



[2019] UKFTT 0047 (PC)

REF/2016/1161

**PROPERTY CHAMBER, LAND REGISTRATION
FIRST-TIER TRIBUNAL**

LAND REGISTRATION ACT 2002

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

BETWEEN

Andrew Upson

APPLICANT

and

John Vincent Brady

RESPONDENT

**Property Address: Old Warley Hospital Gatehouse Pastoral Way Warley Brentwood
CM14 5WF**

Title Number: EX742670

ORDER

IT IS ORDERED as follows:

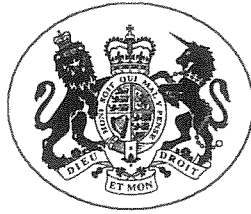
The Chief Land Registrar is to cancel the Applicant's application dated 11 February 2016p for the entry of a restriction.

Dated this 10 December 2018

BY ORDER OF THE TRIBUNAL

Elizabeth Cooke





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DECISION

1. Mr John Brady, the Respondent, is the registered proprietor of The Old Warley Hospital Gatehouse (“the property”), a beautiful Victorian building, formerly part of a hospital and purchased in 2004 from the NHS. In 2016 Mr Andrew Upson, the Applicant, applied to HM Land Registry for the entry of a restriction on the title to the property to protect his interest, because he says he is a joint owner of the property in equity. He says the parties had an unwritten agreement that they would be joint owners, in reliance on which he has contributed to the purchase price and done a large amount of work on the property. The Respondent denies that there was an agreement

to share ownership. The dispute was referred to this Tribunal pursuant to section 73(7) of the Land Registration Act 2002.

2. I heard the parties on 21 September 2018 and on 29 October 2018. The Applicant presented his case himself and the Respondent was represented by his solicitor Mr Themis.
3. I have decided that the Applicant is not a joint owner and therefore is not entitled to the entry of a restriction. I have therefore directed the registrar to cancel his application. That will not be the end of the matter, because the Respondent has commenced trespass proceedings in the Chelmsford County Court. Those proceedings are on hold pending my decision, but will now be able to go ahead. The Applicant will no doubt wish to counterclaim in those proceedings for what he says he is owed. I can respond only to the reference from HM Land Registry. In the paragraphs that follow I explain my decision on joint ownership.

The property and the Applicant's case

4. The property was bought in 2004. It is agreed that the purchase was the Applicant's idea, and that he instructed solicitors to act on the purchase of the property. The purchase price was £400,000; the Respondent borrowed £360,000 from Birmingham Midshires, secured by a mortgage on the property.
5. Just before the purchase the Applicant paid the Respondent £95,000, which he raised by re-mortgaging his flat; the solicitor, Mr Maryon of Martin Nossel & Co, who acted on the purchase also acted on that re-mortgage. That £95,000 funded the balance of the purchase price over and above the mortgage advance; the surplus was spent by the Respondent on mortgage repayments.
6. The mortgagee made a retention of £22,500 because of the work that needed to be done on the property. Following the purchase the works required by the mortgagee were carried out and the £22,500 retention was released to the Respondent.
7. More work was then needed on the kitchen and bathroom. There was a major problem with the sewers when a neighbour severed a drain; eventually the NHS as the neighbouring owner paid for that work. But still more work was done, and continued to be done until 2016 – when the Applicant made his application – and beyond.
8. The Applicant was the prime mover in all the work. He has lived at the property for most of that time in the summers (most winters he worked in Austria as a ski instructor). He got in lodgers who paid rent, although there is a dispute as to how much of the work of getting lodgers was done by him; at any rate he says it was all his

doing. Of the £226,000 rental income over that period the Respondent was paid approximately half; the Applicant has said in the past that he kept £108,000 but he now says he kept £76,000. Work was done on the kitchen, the roof, the drains, the porch, the courtyard; scaffolding was put up; the Applicant arranged for friends from the Czech Republic to come and help; planning permissions were applied for and some were obtained. Work continued until well into 2017.

9. What the Applicant says is that he and the Respondent had an agreement before the purchase that they would be joint owners and partners. They would do up the building for sale and the Applicant would get his £95,000 back and have a share in the profit on sale; by “profit” he means the eventual sale price less the initial cost of £400,000. He says the agreement was that he would have 90% of that profit and the Respondent would take the balance. True to that agreement, he says, he has been working on the property ever since, including obtaining planning permissions and a complete renovation of this complex listed building. For some of that time he has been living there. The property has not been sold, and cannot be while the current dispute continues, and so a re-sale price is not known; but what the Applicant now wants is
- a. the return of his £95,500,
 - b. a payment for his labour amounting to £212,000, and
 - c. £25,000 for his materials which cost, he says, £101,000 less the £76,000 rent he has received from the property.

The Respondent’s case

10. The Respondent says that the £95,500 was a loan. He says that they never agreed to be joint owners. He says that the intention was that the Applicant would be repaid his investment of £95,000 together with a refund of the interest that he had paid on the mortgage that funded the £95,000, together with a share of profits to be negotiated. The two men had been close friends and he did not believe there was any need to make a complete agreement; the idea was to buy, renovate and flip the property, and the project was not supposed to last more than 12 – 18 months.
11. Moreover, the Respondent says that the Applicant has been at least in part repaid because of the rent he has kept. The Respondent expected to receive all the rent, to service the mortgage, but the Applicant kept half. He prefers the Applicant’s earlier figure of £108,000 for what he received in rent. He accepts that the Applicant has done a lot of work on the property, although he disputes the cost and value of that work. He

says that in 2007 and again in 2016 he told the Applicant to stop work, and that therefore he is not liable to pay the Applicant for anything he did after 2007.

Procedural matters

12. The hearing was listed for one day before me at Alfred Place in London on 21 September 2018. The Applicant wanted a site visit, which I refused. Although the cost and value of the work he has done is in dispute, the current physical state of the property is not in dispute and there was no need for me to view it. It would be very unusual for there to be a site visit in a beneficial interest case.
13. As this is a beneficial interest case, I explained to the Applicant at the start of the hearing that if he was found to have a joint ownership interest in the property, it would not be possible for this Tribunal to give a binding determination of the extent of his share. I have jurisdiction only to decide the outcome of the reference to HM Land Registry, so I can decide only whether or not the Applicant is a joint owner entitled to a restriction. The Applicant produced, very shortly before the hearing, a considerable quantity of documentary evidence in the form of his own diaries and notes, and a valuation of the work he says he has done by a firm of surveyors. I refused to admit this evidence, not only because they were produced at the last minute, but also because they relate to a matter that I do not have jurisdiction to decide.
14. It is likely that in future proceedings there will have to be a taking of accounts in relation to the work done on the property, the rent received by each party, the use to which the rent has been put, and the value of the accommodation the Applicant has had there. In that event the parties will each have to ask permission, in good time before a hearing, to produce expert evidence of the value of the property, and of the extent to which the work done has increased its value (as to which I believe there is none at the moment). It is likely that a court will require the parties jointly to instruct a single expert witness. The Applicant will also have to produce properly organised evidence of what he has spent, if that is still in dispute.
15. I turn now to the course of the hearing before me.
16. The case was listed for a single day, which should have been ample. The Applicant had put in a Statement of Case but had not made a witness statement; he adopted his Statement of Case as his evidence. The morning of 21 September was entirely taken up by his re-stating his case; he was allowed to give fresh evidence, to Mr Themis very helpfully made no objection.

17. The Applicant had with him two witnesses, his mother Mrs Upson and his friend Mr Poulton who had helped him with the work. I read their witness statements and Mr Themis confirmed that they were not in dispute and that he did not wish to cross-examine them on the contents of their statements. I therefore explained to the Applicant that there was no need for these witnesses to be called. This was a great disappointment to him as he wanted them to give fresh evidence. I explained to him that this is not permissible; he was notified some months ago of the need for witnesses to set out their evidence in statements, and it is not open to either party to surprise the other by producing fresh evidence on the day of the hearing.
18. I would add that it seems to me that both these witnesses were going to give evidence about the extent of the work done by the Applicant. But, again, that is not something that the Tribunal has jurisdiction to decide, and so it would not help the Applicant to have their evidence called. Neither could give evidence about an agreement between the Applicant and the Respondent about joint ownership – aside from what they had heard from the Applicant himself – and so neither was able to help his case. So I wish to reassure the Applicant that the inability to call fresh evidence on the day of the hearing has not done him any harm.
19. The afternoon of 21 September was taken up with Mr Themis' cross-examination of the Applicant; I am grateful to Mr Themis for restricting his cross-examination to relevant matters. Some time was also taken up by my allowing the parties to make a final attempt to agree the contents of the bundle, since matters had been made very difficult by their failure to agree a bundle and by the Applicant's production of fresh bundles on the morning of the hearing. The Applicant had objected to the bundle produced because he did not like the order in which it was presented, and wished to include copy documents with his own annotations on them, which I did not allow, and some without prejudice correspondence which I also excluded. In the end I made it clear that in directing a further listing of what was inevitably now a part-heard case, I would require the parties to produce an agreed, and properly indexed, bundle, and that neither would be permitted to adduce further evidence.
20. It appears that the process of trying again to agree a bundle before the final hearing was stormy, but a bundle was produced and helpfully indexed. At that hearing on 29 October 2018 the Respondent was cross-examined, and both Mr Themis and The Applicant had the opportunity to close their cases.

The law

21. The Applicant claims to be a joint owner of the property in equity on the basis of a common intention constructive trust.
22. In order to establish such a trust he must establish an agreement or common intention between the parties that they would share ownership, and detrimental reliance on his part on that agreement. There is no dispute that this is the law, established in *Stack v Dowden* [2007] 2 AC 432 and other leading cases, and the Applicant was aware that this was what he had to prove.

Detrimental reliance

23. I can cut through a great deal of complexity by saying at the outset, and without making any findings on evidence that is in dispute, that if there was an agreement as to shared ownership, I find that the Applicant would have no difficulty in proving detrimental reliance on it.
24. It is not in dispute that he paid an initial £95,500 towards the acquisition and renovation of the property. It is not in dispute that he has spent many hours working on it, and that he has incurred substantial costs, although the evidence is not in a state for me to find how much and it is not necessary for me to do so. Although he has kept half the rental income, to the tune of at least £74,000, either that income has repaid some of his initial outlay leaving him unpaid for what he spent on the work, or it has paid for some or all of the cost of the work leaving him out of pocket to the tune of £95,500 and interest; either way he has invested years of his time in the property. He has been able to live at the property, but no figures have been put forward as to the value of the accommodation.
25. Accordingly if there were an agreement to share ownership, I would have no difficulty in finding that the Applicant has incurred substantial detriment in reliance upon it, in terms of time and money spent on the property since its acquisition.
26. So the question I have to decide, and the answer to which will determine the outcome of this reference, is whether the parties had an agreement or shared understanding that they would be joint owners of the property in equity.

Was there an agreement about shared ownership?

27. The Applicant gave extensive fresh evidence at the hearing, setting out the story from start to finish. I asked him a number of questions in the course of his evidence, and I am grateful to him for answering. I think he will not mind my saying that he is not a very organised or business-like person. I believe that he gave evidence to the best of

his recollection, but that he did not find it easy to focus when I asked him for precise details on any point. He does not find it easy to keep tidy records of what has been said or of what has been done or spent; all his records are hand-written which makes them very difficult to follow. I regard him as an honest witness, but not a very precise one. I have rejected his account of the arrangement between him and the Respondent, but in doing so I make it clear that I accept that he believes that his evidence and his recollection are true.

28. The Respondent had made a witness statement and was cross-examined on it by the Applicant; he is a more business-like person than the Applicant and he keeps records in a well-organised form. Again I regard him as an honest witness and I prefer his evidence to that of the Applicant because it is plausible and precise whereas the Applicant's is not.

What the Applicant says about the agreement to purchase the property

29. The Applicant's evidence was that he is an architect, although he makes his living as a ski instructor in Austria in the winter months. He loves renovating beautiful properties such as the one in question here. He found it in 2004 and proposed to the Respondent that they acquire it together.
30. He said that they decided to put the house in the Respondent's name. Initially he said that this was done at his own request because the Respondent was going to provide the finance and that it would save costs. He added that the property was going to be the Respondent's house and the Respondent was going to move in when it was completed. I have to say that is wholly inconsistent with the rest of his evidence, which was that the idea was to do up the property and sell it for a profit, which they were going to share. The Respondent is a person of greater means and far more regular and reliable income than the Applicant and it is likely – and so I find – that he took on the legal title, and sole liability under the mortgage, because of the two of them he was the one with the ability to raise the finance by way of mortgage. That does not, of course, answer the question about joint ownership in equity.

31. The Applicant's evidence is that before the purchase they agreed that they would be joint owners, that he would get back his £95,500, and that he would take 90% of the profits on sale while the Respondent took 10%. He says the agreement was unwritten.

What the Respondent says about the agreement to purchase the property

32. The Respondent's evidence is that there was no agreement to share ownership. He says that he told the Applicant that he would be content with a 5% or 10% return on

the investment – and by that he meant that he would be content if they could sell the property for 5% or 10% more than they bought it for. That, he says, is the source of the Applicant’s understanding about a 90%/10% split, which is not what was agreed.

33. The Respondent goes on to say that he intended that the Applicant would get back his £95,000 with compensation for the interest he had paid on the mortgage of his flat, and a fair share of the profits.

Correspondence with the parties’ solicitor

34. Mr Maryon acted on the purchase. I believe it is not in dispute that he was initially instructed by the Applicant and advised both the parties; certainly it was the Respondent’s case that the Applicant had been advised by Mr Nossel about his own position, although I did not allow Mr Themis to pursue that line of questioning because any advice given to the Applicant alone would be privileged.

35. The following letters are significant:

a. A letter dated 28 May 2004 to the Respondent. It begins:

“I understand from Mr Upson your friend that you will be buying the property for £400,000 subject to contract and that you are arranging for a mortgage to be secured over the property. As you probably know Mr Upson has been away and the sellers really have lost their patience”.

There is no further mention of the Applicant in that letter, which encloses the purchase contract and asks for the signed contract to be returned with a cheque for the deposit of £40,000.

b. A letter dated 24 June 2004 to the Respondent enclosing the mortgage deed for signature.

c. A letter dated 9 July 2004, still pre-completion, to the Respondent enclosing the transfer and a deed of covenant for signature. The letter goes on to say:

“You are effectively borrowing £95,437.75 from Mr Upson. At the moment there is only a verbal agreement between the two of you. I think Mr Upson wants me to prepare a form of second charge and Deed of Trust. I have not budgeted for this as it was outside the scope of my original instructions from Mr Upson. This would cost about £200 plus VAT. It would also be sensible if you really want to look after his interests to make a Will leaving in your estate

a sum equal to this to him. I am not sure if you have already prepared a Will but this would cost about £70 plus VAT”.

36. In cross-examining the Respondent the Applicant put it to him that despite the terms of that letter he did not execute a second charge or a deed of trust, nor did he make a will. It is not in dispute that he did not. The important point in terms of what I have to decide is that there is no evidence of any agreement that he should do so; the evidence points the opposite way, to the absence of any agreement even to execute a charge let alone to enter into a deed of trust, in particular the fact that the Applicant went ahead with the project without either a charge or a deed of trust being put in place.
37. Moreover, what is clear from this correspondence is that the solicitor understood the arrangement to be a loan. It is not clear why he refers to a deed of trust but the rest of the letter does not point to joint ownership. There is not even any mention of a share of profits. Even the reference to a will is only supposed to be for the return of the £95,000 (“a sum equal to this”). The Applicant at the hearing showed no understanding of the difference between a charge and a deed of trust, but of course to a lawyer the difference is crucial; a deed of trust would create – or record – joint ownership in equity whereas a Second Charge would secure a loan.
38. In a further letter sent to the Respondent after the purchase, dated 8 March 2005, Mr Maryon enclosed the register entries following registration of the purchase and goes on to say:

“There is nothing in this document illustrating the interest of Mr Upson whatsoever.

I have mentioned this several times, certainly to Mr Upson who’s [sic] legal position remains very vulnerable.

I am sure I have sent you notes on making Wills before. Whilst I am not in a position to influence you in any way here, I should bear in mind that it was Mr Upson who first instructed me in connection with this matter and I am sure he would like you to make a Will leaving the property to him at the very least.

However this is where life and me gets a little sensitive. You are entitled to your own independent legal advice and certainly, if you feel I have Mr Upson’s interests at heart instead of yours.

Because of Mr Upson's involvement with this matter, I propose sending Mr Upson a copy of this letter unless I hear from you with instructions to the contrary within the next 7 days.

There is little more I can do to influence matters from my perspective and I do hope the good relationship between you and Mr Upson continues."

39. Clearly by March 2005 it had dawned on Mr Maryon that there was a potential conflict of interest between his two clients. His letter does not indicate what were his instructions from the Applicant, nor does it give any clue as to the Respondent's intentions. Why the Respondent, who had taken on liability for a loan of £360,000, might leave the property to Mr Upson is not explained. There is still no mention of joint ownership.
40. So the correspondence from the solicitor provides no evidence to support the Applicant's case that the parties had agreed on joint ownership from the outset, and some evidence to contradict it because it appears that the solicitor understood that the Applicant was a lender not a joint owner.
The work done on the property
41. It is common ground that the parties intended to repair and improve the property, and indeed there was a mortgage retention which meant that they had to do so. Before the purchase a survey was carried out by W.G. Edwards Surveyors Ltd. Their report, dated 19th May 2004, is addressed to the Respondent. It sets out the work that is needed on the property and states that the Respondent will need to have available a sum in the region of £22,500, although the report also advises that this sum may not be the end of the matter and further work may be needed.
42. It is the Respondent's case that that was the total that they expected to have to spend on the property, whereas the Applicant says that that was just the estimate of what would be needed by way of preliminary work to release the mortgage retention.
43. This was of course the survey on the basis of which the retention was made; it is a survey addressed to the purchaser but carried out, as is usual, to satisfy the mortgagee. It certainly does not purport to be a final and definitive statement of the work that would be needed to put the property into a satisfactory state for re-sale. But in the light of that survey I find as a fact that the parties will not have expected, prior to the

purchase, that work costing greatly in excess of £22,500 would be needed. They would certainly not have expected to have to find any more than, at most, twice that figure. Their expectations can be seen from the financial arrangements they made; The Respondent raised £360,000 and the Applicant provided £95,000, which allows for some extra expenditure but not a great deal. The mortgage payments were supposed to be covered by the rent. There was no planning for expenditure on renovation beyond what the parties raised by borrowing.

Correspondence after 2004

44. I was shown a great deal of correspondence, much of it irrelevant to what I have to decide. But it is relevant to note that the correspondence demonstrates that as time went on the parties became very unhappy with each other, and more than once they sought to re-negotiate their deal, without success.

45. In 2007 the Applicant says he and the Respondent had a “massive row”; the Respondent suggested that they should split the profit 50/50, which the Applicant says he rejected. The Respondent wrote to the Applicant a letter that made plain his unhappiness with the amount of work being done and his wish to stop. He said:

“I am not prepared to increase my financial exposure. If you want to pay out of your own money, that is fine”.

Later in that letter the Respondent said “I believe we need 15K to get the house saleable.”

46. I asked the Applicant, at the hearing on 21 September, why he carried on working after receiving that letter, and he said: “Because I never give up”, and added “If I say I will rebuild this house then I will do that.”

47. In 2013 the Applicant put together some figures setting out what he said he was owed for his time and materials. But there does not appear to have been any concluded agreement.

48. In 2016 the Respondent asked the Applicant to stop work. He refused to do so. He applied for the entry of a restriction to protect what he regarded as his beneficial interest in the property.

Conclusions

49. I regard the following points as most important:

50. First, the Respondent’s explanation of what was agreed at the outset is far more plausible than the Applicant’s. There is no reason why someone in the Respondent’s position would agree to a 90/10 split of the profit on sale; on the other hand, for the

Respondent to say that he would be happy with a quick re-sale at a profit of 10% (which he intended to be shared) would be realistic and sensible.

51. Second, it is clear that no instructions were given to the solicitor about joint ownership before the purchase, although after the purchase was completed the Applicant may have taken the view, or perhaps been advised, that he ought to be a joint owner. Had there been an agreement from the outset, then the Applicant in contacting the solicitor would have said something like “my friend and I are buying together” whereas what the solicitor had clearly been told was that he was making a loan (see in particular the letter of 9 July 2004).
52. Third, the parties’ expectations of a relatively short programme of work, not costing much more than the mortgage retention for £22,500, indicates that it is likely that they would have made an arrangement that did not involve shared ownership. There was no reason why they should. There was no intention for ownership to last very long, and the idea was to put money in and then get it out again quickly. Shared ownership was not relevant to what the parties wanted to do.
53. Fourth, the deal that the Applicant describes is not joint ownership. It is a joint venture, certainly, and perhaps a form of partnership. But the deal was for reimbursement of the initial cash contribution and for a share in the profit on sale. There is no agreement to share in any losses. The risk on the mortgage rests entirely with the Respondent, which is inconsistent with joint ownership – obviously the formal risk vis-à-vis the bank has to remain with the legal owner, but there is no agreement by the Applicant to share the risk with him. So even if what the Applicant says, and I think believes, about the initial agreement were true, that would not make him a joint owner. It is inconsistent with the idea of joint ownership or, as one might colloquially put it, shared equity.
54. I am reinforced in that view by the fact that in 2007 when relations broke down the replacement deal that The Respondent suggested (and this is not in dispute) was for a 50% share of the profits. Again, this is a profit share, and not joint ownership.
55. I find on the balance of probabilities that what the parties agreed was this:
 - a. The property would be purchased by the Respondent for renovation and re-sale.
 - b. The Respondent as owner would take the risk of any loss on sale, while the Applicant contributed an unsecured cash loan.

- c. The parties expected the refurbishments to cost around £22,500. That means that the £95,000 was ample to cover the initial cash outlay despite the retention, and some professional fees, and when the retention was repaid that amount went into the mortgage repayments.
 - d. The parties' expectation was that the payments from the lodgers would then cover the mortgage repayments until they could sell, which they planned to do relatively soon.
 - e. The Respondent intended to repay the Applicant's loan, with some interest, and to give him a fair share of the profit on sale.
56. In the event things got out of hand. Work took longer than expected. More was needed than had been expected; and in the end more was done than was really needed. The Applicant carried on working when the Respondent asked him to stop.
57. As a result the resources put into the project were insufficient to cover the mortgage payments and the renovations. The mortgage had to be serviced for many years longer than the parties had anticipated, and the renovations cost far more than anticipated. That is why the Applicant is, on any reckoning, out of pocket (see my paragraph 25 above) and the Respondent, although not very much out of pocket at the moment, baulks at the prospect of making a further payment to the Applicant. Whether he has to do so, and if so how much, will be for the court to determine in the context of the trespass proceedings.
58. I find that the Respondent's account of what was agreed is correct, and that there was no common intention or agreement about joint ownership when the property was purchased, nor at any stage thereafter. The property belongs at law and in equity to the Respondent. There was an agreement that the Applicant would be reimbursed for his loan of £95,000 and would get a share in the profits on sale, and he may have a claim in contract or restitution to that extent, but he is not a joint owner.
59. I have directed the registrar to cancel the Applicant's application for a restriction. In principle the Respondent is entitled to his costs. If he wishes to apply for costs he is to make an application within 28 days of the date of this decision; the Applicant may make submissions as to liability and as to the amount claimed within 28 days after that; the Respondent may then reply within a further 21 days if so advised.

Dated this 10 December 2018

BY ORDER OF THE TRIBUNAL

Elizabeth Cooke

