[2017] UKFTT 736 (PC)

REF/2016/0538

PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

JAMES MICHAEL O'REGAN

APPLICANT

And

ANGELA CRUIKSHSHANK

RESPONDENT

Property Address: Kalathea, 1b St Michael's Road, Aldershot, GU12 4JF

Title Number: HP460720

Before: Judge Tozer

ORDER

UPON HEARING COUNSEL FOR THE APPLICANT AND COUNSEL FOR THE RESPONDENT

IT IS ORDERED THAT:

1. The Chief Land Registrar shall give effect to the Applicant's application dated 18 January 2016, as if the Respondent's objection dated 11 February 2016 had not been made;

2. If either party wishes to seek an order for costs against the other, the claiming party shall, by 5pm on 29 September 2017, file and serve (a) brief written submissions explaining the basis for the application for costs and annexing any documents which are not in the trial bundle which are relevant to the question of who should pay the costs; and (b) an up to date schedule of costs.

3. In the event that the other party objects to an order for costs being made against them and/or objects to the amount sought, submissions in answer shall be filed by 5pm on 27 October 2017.

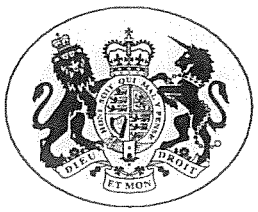
4. A determination about costs will thereafter be made on paper, unless the Tribunal orders a hearing or further submissions.

Judge Tozer

Dated this 30th day of August 2017

Stephanie Tozer

BY ORDER OF THE TRIBUNAL



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Title Number: HP460720

Before: Judge Tozer

Sitting at: 10 Alfred Place, London WC1E 7LR

On: 10 and 11 July 2017

DECISION

Keywords: beneficial interest; joint names; agreement to contribute; non-compliance; subsequent agreement for transfer of share in exchange for payment; payment not made; whether beneficial interest subsists

1. The Respondent, Ms Cruikshank, is now the sole registered proprietor of the property known as Kalathea, 1B St Michael's Road, Aldershot, Hampshire GU12 4JF and registered under title numbers title number HP460720 and HP462634 ("the Property").

2. On 13 January 2016, the Applicant, Mr O'Regan, applied for two restrictions to be entered on the title of the Property on the basis that he had a beneficial interest in the Property.

3. Ms Cruikshank objected, and the dispute was referred to the First Tier Tribunal on 18 July 2016. The matter came before me for a hearing on 10 and 11 July 2017, at which both parties were represented by Counsel. I am grateful to Counsel for their assistance. Both parties gave evidence, and I also heard from a Ms Hodge. I set out below my conclusions, having heard the evidence, about the relevant facts.

The background

4. It was common ground that the parties had known each other since school, but had started a relationship in 2004 when Ms Cruikshank was on holiday in New Zealand. Mr O'Regan came to England the following year, with his son Keegan, who was then 4. At that time, Ms Cruikshank owned, and was living in, a property at 25 Woodside Close, Borden, Hampshire with her adult son, Sam. Mr O'Regan and Keegan joined them. Ms Cruikshank continued to be responsible for all the outgoings, but Mr O'Regan said, and I accept, that he did give Ms Cruikshank money towards the general household expenses. Indeed, he explained that when he first arrived, he had no bank account here, so his wages were paid into Ms Cruikshank's account. It was also common ground that Mr O'Regan had paid at least half the cost of new carpets for this property when they moved out.

The Purchase

5. In 2006, they agreed that they would move, and the Property was ultimately bought in joint names in August 2006, for £247,000. It is common ground that, at that time, the parties intended to build a life together. Mr O'Regan denied that they were engaged, but I accept that Ms Cruikshank understood that they were. During her evidence she referred to showing off an engagement ring.

6. Mr O'Regan was then earning about £25-28k as a chef, and Ms Cruikshank was then earning about £62k working in IT. Ms Cruikshank told me, and I have no reason to doubt it, that she could have secured a mortgage for £180,000 as a sole purchaser.

7. However, they agreed that the house would be jointly owned, and that the deposit would be funded with the equity from Ms Cruikshank's property in Borden, which was about £70,000. The balance was funded by a mortgage from the Woolwich,

for which they were jointly liable. The mortgage was an offset mortgage, which had a current account attached to it.

8. It seems clear to me that the parties did intend, at the outset, that Mr O'Regan would have a beneficial interest in the Property. Otherwise, there would have been no reason for the Property to have been in joint names, and for him to have assumed liability for the mortgage. In addition, he said that he paid for the removals and the legal costs, which I accept.

9. Mr O'Regan says that there were no further discussions about the beneficial ownership of the house.

10. Ms Cruikshank says that there were discussions about the ownership of the house, and that it was agreed that their shares would be based on their contributions.

11. I consider that the truth lies, as it so often does, somewhere between the two positions. An express agreement that their shares would be based on contributions is unlikely to have happened given that, as they both agreed, at the time the house was bought, they expected to have a future together, and would not have been thinking with reference to the legal framework or intending to keep complicated accounts. But, it is also unlikely that the parties would not have had some discussion about the fact that Ms Cruikshank was going to put all of her equity into the property. Ms Cruikshank said, in her evidence, that Mr O'Regan had said that he would make contributions to the mortgage to catch her up. It was suggested to her that this was unrealistic, because it would take him years to pay down an equivalent amount, particularly if he was also to contribute to the ongoing monthly payments, but I do not consider it inherently unlikely, given their plans for a future together, that the parties might have envisaged this happening over the whole course of the mortgage. I therefore accept what Ms Cruikshank says in that regard, and that they agreed to buy it jointly on the basis that Mr O'Regan had agreed to contribute more to the mortgage. In passing, I note that as time went on, Mr O'Regan did in fact control the current account which was linked to the mortgage at the Woolwich, and did make payments into it, which I assume were intended to off set the mortgage balance. As things turned out, unfortunately, he withdrew more than he put in, but the fact that he had day to day control over this account fits with the idea that the original intention had been that he should make payments into it when he could in order to build up a fund which might eventually approach the amount of Ms Cruikshank's initial contribution.

12. Ms Cruikshank suggests that there was an express agreement that Mr O'Regan would contribute equally to the household expenses. I do not accept that. Ms Cruikshank was earning significantly more than Mr O'Regan at the time of the purchase, and it cannot sensibly have been intended that he should pay as much as

her towards running the household. Nor would it have been practical for a precise score to be kept of who paid for what. The parties had not set up their finances so that all bills went out from a joint account into which both contributed an equal amount every month. One would pay for one thing, and the other would pay for something else. I therefore reject this suggestion. That said, I do not doubt that Ms Cruikshank expected him to contribute what he could to the running of the household.

13. Neither party suggested that there had been any discussion, at the time of purchase, about what would happen if the other died, nor that either party had drawn up a will. It may be that they simply didn't address their minds to this possibility at all.

14. Neither party adduced the purchase file in evidence. Ms Cruikshank said that the solicitor had advised her that paperwork to record the shares should be drawn up sooner rather than later, but that this never occurred because Mr O'Regan refused to sign any such document. This did not appear in her witness statement, was not put to Mr O'Regan and was not foreshadowed in her barrister's skeleton argument. Furthermore, Ms Cruikshank had taken no steps to contact the solicitor to see if there was anything on the file to support what was said. In the circumstances, I cannot attach any weight to that evidence.

15. Ms Cruikshank says that Mr O'Regan misled her, at the time of purchase, because he failed to mention the existence of a significant debt in New Zealand to the child maintenance authorities. She suggests that she would not have agreed to co-own the Property with him if she had known of this.

Events after the purchase

16. The parties co-habited at the Property until 2014. During that period, Ms Cruikshank paid the mortgage repayments of about £900 every month until January 2014 (and in fact she made overpayments of about £100 a month to assist in paying down the mortgage more quickly), and she paid all the household bills too, with the possible exception of the skyTV. She accepts that Mr O'Regan paid for the groceries, and bought some furniture, a television and the lawnmowers.

17. Mr O'Regan said that he maintained the house and garden. There was a dispute as to the extent of the work that he did in the garden, but he did not allege that he did more than plant a few fruit trees and general maintenance such as painting fences and water blasting the patio and generally keeping the place looking nice.

18. Keegan and Sam's mobile phone bills were paid from the mortgage current account. Mr O'Regan says that the money he paid into the mortgage current account was used for family expenses, and he also paid cash to Ms Cruikshank, or

money into her bank account, from time to time. Ms Cruikshank did not accept this, but it seems to me likely that this did occur occasionally.

19. He also says that he paid money towards her credit card bills on 2 occasions. She accepted that she had received money for her credit card bills, but asserted that this was for Mr O'Regan and Keegan's share of the cost of family holidays. However, the bundle contained text messages showing that in September 2014, Ms Cruikshank was still chasing Mr O'Regan for contributions to the 3 holidays, so if she had received money earlier, it must have been for something else.

20. I have no doubt that Ms Cruikshank will have paid more of the outgoings than Mr O'Regan. She was earning more. However, I do not accept that Mr O'Regan's contributions were as limited as she sought to make out. As he says, his wages must have been spent on something.

21. Ms Cruikshank referred to a separation shortly after they moved in, in 2007. At this time, according to Ms Cruikshank, the engagement was broken off. Nonetheless, the parties reconciled, and continued cohabiting until 2014.

Events of 2014

22. In about January 2014, Ms Cruikshank was contemplating becoming involved in a management buy out of the company for whom she worked. Perhaps related to this, at this time, she asked Mr O'Regan to take on liability for the monthly mortgage payments.

23. By September 2014, Ms Cruikshank discovered that there was an overdraft of about £40,000 on the mortgage current account. She says that she had not been aware of this before, and I accept that.

24. As a result of this, and other matters, the relationship ended in September 2014. Mr O'Regan moved out. Keegan, then nearly 14, stayed with Ms Cruikshank.

25. Ms Cruikshank says that Mr O' Regan assured her, on a number of occasions when they discussed separating, that he would not seek anything from the property. He denies that. If Mr O'Regan did say something along those lines, it would have been in the course of conversation about a number of other matters which they needed to deal with in unwinding their relationship, and in context that in due course they would have to draw up some sort of settlement agreement. I would not therefore view any such statement as intended to give rise to any immediate transfer of any beneficial interest that he might have had, or as Mr O'Regan's definitive position.

26. Mr O'Regan says that in about October 2014, there was a further discussion between the parties. He says it was agreed that she would seek a mortgage offer to obtain £10,000 to pay to him immediately, and that once that had happened, they would see a solicitor to work out what else he was entitled to.

27. Ms Cruikshank denies that this agreement was made. However, she suggested that there was a discussion about the overdraft on the mortgage current account of over £41,000, and the arrears on the mortgage account, and how these were to be cleared. She says that she offered to pay £20,000 of the debt, and that she also offered to pay Mr O'Regan £20,000 if he would take on the debt, but he declined. She did not explain why she was willing to accept liability for £20,000 if, as she asserted, it was all his debt. She agreed that there had been some discussion about her making a payment of £10,000 to Mr O'Regan but said (to social services at the time) that this had been proposed by Mr O'Regan as a payment for her having the right to keep Keegan.

28. I find that, once again, the truth is somewhere between the parties' accounts. I find that there was a discussion about the need to clear that debt, and what should happen to the property. I find that it was agreed that Ms Cruikshank would have the property, and would take on the debt, and that she would pay Mr O'Regan £10,000 for his interest in the Property, by remortgaging the property. However, I do not accept that it was agreed that Mr O'Regan would be entitled to a further sum of money from the Property in the future, for if the parties had agreed that he should be entitled to more, there was no reason for Ms Cruikshank not to raise all the sums which Mr O'Regan was to be paid, at the outset. If there was insufficient equity in the property for any further sums to be taken out at that stage, then he could not possibly have been entitled to any more. Furthermore, I was shown a document dated 8 October 2014, which I find to have been typed by Ms Cruikshank and signed by Mr O'Regan (albeit in circumstances where he may not have read it terribly carefully) which states: "I have no interest in the mortgage rate or property and have agreed a settlement amount for the above property which will be paid to me by a solicitor, acting on behalf of myself and Ms A Cruikshank, at completion of transfer of mortgage." Ms Cruikshank said that this was a document which Woolwich had produced, but this seems unlikely to me bearing in mind the absence of any corporate logo on the form, the wording, and the fact that the account number and Ms Cruikshank's name appear as part of the typed text. As I have said I find that Ms Cruikshank prepared this document. It is entirely consistent with my view as to what is likely to have happened, bearing in mind what each party said in evidence. Accordingly, I find that the parties agreed that the house would be transferred to Ms Cruikshank in return for a payment of £10,000. Both parties have, in my view, subsequently sought to row back from that agreement to a more extreme position one way or the other.

29. Various documents, including a TR1, were then signed by Mr O'Regan in furtherance of this agreement. (Ms Cruikshank evidently lodged this at Land Registry, which is how the Property now comes to be registered in her sole name.) I do not accept Mr O'Regan's evidence that he understood that these documents were simply to enable Ms Cruikshank to get a mortgage offer. I find that he was aware that Ms Cruikshank was intending to remortgage the property in order to clear the debt as quickly as possible, and to pay him the £10,000 he was expecting to receive from the property immediately. Mr O'Regan acted in reliance on the agreement. So too did Ms Cruikshank, for she took on sole responsibility for their joint debt when remortgaging the property.

30. There was a dispute about the circumstances in which the TR1 was executed, and in particular whether it was witnessed. It is common ground that it was executed by Mr O'Regan when Ms Cruikshank came round to his place of work, in the car park. Mr O'Regan says that if Ms Cruikshank had asked him to have someone witness his signature, there would have been no difficulty with him asking one of his colleagues to do so, so there was no need for anyone to attend specially in order to witness his signature. However, Ms Cruikshank called a friend and colleague, Ms Jacqueline Hodge, who asserted that she had been present (albeit in the back of the car doing a cross word) when Mr O'Regan had signed the TR1, and had subsequently signed the paper to witness his signature. Mr O'Regan said that he had not seen her and he would have seen her if she'd been there, because he signed on the bonnet of the car. Ms Cruikshank said that he must have seen her. Ms Hodge said that he did not come near the car and would not have seen her. Ms Hodge also said that the reason she went was not to witness the signature – indeed she said that she was not even asked to witness the signature until she returned to the office – but because she was worried about Ms Cruikshank going on her own. However, if that was the reason for going, it strikes me as surprising that she did not get out of the car with Ms Cruikshank, or at least make sure that Mr O'Regan knew that she was there, and that she was not watching the encounter rather than doing a cross-word. In addition, Ms Hodge did not mention that they stopped en route for a paper as Ms Cruikshank had done. Furthermore, although not a factor that I give great weight to because there may be other explanations for it, I do think its of some significance that Ms Cruikshank's pleaded case relied not on the TR1, but on a Declaration of Solvency (which was witnessed by a solicitor), as the document which effected the transfer of the beneficial interest. For all these reasons, I find that Ms Hodge was not present when the TR1 was signed, and that she was simply asked to add her signature to the TR1 when Ms Cruikshank got back to the office.

31. In December 2014, Mr O'Regan attended a solicitors in Guildford in order to sign a declaration of solvency. There is no dispute that the Declaration of Solvency was signed by him and witnessed by a solicitor. In it, Mr O'Regan again confirms that he intends to transfer all of his interest in the Property to Ms Cruikshank. Mr

O'Regan says and I accept that the solicitor did not give him any advice, and the whole encounter lasted 2 minutes.

32. A further document called a declaration of share document was also in evidence. This suggested that Mr O'Regan was transferring his share to Ms Cruikshank for nil consideration. Ms Cruikshank was not able to say when or where Mr O'Regan executed this. He could not be sure he had, but said, if he had, then the amount of the consideration, which was hand-written, was added after he had signed and he would not have signed if that had been stated. I agree. This is inconsistent with the document of 8 October. Mr O'Regan knew that he had to sign documents to transfer the ownership to Ms Cruikshank so that she could remortgage, but I do not accept that he agreed that he would get nothing.

33. The Transfer and remortgage was completed on 18 December 2014 and registered on 21 January 2015.

34. Perhaps because Ms Cruikshank had opened Mr O'Regan's post from the Inland Revenue in New Zealand in the interim, and had learned that he apparently owed $937k in child support payments, or perhaps because Mr O'Regan had failed to pay her any maintenance for Keegan after September 2014, Ms Cruikshank did not pay Mr O'Regan any money when the remortgage was completed. By February 2015, Mr O'Regan wanted to know where his money was, and was accusing Ms Cruikshank of having tricked him into transferring the Property to her, and Ms Cruikshank was asking for child maintenance for Keegan. In a text message dated 13 February 2015, Ms Cruikshank said "You weren't tricked and you lost nothing as you never paid anything."

35. In January 2016, as I have said, Mr O'Regan made his application for restrictions over the Property.

The Issues

36. What I must determine is:
(1) Did Mr O'Regan have a beneficial interest at the time of purchase?
(2) If so, has he lost that beneficial interest by reason of subsequent events?

The Law

37. It is perfectly possible for a person to own a property, or a share in it, even if it is not in his name. The person in whose name the property is registered is the legal owner. The true owner is the beneficial owner. Originally, the Property was in joint names. Now it is in Ms Cruikshank's name (although as a result of my finding above that Ms Hodge was not present when the TR1 was signed by Mr O'Regan, it seems to me that he would be entitled to seek rectification of the register so as to restore his name to the legal title. No question of Mr O'Regan

being estopped from asserting the invalidity of the TR1 can possibly arise on the facts on this case. Ms Cruikshank knew perfectly well it had not been properly attested). But, although relevant as I explain below, the register is not determinative of the true, beneficial, ownership of the Property. That is what I must determine.

38. People can share the beneficial ownership of a property in 2 different ways: they can be joint tenants, or tenants in common. Joint tenants own the whole property in "undivided shares" – ie they own the whole thing together. If one dies, the other gets his or her share automatically, under the doctrine of survivorship. Tenants in common each have a defined share in the property, which can, but need not be, equal. If a tenant in common dies, his or her share passes under the will. Joint tenants can "sever" their joint tenancy, so as to become tenants in common in equal shares.

39. In *Jones v Kernott [2012] 1 AC 776*, the Supreme Court reiterated the relevant principles for establishing who has the beneficial ownership where a family home is bought in joint names, with a mortgage for which they are both liable. The law is:

    (1) The starting point is that the parties were joint beneficial owners, even if one party has contributed a lump sum at the time of the purchase and the other has not. All else being equal, the beneficial ownership follows the legal ownership.
    (2) However, if one party proves that there was a different common intention at the time of purchase, and he or she relied on this to his or her detriment, a constructive trust is imposed to give effect to that common intention.
    (3) This is an example of circumstances in which a constructive trust is imposed because, given the circumstances at the time of acquisition, it would be inequitable for the purchaser to deny a person a beneficial interest (or a bigger beneficial interest) in the property.
    (4) The beneficial ownership can alter over time, if the parties formed a common intention that their respective shares would change, and relied on that. This would effect a severance of the joint tenancy. If there were an agreement that one party would give up (or reduce) its share in return for payment, and the parties acted in reliance on the agreement, a constructive trust would be imposed to prevent either party resiling from it: *Oates v Stimson [2006] EWCA Civ 548.*
    (5) If the original common intention was conditional on future payments being made by one party, and those payments are not made, the agreement will not be determinative of the parties' shares. If there is no subsequent common intention, the Court will infer, from the whole course of dealing, what the parties must have intended should occur in that situation: *Gallarotti v Sebastianelli [2012] EWCA Civ 865.*

(6) Common intentions are to be ascertained by looking at what the parties said and did.

(7) If it is not possible to infer what their actual intentions as to the respective shares were from such evidence, an intention to own in such shares as the Court should see fit, by reference to the whole course of dealing between the parties is to be imputed to the parties.

40. One matter which has not, so far as the researches of the parties have shown, been considered previously is the relevance of a mistake or misrepresentation by one party which caused one party's intention to arise. However, it seems to me as a matter of principle, that equity ought not to assist a party who has caused the other party to form a common intention by misrepresentation, or who has otherwise acted inequitably to produce the common intention.

Applying the Law to the facts of this case

41. I am not satisfied that there was, at the time of purchase, any common intention other than an intention that they should own the property jointly. If anything, in my view, the evidence suggests that this is what the parties intended – hence the notion that Mr O'Regan should have to catch up Ms Cruikshank's contribution. In my judgment, the parties had not agreed that shares should be based on contributions; they had agreed that the property was to be jointly owned and that Mr O'Regan should make substantial contributions to the mortgage.

42. However, Ms Cruikshank suggests that she would not have bought the Property with Mr O'Regan if she had been aware of his debts in New Zealand. I accept that she was not aware of the situation at the time of the purchase, and that, had she known of the alleged debt, she would have been concerned as to whether this would affect her security if the Property was put into joint names. However, I consider that, had the topic arisen, Mr O'Regan would have been able to satisfy her (as he satisfied me during evidence) that the paperwork sent by the New Zealand child maintenance authorities was sent in error and he did not in fact owe the sums alleged. It therefore seems to me that even if he positively represented to her that he was free from debt (which was not suggested), no equity would have arisen as a result of this.

43. She also says that she would not have bought the Property with him if he had not agreed to marry her. That may well be true, but it does not seem to me that any equity arises from that either. I am not satisfied that Mr O'Regan was misrepresenting his intention to marry her.

44. In the circumstances, I find that at the time of purchase the parties were joint beneficial tenants.

45. Mr O'Regan's failure to make any substantial payments off the mortgage capital as he had agreed would give rise to the question of whether the parties' initial agreement should still apply, were it not for the fact that the parties reached a further agreement about the ownership of the Property in 2014. This agreement was, no doubt, made against the background of the earlier agreement and the fact that Mr O'Regan had not in fact made any contribution to paying down the mortgage capital.

46. In 2014, as I have indicated, they agreed that the legal ownership of the property should be transferred to Ms Cruikshank so that she could remortgage in order to clear the debt and pay the agreed sum of £10,000 to Mr O'Regan. Mr O'Regan executed a TR1, which, although not valid as a deed, would, in my view, have been effective to transfer his beneficial interest to Ms Cruikshank.

47. However, immediately on that transfer occurring, a fresh constructive trust arose because he made the transfer in reliance on Ms Cruikshank's promise that he would be paid £10,000 when the remortgage was completed, and it would be inequitable for Ms Cruikshank to acquire his beneficial interest without giving effect to that promise.

48. Accordingly, the effect of the agreement was that instead of a joint beneficial tenancy, Ms Cruikshank had the whole beneficial interest, save that Mr O'Regan had such share of the equity as equated to £10,000 in 2014. (In order to work out what he is now entitled to, a valuation of the property as at October 2014 [X]will be required; Mr O'Regan's share is worth 10,000/X x the value of the property as at today's date.)

49. Mr O'Regan has not been paid to date. It follows that he does have, and did have at the date he made his application, a beneficial interest in the Property. Accordingly, he is entitled to the restrictions he sought, and I will direct that the Chief Land Registrar should give effect to his application.

Judge Tozer

Dated this day of 30 August 2017
Stephanie Tozer

BY ORDER OF THE TRIBUNAL