

**Neutral Citation Number: [2014] EWHC 2887 (Fam)**

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice

Wednesday, 19<sup>th</sup> March 2014

Before:

MR. JUSTICE COLERIDGE

(In Private)

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B E T W E E N :

AM      Applicant  
- and -  
SS      Respondent  
- and -  
WS      Intervenor

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Official Court Reporters and Audio Transcribers  
One Quality Court, Chancery Lane, London WC2A 1HR  
Tel: 020 7831 5627 Fax: 020 7831 7737  
[info@beverleynunnery.com](mailto:info@beverleynunnery.com)*

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MR. S. CALHAEM (instructed by Vardags) appeared on behalf of the Applicant.

MR. S. WEBSTER (instructed by Levison Meltzer Pigott) appeared on behalf of the Respondent.

MR. M. BRADLEY (instructed by Withers LLP) appeared on behalf of the Intervenor

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**J U D G M E N T**

MR. JUSTICE COLERIDGE:

- 1 The first part of this hearing has been concerned with preliminary questions relating to the ownership and beneficial interest of the parties in three properties. Two of them are in this country and one is in Cairo. In England the two properties are the St John's Wood property, which has an agreed value of £5.36 million. Then there is a property in the Acton property, which is valued at £1.25 million, and is the present home of the Intervenor. The property in Egypt is known as the Cairo property, with an agreed value of approximately £3 million.
- 2 I have had numerous statements from the parties including the Intervenor and, the husband's father (and very much the *paterfamilias* of this extended family) the husband being one of his 10 children. I have also heard oral evidence from all the parties, and indeed from the husband's father by video link from Turkey.
- 3 In relation to each of the properties, the parties' positions are these. The wife maintains that in relation to each of the properties the husband is at least the beneficial owner of all three; that in relation to the St John's Wood property and the Cairo property, both she and her husband were given them as part of a generous wedding gift by the husband's father, either at the wedding itself or shortly thereafter. Accordingly, she says that gift should be recognised in these proceedings. So far as the Acton property is concerned, the property is indeed in the husband's sole name, she says, and he has accordingly both the legal and ultimately the beneficial interest in that property - subject perhaps to the Intervenor's right to occupy it while her children are growing up.
- 4 The husband's case, supported by his father, is that the husband has no beneficial interest in any of the properties; that the St John's Wood property and the Cairo property have at all times been the husband's father's property, and the father has never given them to anyone or even purported to do so. So far as the Acton property is concerned, the husband's case, the Intervenor's case and the husband's father's case is that the property is beneficially owned by the Intervenor and has always been her property beneficially.
- 5 I can deal with the St John's Wood and Cairo properties quite shortly.

The St John's Wood property

So far as the St John's Wood property is concerned it is part and parcel of a greater property. That larger property was bought by the father in 1978 and, as I say, the St John's Wood property is on the same title. The St John's Wood property was originally the garage, or possibly the Mews House, to the principal very substantial property. In 2005 this building was converted for residential use and was and is used by various members of the husband's

family when they come to stay in England. It is available for use by a number of members of the family.

- 6 At a previous hearing in this case some four years ago in relation to jurisdictional issues, (and whether or not it was proper for the parties' child to be returned summarily to Egypt) I heard evidence from other members of the family (in particular one of the sister's of the husband) and I made a finding that this property was not used exclusively by the husband and wife but was indeed used by other members of the family.
- 7 The title to the property is in fact in a BVI company known as T Limited. T Limited was a company registered in 2003 and has been the registered owner of the larger property since 2005. The entire shareholding of T was transferred to a Liechtenstein establishment, an Anstalt, known as the. This took place in January 2006 - some 18 months before the parties' marriage. S is a foundation of which the husband's father is and always has been the sole beneficiary, and the husband's father, on the video link yesterday, was adamant about that. In short, therefore, both the properties (the larger and smaller properties) are owned ultimately for the husband's father's benefit.
- 8 To be fair to the wife, she does not, now at this stage, any longer dispute that. In her recent pleading she says, "I now understand that the legal title for the St John's Wood property was never extracted from the father's property." The wife, however, says that this property was given to the parties and she gives a number of factual and evidential scenarios for when that gift took place.
- 9 I was not, I have to say, impressed by her evidence in this regard. It has changed from time to time and she is not wholly clear as to when this gift is said to have taken place. She is very short on any kind of detail which, it seems to me, is vital to enable her to establish that this extremely valuable property was given to her and the husband. At the end of the day, I am satisfied that there is no cogent evidence to displace the primary evidence that this property is and always was the father's property and so I find and rule.

#### The Cairo property

- 10 Again, the primary position is very clear indeed. This was indeed a property that was used by the parties as a home when they lived in Egypt prior, in particular, to the wife coming to this country with her daughter at the time of the break-up of the marriage. The property was again bought by the husband's father as his home in May 2004, some three-and-a-half years before the parties were married. There is clear evidence to support that.
- 11 The wife, again to be fair to her, does not suggest that the father did not buy this property. Indeed, in order for her to assert that it was a gift, she has, of course, to first of all accept that it belonged to the husband's father so as to

enable him to give it away. However, once again she says that the properties were given to both the husband and herself, either on their engagement, or wedding or shortly thereafter. Accordingly, that gift should be recognised.

- 12 Once again I find her evidence on this aspect of the case thin and inconsistent, and again nowhere near sufficient, it seems to me, to displace the basic legal position, which was and is accepted to be that the property belonged in every sense to the husband's father. Accordingly, also I have no hesitation in finding that the Cairo property is and remains the property of the husband's father.

#### 16 Friary Road.

- 13 There is very little real dispute about the surrounding facts and circumstances in relation to the purchase of this property. The property, it is agreed, was bought in the husband's name and one of the motives and reasons for that was that the Intervenor and her father were not at the time on very good terms - apparently, according to the Intervenor, because her father did not approve of her choice of husband.
- 14 The following is agreed so far as the purchase is concerned. The property was found by the Intervenor and her husband. The particulars for the property were sent by the Intervenor to her brother, the husband, and there is no doubt that all the money for the purchase price emanated from the husband's father. Following on from the purchase, which was taken in the name of the husband, the Intervenor wrote a letter to her father (whether it was ever sent or not is not entirely clear) but it plainly seems to indicate a very considerable sense of gratitude for the father's generosity in providing her with this property.
- 15 Furthermore, she was responsible for having the property substantially refurbished and for overseeing the works done to the property after the purchase. There are communications indicating, in relation to the purchase of fixtures and fittings, that it was she who was the one who approved the list.
- 16 Since the property was purchased the Intervenor has been responsible for the outgoing on the property. Significantly, in my judgment, when the Intervenor returned to live in Egypt for a few years she rented out the property and kept the rent throughout that time. That seems to me to be only consistent with everyone accepting that she had a very considerable interest in the capital value of this property one way or another.
- 17 Since her return to this country, I think in 2009, she has resumed living there with her family and in every sense has been responsible for the upkeep of the house.
- 18 Much criticism is made of the fact that when these proceedings were in their early stages and Forms E were produced, the husband failed to reveal on his

Form E the existence of this property. Mr. Calhaem, on behalf of the wife, is entitled to complain about that. However, I am satisfied with the husband's explanation that the reason it did not appear on his Form E at the time was that - and I use his own expression - it did not dawn on him that he had any interest in that property which would be of interest to this court or which constituted provided any value to him.

- 19 The only real evidence to the contrary about this property is that the wife says that she recollects her husband referring to this property as his and that this was part of his "retirement plan". Again, her evidence is somewhat vague in relation to this. The husband denies he ever said such a thing and the conclusion I have come to is that it is unlikely that this particular man with his background of a family with massive wealth, would be discussing anything so mundane as a retirement plan.
- 20 That is the factual position so far as this property is concerned. As I say, there is no real dispute as to what has actually gone on in relation to the property. The issue is as to what legal construction should now be put on the evidence and facts.
- 21 As I say, there is no dispute that the money emanated from the husband's father and that the property was chosen by the sister. But was he holding the property for his sister qua beneficiary or merely as a trustee for her use in some more vague sense whilst a roof was required over the head of the children? There is no doubt that the purpose was to provide a secure roof over her head and it may well have been motivated as well by a wish to keep it away from her own husband's hands in relation to some potential claim if the marriage came to an end. However, says, the wife, the beneficial interest in a strict sense never shifted from the husband.
- 22 Unsurprisingly I have been referred to many of the recent cases on resulting and constructive trusts. They mostly concern the situation where the court is being asked to recognise a beneficial interest created in favour of a claimant who has been a partner of the legal owner, but who has contributed money directly or indirectly to its purchase or improvement or where there is a discernible common intention from the words or conduct in relation to the property which the claimant has and it is intended to have such share or interest in it.
- 23 The cases are now very well-known and have arisen in circumstances, as I say, almost always involving what in the vernacular is described as TOLATA claims. The cases are *Lloyds Bank v Rossett* [1990], *Oxley v Hiscock* [2004], *Stack v Dowden* [2007], *Kernott v Jones* [2011] - and they are all helpfully contained in the bundles of authorities which counsel has provided to the court.

- 24 All of them deal with the different circumstances which can give rise to a constructive trust - that is to say where a court can construe a trust from the surrounding facts and circumstances, and where it would, in the end, be inequitable or unconscionable to proceed only on the basis of the strict legal interest. Of course, necessarily, the facts and circumstances that give rise to these trusts differ hugely, and it seems to me the court must always be flexible to absorb the various different potential factual scenarios and be astute to discern unconscionable behaviour.
- 25 I have, in this regard, been especially reminded by Mr. Bradley, on behalf of the Intervenor, of the case of *De Bruyne v De Bruyne* [2010] 2 FLR 1240 where the court dealt with a range of different situations in which equity holds the transferee of the property to the terms on which the property was acquired by imposing a constructive trust to that effect. I quote from part of the judgments in that case.

“49. The authorities dealing with common intention constructive trusts provide only one example of a situation in which equity will impose a trust upon the owner or transferee of property based on the circumstances in which the property is acquired or dealt with. For a trust to be created the court has to be satisfied that it would be unconscionable for the legal owner to assert his legal interest in the property to the exclusion of the alleged beneficiaries...”

Then going on to paragraph 51:

“51. There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely in any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only

basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to *inter vivos* transactions as it does to wills...”

Then two old, but well trusted cases are cited - *Rochefoucauld v Boustead* [1897] and *Bannister v Bannister* [1948] 2.

- 26 Having reviewed all the facts and circumstances surrounding the provision of the purchase monies in this case, and the subsequent dealings in the property by the various parties and witnesses in this case, it seems to me this situation precisely fits the analysis in *De Bruyne v De Bruyne*.
- 27 So where does that leave the court here? As I say, given the evidence about the derivation of the purchase price and the express understanding as to why the property was being placed into the husband’s name, it would be wholly unconscionable to allow the husband to assert that it was his property beneficially, and of course he does not for one moment do so. All the surrounding evidence, it seems to me, points in one direction.
- 28 It seems to me to matter not that this mechanism may have been chosen in the misguided belief that it might afford the wife some protection from a potential claim from her husband; such a claim is not even in prospect as a matter of reality. Such a mechanism is a popular misconception, but it does not alter, in my judgment, the underlying factual and legal situation.
- 29 Accordingly, I find that the husband holds the beneficial interest in this property at the Acton property for his sister, the Intervenor, and she could, if she chose to do so, call for it to be transferred to her. However, she may choose to leave the present arrangement in place because of the wider family issues and pressures.
- 30 Those are the three findings I make in relation to these three properties.
- 31 But I ask myself are there any other features of the parties’ past or present use of these properties which potentially might impact on the disposal of this claim by the wife. I think there is one important one. The husband does continue to have unrestricted use, both of the St John’s Wood property when he is in London and especially when he is here to see his daughter. Similarly, he has unrestricted use of the Cairo property when he needs it. Both properties are attractive and self-evidently very valuable. It seems to me they meet fully the husband’s housing requirements. To that extent he has no need for other housing, it seems to me at present, certainly in the foreseeable future. That is a valuable resource to him and quite apart from any other benefits which may or may not accrue to him from being the eldest son of an acknowledged very rich man.

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