



[2019] UKFTT 0504 (PC)

PROPERTY CHAMBER
FIRST-TIER TRIBUNAL
LAND REGISTRATION DIVISION

IN THE MATTER OF A REFERENCE FROM HM LAND REGISTRY

LAND REGISTRATION ACT 2002

REF No 2018/0143
BETWEEN

ROSEMARY DE HUSSEY

Applicant

and

EDWARD CANNEY

Respondent

Property: (i) Flat 1, 48 Brook Drive, London SE11 4TT
(ii) Flat 2, 48 Brook Drive, London SE11 4TT
(iii) 193 Brook Drive, London SE11 4TG

Title numbers: TGL420016, TGL420014, TGL324157

ORDER

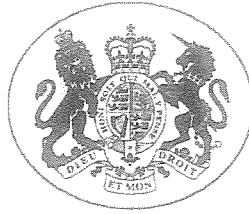
1. The Chief Land Registrar is ordered to cancel:
 - (i) The application dated 19 December 2017 in respect of title TGL420014;
 - (ii) The application dated 26 September 2017 in respect of title TGL420014;
 - (iii) The application dated 16 January 2018 in respect of title TGL324157.
2. Pursuant to Rule 40(3)(b)(i) of the Tribunal Procedure (First-Tier Tribunal) (Property Chamber) Rules 2013 the Chief Land Registrar is further directed to reject unconditionally any future application by the Applicant to enter a restriction against all or any of the above titles by which any claim to any beneficial interest in all or any of the above titles is made.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 10th day of July 2019





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REF No 2018/0143
BETWEEN

ROSEMARY DE HUSSEY

Applicant

and

EDWARD CANNEY

Respondent

Properties: Flats 1&2, 48 Brook Drive and
193 Brook Drive London SE11

Title numbers: TGL420016, TGL420014 and TGL324157

Before: Judge McAllister
Alfred Place, London
1 July 2019

Representation: The Applicant appeared (briefly) in person: the Respondent was represented by Sam Phillips of Counsel, instructed by Hodders Law.

DECISION

Introduction

1. In 2001 the Applicant purchased the long leasehold interest in 48 Brook Drive, subsequently converted into Flats 1 & 2 ('the Flats'). On 30 January 2015 the Applicant executed a Declaration of Trust to the effect that she held the Flats on bare

- trust for the Respondent, her son. The Flats were transferred to the Respondent on 27 February 2015 for no consideration.
2. On 22 May 2009 the long leasehold interest in 193 Brook Drive ('193') was purchased in the name of Michelle Gilbey, who was said to hold the property on trust for the Applicant. Ms Gilbey transferred 193 to the Respondent for no consideration on 11 December 2012.
 3. It is the Applicant's case, in outline, is that the true intention of the parties at all times was that both the Flats and 193 are held by the Respondent as bare trustee for the Applicant or that, it seems, and in any event she has a beneficial interest in the Flats and 193 by virtue of a resulting or constructive trust.
 4. By applications dated 26 September 2017, 19 December 2017 and 16 January 2018 the Applicant applied to enter restrictions in Form RX1 against Flat 2, 48 Brook Drive; Flat 1, 48 Brook Drive and against 193 Brook Drive respectively. The applications, if given effect to, would prevent the disposition of the Flats and 193 Brook Drive unless authorised by the court.
 5. The matters were referred to the Tribunal on 8 February 2018, 22 March 2018 and 16 July 2018 and in due course consolidated.
 6. On 27 March 2019 the case was set down for two days on 1 and 2 July 2019.
 7. The Tribunal received a number of applications for an adjournment from the Applicant in a series of emails between 29 May 2019 and 27 June 2019. The applications were made on a number of grounds, namely: (a) that proceedings had been issued by the Applicant against the Respondent in the County Court Money Claims Centre for unpaid rent in respect of Flat 1, 48 Brook Drive on 24 May 2019; (b) that further disclosure was being sought from solicitors who had previously acted for her and the Respondent and (c) in order to allow the Applicant further time to instruct a new firm of solicitors, particularly in view of her dyslexia and (d) relying on a doctor's note to the effect that she was suffering from anxiety and pain and was not likely to be able to conduct a hearing without assistance.
 8. The Respondent's solicitors resisted the application for an adjournment. They stated that the Applicant had instructed and then dis-instructed a number of firms; that in any event, so far as they were concerned the duty of disclosure had been complied with (Hodders Law were instructed in place of McMillan Williams on 30 April 2019) and, generally, that any further delay would prejudice the Respondent who now wishes to sell the properties.

9. The application for an adjournment was refused by me on paper. I also stated that the Applicant could renew her application at the hearing.
10. The Applicant did so, on the grounds that she needed more time to instruct new solicitors; that she found the proceedings traumatic and that the issue of disclosure is still outstanding, and in particular that McMillan Williams (who, at one point, as I understand it, acted for both parties) are withholding documents which are helpful to the Applicant's case.
11. I refused the application for an adjournment. Taking into account all the relevant circumstances, including the previous delays in this case, the fact that the Applicant has had almost 3 months to find alternative representation, the prejudice to the Respondent if any further delay was allowed and the interests of the Tribunal, I came to the clear conclusion that the case should proceed. I note also that although the point relating to disclosure of the McMillan Williams files was raised in correspondence by her then solicitors, Child and Child, on 4 March 2019, no application was made to the Tribunal for further disclosure.
12. I informed the Applicant of my decision, whereupon she stated that she would leave the courtroom.

Procedural history

13. By order dated 27 April 2018 the references relating to the Flats were consolidated. The reference relating to 193 Brook Drive was consolidated with the existing reference by order dated 20 July 2018.
14. At the time of the various references the Applicant was not represented, although, as I understand it, Ingram Winter Green LLP were instructed by her in early 2018. On 8 March 2018 Dewar Hogan Solicitors were instructed by the Applicant. Dewar Hogan came off the record on 3 September 2018. On 19 October 2018 Child and Child came on the record.
15. The Applicant's Amended Statement of Case is dated 31 October 2018. The Respondent's Amended Statement of Case is dated 12 November 2018. Standard directions were given on 10 January 2019 relating to disclosure and witness statements. The Applicant sought extensions of time on medical grounds, and the directions regarding disclosure were extended to 6 March 2019 and regarding witness statements to 3 April 2019 (a total of 9 weeks).

16. On 26 March 2019 Child and Child came off the record. As stated above, the case was set down for hearing on 27 March 2019. On 2 April 2019 the Applicant filed and served her witness statement.

Evidence

17. I heard evidence from the Respondent, Edward Canney, who confirmed the contents of his Amended Statement of Case and his witness statement. I have also read the statement of his sister, Lacy Day, although she did not attend. I was also taken to a number of documents and emails. In addition, I have read the Amended Statement of Case of the Applicant, and her witness statement.
18. The Applicant invested in a number of 'buy to let' properties, some of which were acquired in her own name, some were purchased by a company of which she is or was the majority shareholder, Aquitaine Estates Limited, and some of which were held on trust for herself, the Respondent and his sister. The Respondent and his sister are now, and have been for some time, estranged from the Applicant.
19. As regards the Flats, it seems to me clear that the purchase price for 48 Brook Drive was raised by a mortgage in the Applicant's name and by money which was the Respondent's. In an email dated 14 January 2015 to her accountant, the Applicant stated that the purchase price for the property was £230,00, of which £185,000 was raised by way of a mortgage with Britannic Mortgages, £23,000 was taken from the Respondent's account with Chelsea Building Account, a further £18,000 from his inheritance and a loan of £3,100 which the Respondent obtained.
20. In 2004 the Applicant secured funds of £390,000 from the Bank of Scotland. In 2012 the Bank of Scotland sought to exercise the power of sale in respect of the property.
21. In or around January 2015 the Applicant agreed with the London Borough of Lambeth to surrender the existing lease in exchange for the creation of separate leases for two flats.
22. As stated above, on 30 January 2015 the Applicant executed a declaration of trust in favour of the Respondent. A number of emails leading up to the declaration of trust make it clear that 48 Brook Drive was held by the Applicant on trust for the Respondent. The declaration of trust recites that the monies necessary to complete the purchase of 48 Brook Drive were provided by the Respondent. The deed provides that

- the Applicant held the property on trust for the Respondent absolutely and that he covenanted to pay all monies due under the Bank of Scotland charge.
23. The Applicant obtained a bridging loan from MTF Finance Limited in order to pay off the Bank of Scotland charge. The Respondent secured a further bridging loan in the sum of £628,000 sufficient to satisfy the bridging loan obtained by the Applicant. This loan was itself replaced by a mortgage in 2016 in the Respondent's name. As stated above the Flats were transferred to him for no consideration on 27 February 2015. In a further email dated 13 February 2015 the Applicant confirmed that she was passing 48 Brook Drive back to her son, the Respondent, who was now capable of managing his own affairs. She went on to say that she had held it on trust for him during the time when he was ill from brain injuries caused by a series of mini strokes. And the Respondent also added that she had used the money he had been left to buy the property.
 24. It is the Applicant's case that the declaration of trust was entered into in the belief that this would avoid the need to pay stamp duty on the transfer to the Respondent. This is denied by the Respondent. He paid £23,723.00 by way of stamp duty. It is his case that he believed that the Flats would have passed to him on the Applicant's death in any event.
 25. The Applicant was sentenced to two and a half years in prison for, as I understand it, fraud and perverting the course of justice in November 2015 and released on licence in August 2016.
 26. 193 was purchased by the Applicant from the London Borough of Southwark by auction in May 2009 for the sum of £320,000. For reasons which are not explained the purchase was made in the name of Michelle Gilbey, a friend of the Respondent's sister, who at all times held the property as nominee for the Applicant. Bridging finance in the sum of £300,00 was provided by another friend of the Applicant. On the Applicant's case she was finding it difficult to repay this loan and was advised to transfer it into the Respondent's name so that he could raise a mortgage. It was her intention, she stated, that the Respondent would hold 193 on trust for her. 193 was transferred to the Respondent on 11 December 2012. On or around 13 September 2013 the Respondent secured a mortgage from Lloyd's bank and was able to repay the bridging loan. The Applicant continued to make payments in respect of the bridging loan between December 2012 and September 2013. It also appears that the Applicant made some interest payments to Lloyd's bank.

27. It is the Respondent's case that the transfer of 193 to him was due to the financial and legal difficulties faced by the Applicant, and was in effect an advance on his inheritance. He denied that he held the property on trust for the Applicant. When title to the properties was transferred to him he took on the outstanding debts and secured further lending and would not have done so unless he was certain that he could sell the properties if and when he wished to do so.
28. Moreover, the Applicant on more than one occasion confirmed to him orally that she did not retain or have any interest in 193. The Respondent was again led to believe that this was on account of his inheritance. Whilst the Applicant had an active role in managing 193 the properties until her imprisonment, it was always understood that she was doing so on the Respondent's behalf, in effect as his agent.

Legal analysis and conclusion

29. The starting point is that the beneficial interest in the properties mirrors the legal interest, and the burden is on the Applicant to establish that that the beneficial ownership of the Flats and 193 is different from the legal ownership by showing that the intention of the parties was to that effect. In light of the recent case of *Marr v Collie* [2018] AC 631 it appears that the test is the same whether the properties were purchased in a domestic case or, as here, as an investment.
30. In *Gancy Holdings (PTC) SA v Khan* [2018] UKPC 21, Lord Briggs stated as follows:
'It is convenient to begin with a re-statement of the basic principles by which equity (which in this respect is shared by England and Wales and the British Virgin Islands) provides for identification of beneficial interests arising from a gratuitous transfer of property. First, if either the transferor or transferee makes a written (or oral) declaration as to those beneficial interests, or they do so together in an agreed form, they will generally be decisive, regardless of the subjective intentions of either of them: see for example Whitlock v Moree [2017] UKPC 44. Secondly, and in default of any such declaration, the court looks for evidence from which a common intention as to beneficial ownership may be inferred. Finally, recourse may be had to time honoured presumptions, such as the presumption of advancement or presumed resulting trust, where there is really no evidence from which an inference of common intention may properly be drawn. But these are, in modern times, a last resort, now that historic restrictions on the admissibility of evidence have been removed, and the

forensic tools for the ascertainment and weighing of evidence are more readily available to the court.'

31. Mr Phillips submitted, in my judgment correctly, that both in respect of the Flats and 193, although the transfer of the properties was for no consideration, the Respondent took on considerable financial liabilities. In relation to the Flats, it is also very clear that the Respondent's own monies were used in part to fund the purchase of the property.
32. In relation to the Flats, he submitted, the declaration of trust is conclusive. Any presumption which might arise because of the failure to give consideration for the transfer is rebutted by the declaration, which is of itself clear proof that the Applicant did intend the Respondent to take the Flats as beneficial owner. The declaration is also consistent with the various emails before the declaration was executed to the effect that the Applicant held the Flats on trust for the Respondent.
33. Finally, and in any event, Mr Phillips submits that reliance can be placed on the presumption of advancement as between mother and son (see *Close Invoice Finance Ltd v Abaowa and others* [2010] EWHC 1920 and *Thandi v Sands* [2014] EWHC 2378) both in relation to the Flats and 193.
34. Mr Phillips accepted that the position relating to the purchase costs of 193 is less clear: there is no evidence as to where the money for the purchase came from. Nonetheless, on the transfer to the Respondent, he took over the mortgage and paid off his mother's debts. He remains liable to repay the capital on the mortgage (the interest is off set by the rents, largely if not entirely).
35. I accept the evidence given by the Respondent as to the discussions he had with the Applicant prior to and after the purchase of 193.
36. It seems to me, taking all the evidence before me, that there is no basis to depart from the starting point, namely that the beneficial ownership in both the Flats and 193 follows the legal ownership. The position is, in my judgement, put beyond doubt in relation to the Flats in view of the declaration of trust. So far as 193 is concerned, taking together the evidence of intention as given by the Respondent, the financial obligations he has incurred, and the presumption of advancement, I am again satisfied that the Applicant has no beneficial interest in this property.

Costs

37. The Respondent has submitted a costs schedule dated 5 July seeking a total sum of £15,681.60. The Applicant may make such representations or raise such objections as she deems appropriate and serve the same on the Applicant and the Tribunal by no later than 25 July 2019.

BY ORDER OF THE TRIBUNAL

Ann McAllister

Dated this 10th day of July 2019

