisingly he was not allowed to adduce any of the new evidence, except for some additional documents. Mr Davis was represented by Mr McLeod, as he was before me.

8. The decision of the FTT was that there was a common intention constructive trust, arising from express agreement on which Mr Wiggett relied to his detriment, and that the two parties owned the flat 50/50.

Ground 1: fresh evidence

9. At the hearing before the FTT Mr Wiggett said in his oral evidence that he had made contributions to the mortgage payment on the flat by means of deductions from his wages from Mr Davis, in the sum of £100 per month, until the flat was let. He also said that he had made other payments from a capital sum raised by a mortgage on his own property, although he could not say exactly how much (paragraph 10 of the decision); altogether he claimed to have contributed about £10,000. The learned judge accepted his evidence, preferring it to the evidence of Mr Davis.

10. As a result of that evidence, Mr Davis sought to have new evidence admitted, and for the FTT to review its decision in the light of that fresh evidence. The FTT refused. Mr Davis is not appealing that refusal, but seeks to have the decision of the FTT set aside on the basis that the evidence before it was incomplete and that fresh evidence should be admitted. He places that evidence in four groups:

    1) Wage slips showing the dates on which the £100 deductions were made from Mr Wiggett's pay. In summary, they extend from March 2008, four months before the flat was bought, to November 2008, two months before it was let. The dates, says Mr Davis, do not match the story; these cannot be mortgage payments made from the date of purchase to the date the flat was let.

    2) Bank statements showing the payments made by Mr Davis in discharge of the mortgage, adduced to show how much greater was his contribution to the purchase than was Mr Wiggett's even if Mr Wiggett's claim to have paid £100 instalments is accepted.

3) The completion statement for the purchase of the flat, to demonstrate that only a very small deposit was paid.

4) Other material which Mr McLeod fairly admits has little chance of being admissible now. He rests his case on this ground on the wage slips and the bank statements.

11. The case of *Ladd v Marshall* [1954] 3 All ER 745 is the starting point for the law on the admission of new evidence on appeal. The following passage from the decision of Denning LJ, as he then was ([1954] 1 WLR 745 at 748), is well-known:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible".

12. So far as the bank statements, the completion statement and the other material I find that the new material could easily have been obtained and should have been put before the FTT, and that it cannot found a successful appeal now. This was a case about a resulting or constructive trust. The funding of the purchase was fundamental to the argument that was bound to take place in the FTT. This is basic material that Mr Davis should have presented to the FTT and that his representatives should have advised him to make available.

13. But the wage slips present a much more difficult problem and are the crux of this appeal. It is argued for Mr Wiggett that so far as the wage slips are concerned Mr Davis fails the first of the *Ladd v Marshall* hurdles; there is also a challenge on the basis of the second and third tests. The refusal by the FTT to admit the fresh evidence after the hearing was on the basis that the evidence could with reasonable diligence have been made available at the hearing and therefore could not be adduced later.

14. The challenge on the basis of the second and third tests is not sustainable. The evidence is clearly important, because in this as in any case where a trust – resulting or constructive – is in issue it is important to get at the truth as to who paid for what. And it is difficult to see how the dates and deductions on the wage slips would not be apparently credible, although of course there is an issue as to the interpretation put on them. But I agree that the evidence could certainly have been produced without much diligence at all.

15. Accordingly it appears that the first of the three criteria in *Ladd v Marshall* is not satisfied. Is Mr Davis therefore precluded from adducing the wage slips?

16. Mr Davis wishes to adduce them in order to answer what Mr Wiggett said in evidence at the hearing namely that the deductions were payments towards the mortgage on the flat. Mr Davis was not forewarned of this evidence. So far as he was concerned, he says, the deductions were nothing to do with the flat. They were repayments by Mr Wiggett for materials that he had bought for himself, using the credit card he was allowed to use as Mr Davis' employee. He had permission to use the credit card in this way and it is not suggested that he was doing anything wrong, but Mr Davis says that Mr Wiggett got behind in repaying the purchases and so the deductions were agreed.

17. Accordingly, says Mr Davis, from his point of view the wage slips were nothing to do with the present dispute and so he did not produce them. But as the deductions are, unexpectedly, sought to be relied on by Mr Wiggett, Mr Davis wishes to produce them so as to show that the deductions began before the purchase of the flat and ended before the flat was let; the timings therefore do not match up.

18. Mr Wiggett says that his evidence was not unexpected. In a letter from his solicitors to Mr Wiggett's dated 30 November 2011 , his solicitor had referred to the deductions and said they were:

> "not a repayment of a loan but was the monthly sum which our client agreed he could afford to be deducted from his wages and paid to Luke Davis pending the building society monies for which our clients had applied becoming available and taking account of any other payments our Client was making to suppliers."

19. That letter is ambiguous and is at least as consistent with Mr Davis' account as with Mr Wiggett's.

20. If it was Mr Wiggett's case that deductions from his wages were contributions to the mortgage on the flat he should have made that clear in his statement of case and in his witness statement, well before the hearing in the FTT. He was unrepresented at the time of the hearing and so may not have understood that obligation, and it is right that his evidence was heard and taken into account. But Mr Davis should be able to adduce evidence to answer it, because Mr Wiggett's evidence on this point appears to have been crucial to the FTT's decision. First, it goes to his credibility; if he is not telling the truth about the deductions then there would be reason to doubt his evidence that there was an express agreement as to the future ownership of the flat. Second, this was the detrimental reliance, or part of the detrimental reliance, found to follow the parties' express agreement. It cannot

be right that that finding was made on the basis of unexpected evidence without Mr Davis having the opportunity to answer it.

21. Does the first criterion in *Ladd v Marshall* constitute an absolute bar to the admission of this fresh evidence, because it could with reasonable diligence have been produced at the hearing before the FTT?

22. The judge of the FTT in refusing to admit it after the hearing and to review his decision in the light of it did not have the benefit of extensive argument on the law and on the cases following *Ladd v Marshall* [1954] 1 WLR 1491, but having heard that argument I am convinced that the fresh evidence must be admitted.

23. Mr McLeod drew my attention to the following authorities which indicate that the three criteria in *Ladd v Marshall* are principles, or guidance, but not rules and not a straitjacket: *Singh v Habib* [2011] EWCA Civ 599, where fresh evidence was admitted on public interest grounds (see paragraph 14), and *Hertfordshire Investments Ltd v Bubb* [2000] 1 WLR 2318 at p 2325 where Hale LJ, as she then was, said that the appeal court's discretion "must be exercised in accordance with the overriding objective of doing justice". She quoted the unreported case of *Banks v Cox* (17 July 2000) and the words of Morritt LJ:

> "… the principles reflected in the rules in *Ladd v Marshall* [1954] 1 WR 1489 remain relevant … not as rules but as matters which must necessarily be considered in an exercise of the discretion whether or not to permit an appellant to rely on evidence not before the court below".

24. Mr McLeod also cited authorities cited *Skrzypkowski v Silvan Investments* [1963] 1 WLR 525, and *Mulholland v Mitchell* [1971] AC 666 where Lord Wilberforce said at p. 680:

> "… courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

25. I am convinced that the fresh evidence must be admitted, as a matter of "common sense and justice". The evidence given by Mr Wiggett about the deductions from his wage slips was unexpected and Mr Davis was not at fault in not having the slips, with their dates, to hand to answer the point; as a result, this aspect of the evidence was not able to be properly analysed by the judge of the FTT.

26. Accordingly the appeal is allowed on the ground that the decision of 4 December 2014 was made without the benefit of crucial evidence. It is common ground between the parties that the consequence of that decision is that the matter must be remitted to the FTT for re-hearing. It is for the FTT to give directions and to make decisions about the evidence to be

adduced at the re-hearing, but I anticipate that it will be open to both parties in effect to start again and to adduce all the evidence on which they wish to rely.

Ground 2: contradictions in the reasoning of the FTT

27. Mr Davis made two applications to the FTT after the hearing, one for the FTT to review its decision and one for permission to appeal, and therefore the FTT gave two further decisions after the December judgment. One of Mr Davis' grounds for appeal is that in those two further decisions the judge contradicted what he said in the December decision.

28. In the December decision – the first instance decision which is now appealed – the judge in analysing the possibility of an agreement or understanding between the parties about the purchase of the flat said at paragraph 33.1:

> "The background to the purchase is that, while the Respondent was in a position to obtain a mortgage, which the Applicant was not, he had limited funds [and] would not have been able to fund a substantial deposit or the work which the property required. On the other hand the Applicant was in a position to borrow some further money on his property."

29. Mr Davis, in asking for that decision to be reconsidered, sought to adduce fresh evidence in the form of the completion statement and other financial information so as to show that no deposit had been paid and that therefore the case should not have been decided on this basis. The FTT judge in refusing to review his decision, at paragraph 7 of his decision of 21 January, said this:

> "Although it is not recorded in my Decision, my impression from the Respondent's evidence and such documents as I saw at the hearing was that, in view of the reduction in the purchase price negotiated by the Respondent, it was unlikely that any significant deposit had been paid."

30. Again, in paragraph 15 of his refusal of permission to appeal, dated 9 March 2015, the judge said:

> "Although there was no finding in the Decision in terms that no deposit had been paid by the Respondent, paragraph 2 of the decision records that "the purchase price of the property was £137,500, being the sum which was advanced by way of mortgage", from which it appears questionable whether any deposit was paid."

31. The reasoning of the December decision and the two further decisions presents, together, a confusing picture. It is possible that the judge in reconstructing Mr Davis' intentions at paragraph 33.1 (see paragraph 25 above) was considering a point at which Mr Davis

himself expected a substantial deposit to be payable, although in the event that did not happen. But that then casts doubt upon the basis of the judge's finding about Mr Davis' intentions. If the basis of that finding is Mr Davis' anticipation of needing help with the deposit, what is supposed to have happened to his intention when it turned out that no deposit was payable? At the very least, the reasoning surrounding the deposit required to be articulated, and as things stand the overall impression is contradictory. This was a crucial point, being the basis of the FTT's findings about Mr Davis' reasoning and intentions at the time of the purchase. The contradiction makes it impossible to see the basis of the decision, and accordingly the appeal must be allowed on this point.

Grounds 3, 4 and 5 relating to the decision of the FTT

32. The two grounds on which I have allowed the appeal relate to what happened after the hearing and the production of the decision. Mr Davis also relies on what he regards as defects in the original December decision. As I noted above, I deal with these very briefly because I would not wish to pre-judge anything that may arise in the re-hearing.

33. First, Mr Davis says that the judge applied insufficient scrutiny to the matter, in the light of the authority of *Geary v Rankine* [2012] EWCA Civ 555 as to the difficulty of discharging the burden of proof of a common intention constructive trust where a property was bought as an investment. In particular it is said that the FTT did not make proper findings as to why the alleged agreement about ownership was not expressed in a declaration of trust drawn up by solicitors. Other points raised challenge the basis of the judge's conclusions in terms of the plausibility of the common intention found, and the adequacy of detriment.

34. It is clear that the judge had the authority of *Geary* in mind (paragraph 17 of his decision). His finding of a common intention constructive trust was based upon a careful consideration of the evidence; a failure to consult solicitors and have a declaration of trust drawn up is so frequently part of the background to constructive trust cases, and so frequently is simply a matter of parties not having got round to it, that it is no surprise that no emphasis was placed upon this aspect of the evidence. I do not accept that the decision was invalidated on this basis. Clearly the admission of new evidence changes the picture and there will have to be a fresh start, and it will be for the judge of the FTT at the re-hearing to reach his or her own conclusions as to the weight to be placed upon particular items of evidence.

35. Second, Mr Davis says that the findings made by the FTT as to detrimental reliance by Mr Wiggett are insufficient to found a common intention constructive trust. The judge's findings about detriment are at paragraph 35 of the decision); he found that the Applicant

> "has done all that was expected of him … in contributing to the mortgage prior to the letting, in working on the refurbishment of the property and in paying for labour and materials and, finally, in joining with the Respondent in causing the mortgage to be paid out of the joint bank account."

36. These are the typical ingredients of detriment in a common intention constructive trust case. To some extent Mr Davis' argument rests on their not having been quantified, but that is not an essential. There are also arguments made about referability, and as to whether there was any net detriment to Mr Wiggett. These elements of detrimental reliance will have to be looked at again in the light of fresh evidence to be adduced at the re-hearing, and therefore I make no detailed finding about them. Had there been no successful appeal on the first two grounds considered above I fail to see how an appeal could be allowed on these grounds.

37. Third, it is argued for Mr Davis that in the light of the other matters he has raised, the judge in the FTT reached the wrong factual conclusion. It is not clear that this is truly a separate ground of appeal, nor is it at all clear to me whether or not the wrong factual conclusion was reached. The fresh evidence to be adduced by the Defendant raises doubt, but not so much as to justify a successful appeal solely on this ground. Indeed, the re-hearing opens wide the evidential door; both parties will have new evidence to put forward; Mr Wiggett will be free to give proper warning of the evidence he sought to put to the FTT at the original hearing; what is the correct conclusion remains to be seen.

Ground 6: Apparent bias in the FTT

38. It is argued for Mr Davis that two remarks made by the judge at the hearing indicated that he had pre-judged the matter before he had heard all the evidence.

39. First, he made a comment about the "spin" being put on Mr Wiggett's evidence by Mr Davis. At the hearing in the FTT Mr Davis was represented and Mr Wiggett was not. The judge accordingly had to take care to ensure a level playing field, and to give proper assistance to Mr Wiggett without unfairness to Mr Davis. That might well include intervention in the form of questions or suggestions that the judge felt might have been put in cross-examination, had Mr Wiggett been represented. In summary Mr Davis feels that the judge got the balance wrong, and I accept that he felt aggrieved, but I do not accept that the judge's remarks indicate bias or pre-judgment or come anywhere near being grounds for appeal.

40. Second, the judge made an observation about the legal consequences of payment out of a joint account, to the effect that it must indicate that Mr Wiggett had been "involved in the

mortgage", before he had heard Mr Davis' explanation for the joint account. This remark was made in the course of discussion with counsel, at a point in the hearing when views can be aired and legal points discussed. It is implausible to suppose that they indicated any bias.

Ground 7: The quantification of the beneficial interest

41. Finally, Mr Davis seeks to appeal the quantification of Mr Wiggett's interest if his other grounds for appeal are unsuccessful. Mr McLeod argues that although the starting point is the finding of an express agreement that the parties would share the property 50/50, there are circumstances where it is possible to depart from that agreement, and that in the circumstances of this case it would be appropriate to do so.

42. Because the appeal is allowed on the grounds set out above I do not need to make a finding on this ground and indeed it would not be appropriate to do so, since the allowing of the appeal makes it necessary for there to be a full re-hearing of the matter at first instance. The quantification of the interest, if there is one, will have to be considered in the light of the evidence given at the re-hearing.

Conclusions

43. Accordingly this appeal is allowed and, as discussed above, the matter must be remitted to the FTT for re-hearing.

44. That requires some further direction, because the FTT in December 2014 required the Chief Land Registrar to cancel Mr Davis' application for the cancellation of the restrictions. With the cancellation of his application the reference to the First-tier Tribunal from Land Registry, pursuant to section 73 of the Land Registration Act 2002, has come to an end and there is no matter before the FTT on which it can adjudicate. Accordingly I make an order which will enable Mr Davis, the successful Appellant, to have his application restored to the register.

45. Mr Davis is not the Applicant in the FTT; if Mr Wiggett wishes to pursue his objection to Mr Davis' application then he will have to take the first procedural steps towards a re-hearing pursuant to the directions of the FTT. I have considered whether to make those directions, and have invited written submissions from the parties as to whether I should do so; in the light of those submissions and on reflection I take the view that it is for the First-tier Tribunal to make directions, once the reference to it is revived by the restoration of the application to Land Registry's Day List.

46. Clearly the cost and the waste of time and effort involved in a re-hearing will be substantial and out of all proportion to the value of the property. It is in the parties' own hands to avoid that cost and effort, and I urge the parties, as did Judge Walden Smith, to reach agreement rather than pursue further litigation.

47. I order as follows:

    1) The appeal is allowed.

    2) The decision of the FTT of 4 December 2014 is set aside.

    3) On receipt of a copy of this order from the Appellant, The Chief Land Registrar is directed to restore to the Day List the Appellant's application in form RX3 dated 10 October 2013.

    4) On receipt from the Appellant of confirmation from Land Registry that his application is restored to the Day List as ordered above, the First-tier Tribunal shall give directions for a re-hearing of the reference.

    5) Any application for costs in the appeal proceedings, including the costs of the oral hearing before Judge Walden Smith, is to be made to the Upper Tribunal within 14 days of the date of this judgment.

Elizabeth Cooke

Upper Tribunal Judge
Release date: 27 July 2016