

STONE BUILDINGS NEWS

Lincoln's Inn

> Introduction



Members of Chambers have enjoyed busy Michaelmas and Lent terms. Before Christmas, the private client work of 5 Stone Buildings was recognised at the High Net Worth awards, with particular distinction awarded to both Emma Chamberlain and Shân Warnock-Smith QC. Mark Herbert QC joins Launcelot Henderson QC in sitting as a Deputy High Court Judge and Karen Walden-Smith has been appointed a Recorder. Our new tenants, Karen Hepworth and Joseph Goldsmith, have embraced all aspects of Chancery work undertaken by Chambers. Further news of members follows on the back page and our new website will be available very soon at 5sblaw.com

Articles in this newsletter discuss the determination of beneficial interests in the quasi-matrimonial property, and the residual benefits of *Benjamin* orders.

Establishing a beneficial interest

Oxley v Hiscock [2004] 3 WLR 715 (relied upon in both *Cox v Jones* [2004] EWCH 1486 and *Humphreys v Humphreys* [2004] EWHC 2201) has now been analysed by a differently constituted Court of Appeal in *Lightfoot v Lightfoot-Brown* [2005] EWCA Civ 201.

Oxley v Hiscock provides a welcome explanation of the development of the law relating to constructive trusts, but highlights the difficulties in calculating the size of beneficial shares with any certainty in the absence of express discussions between the parties. In following *Oxley v Hiscock*, the court is obliged to consider what is “fair” having regard to the whole course of conduct between the parties. It is suggested that this assessment comes close to the “palm-tree justice” otherwise reviled by Chadwick LJ and described by Dillon LJ in *Springette v Defoe* [1992] 2 FLR 388 when he said that “*the court does not as yet sit, as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair.*”

What *Oxley v Hiscock* does not do, however, is to extend the circumstances in which a common intention constructive trust arises. This interpretation of *Oxley v Hiscock* has been affirmed by the Court of Appeal in *Lightfoot v Lightfoot-Brown* where Arden LJ, with whom Auld LJ and Wilson J agreed, held that “*it is in my judgment quite clear that Chadwick LJ did not dispense with the requirement for communication of the common intention when determining whether a common intention constructive trust had arisen. Indeed, the concept of communication of common intention has much in common with the manifestation of intention. An intention to share a beneficial interest in property has to be manifested to give rise to a rival obligation.*”

The facts of *Oxley v Hiscock* were not unusual. The quasi-matrimonial home was purchased with the unequal contributions of Mrs Oxley and Mr Hiscock and registered in the sole name of Mr Hiscock. After the acquisition, both Mrs Oxley and Mr Hiscock contributed to the maintenance and improvement of the property from their pooled resources in the belief that they each had a beneficial interest. The judge concluded that while there had been no express agreement between the parties, they had evinced an intention to share the benefit and burden jointly and equally and that each was therefore entitled to a half share in the proceeds of sale.

Mr Hiscock appealed on the basis of *Springette v Defoe* that, as there had been no discussion between the parties as to the extent of the beneficial shares at the time of the purchase, the presumption of a resulting trust had not been displaced and he was therefore entitled to a share in proportion to his original contribution. Chadwick LJ, with whom Mance and Scott-Baker LJ agreed, used this case as an opportunity to give a detailed and helpful exposition of the development of the law relating to constructive trusts.

The starting point of the judgment is the reference to the underlying requirement that no interest in land can be created orally and no declaration of trust respecting land can have effect if made orally (s. 53(1) of the LPA 1925). That requirement of formality is excluded in the creation or operation of resulting, implied or constructive trusts (s. 53(2) of the LPA 1925) and it is for that reason that many former co-habitees have relied upon the establishment of a constructive trust to obtain an interest in the proceeds of sale of the former quasi-matrimonial home. Chadwick LJ referred to the analysis of the constructive trust set out by Nourse LJ in *Grant v Edwards* [1986] Ch 638, following *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886 “...where there has been no written declaration or agreement, nor any direct ►►



« provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted upon by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it... the fundamental, and invariably the most difficult, question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively.”

Consequently, in order for there to be the imposition of a constructive trust, there must first be a common intention, either expressly reached or inferred, which common intention is relied upon to the detriment of the party not named on the legal title. Such common intention is often inferred from payments made towards the cost of acquisition. With respect to this first question, **Oxley v Hiscock** changes nothing: “... the first question is whether there is evidence from which to infer a common intention, communicated by each to the other, that each shall have a beneficial share in the property” (per Chadwick LJ).

The importance of **Oxley v Hiscock** lies with the secondary, or consequential, question; that is, what is the extent of the interest once the constructive trust is established, and it is only in this respect that Chadwick LJ held the need for communication to be unnecessary (per Arden LJ in **Lightfoot**). Referring to the decision of Nourse LJ in **Stokes v Anderson** [1991] 1 FLR 391, Chadwick LJ held that “the court may well have to supply the answer to that secondary question by inference from the parties’ subsequent conduct.”

In doubting whether **Springette v Defoe** was correctly decided, given the state of the law in 1992, Chadwick LJ referred both to **Midland Bank plc v Cooke** [1995] 4 All ER 562 (in which Waite LJ referred to “equity’s assistance in formulating a fair presumed basis for the sharing of the beneficial title”) and **Drake v Whipp** [1996] 1 FLR 826 (in which Peter Gibson LJ stated “in constructive trust cases the court can adopt a broad brush approach to determining the parties’ respective shares” and “...I would approach the matter more broadly, looking at the parties’ entire course of conduct together”).

Chadwick LJ concluded that where there was no discussion between the parties as to the extent

of the share “...the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property.” Chadwick LJ recognises that this assessment is not easily reconciled with a traditional, property-based approach, but observes that once it is determined that what the court is doing is to impute a common intention as to the respective shares, then there is no difference between constructive trusts and proprietary estoppel: a view seemingly shared by Sir Nicholas Browne-Wilkinson VC in **Grant v Edwards**, Nourse LJ in **Stokes v Anderson** and Robert Walker LJ in **Yaxley v Gotts** [2000] Ch 162.

As **Lightfoot v Lightfoot-Brown** determines, **Oxley v Hiscock** has not changed the law with respect to the creation of constructive trusts, but it does make it more difficult to advise with certainty as to the extent of the beneficial interests created.

The decision in **Oxley v Hiscock** creates fertile ground for future arguments about shares in property between formerly co-habiting couples, and between the lawyers representing them.

Karen Walden-Smith



Speaking Events Seminars

13-6-05 & 30-9-05

Karen Walden-Smith

will be lecturing in Birmingham and Liverpool to the Property Bar Association on issues of undue influence

16-6-05

Chris Whitehouse and Emma Chamberlain

will be lecturing at the Chartered Institute of Taxation on pre-owned asset issues

Benjamin orders: a useful last resort?

In an age when the internet has brought many strange and unlooked-for identifications* and reunions at long distances of time and place, one might think that a Benjamin order was forgotten and redundant Victorian legal clutter.

In *Re Benjamin* [1902] 1 Ch 723, one of the testator's children had gone missing whilst supposedly returning to London from Aix-la-Chapelle in September 1892. Ten years later the court gave the testator's executors permission to distribute the estate on the footing that the missing son had predeceased him, without attempting to resolve the mystery of his disappearance or calculate his prospects of survival. But a hundred or so years later, applying for a *Benjamin* order may still be a useful last resort for executors otherwise unable to wind up an estate. I have recently acted in a case which illustrates this well.

The testator died in 1974, leaving a life interest to his wife, with the remainder to his son if his son survived him or left children of his own who would take instead. The testator had a son who, if still living, is now in his late 50s.

The testator's widow long outlived him, but even before her death the testator's daughter started to make enquiries to trace her brother, who had last been seen by his wife in New Zealand in the late 1970s. The testator's son told his wife he was leaving for the UK and gave her the impression that he wanted to lose contact with his entire family, and effectively disappear from their lives. Exhaustive enquiries in registers and records in the UK and in New Zealand made both by the sister and by probate genealogists failed to yield any positive identification either of the testator's son or of any children he might have had. The two leading providers of missing beneficiary insurance both declined cover, citing the size of the estate, the age of the son and his close blood relationship to the testator as reasons for regarding the risk as unacceptable.

Different considerations must influence the court in deciding whether or not to order the estate to be distributed on the footing that the son has both died and left no living children. If the court is satisfied that every reasonable step has been taken to try and identify the missing beneficiary (and probate genealogy, like missing beneficiary insurance, was not a feature

of 19C estate administration) and the evidence suggests that it is improbable that any legitimate beneficiary will ever come forward, then an order should be made. Also, unlike an insurer, where there remains a theoretical possibility of beneficiaries appearing despite their long absence, the court will consider whether it is just that distribution in favour of known beneficiaries who would take instead of the missing beneficiary should be delayed. Where, as in this case, there are known, living beneficiaries who would take, and there is no question of bona vacantia or further research into ever remoter family connections, the answer to the "is it just" question seems obvious. Also, the court may well be prepared to deal with the application on paper in accordance with the new Practice Direction 64B, making justice both more effective and possibly less expensive than insurance in some cases.

* A notorious but entertaining example being a woman in New York who typed the name of a man she was meeting for a blind date into Google, discovered that he was wanted for fraud in another US state and greeted him at a cocktail bar accompanied by some FBI agents and a pair of handcuffs.

Barbara Rich

16-6-05

Patrick Rolfe and Karen Walden-Smith
will be speaking to solicitors about the insolvent tenant

14-7-05

Chris Whitehouse and Emma Chamberlain
will be lecturing with Lexis Nexis for High Net Worth Clients

15-7-05

Chris Whitehouse and Emma Chamberlain
will be lecturing on the Finance Act

7-9-05

Patrick Rolfe and Karen Walden-Smith
will be speaking to solicitors about restrictive covenants



Members' News

Henry Harrod has been giving advice recently on matters ranging from conflict of laws rules in Norway to conditional contracts for sale of development land in Lancashire.

Shân Warnock-Smith QC has been speaking at the STEP Caribbean Conference in Miami and advising trustees in a number of trust disputes with international dimensions. **Chris Whitehouse** continues to co-edit *Dymond's Capital Taxes* with Emma Chamberlain, and to advise in capital tax planning issues. **Mark Herbert QC** spent three days in Manchester arguing a case about the rule in *Hastings-Bass* and has been involved in two all-day conferences for CLT and STEP Sussex branch. **Mark Blackett-Ord** has been advising several solicitors on their partnership difficulties, including a partner in a firm in Azerbaijan. **Martin Farber** represented Naomi Campbell in the House of Lords in the important costs litigation *Campbell v MGN*.

Andrew Simmonds QC led Barbara Rich in a case with respect to the Merchant Navy Pension Scheme, led Henry Legge in an actuaries negligence case, and in June he will be acting in a preliminary hearing in a new class action against Equitable Life. **Penelope Reed** has been in the Court of Appeal in *Drew v Daniel*, a decision on actual undue influence.

Christopher Tidmarsh QC has been advising the

Institute of Actuaries in relation to professional guidance and has also been advising on aspects of the pension schemes – particularly on the implications of the Pensions Act 2004.

Michael O'Sullivan had an article published in the ACTAPS newsletter and was part of the team at the CLT Trust Conference where he spoke on trusts and professional negligence. **Emma Chamberlain** is co-author of the recently published book on Pre-Owned Assets Income Tax. She has become chair of the Chartered Institute of Taxation Capital Taxes Sub-Committee and is busy dealing with capital tax planning issues following the introduction of pre-owned assets income tax. **Patrick Rolfe** has been advising indemnity insurers with respect to a number of mortgage transactions. **Barbara Rich** has been busy with both contentious trusts and estates and pensions matters, appearing in *Lewis v Pensions Ombudsman* and as junior counsel in the Merchant Navy Officers' Pension Fund litigation. **Karen Walden-Smith** has been involved in a number of restrictive covenant cases including *University of East London v London Borough of Barking and London Borough of Redbridge*, now reported in the Property and Compensation Reports. **Tracey Angus** has been involved in family provision trials in the Chancery Division as well as in applications in

the Court of Protection. She also took part in the CLT Trust Conference. **Henry Legge** was led by Andrew Simmonds QC in an actuaries negligence case. **David Rees** has recently appeared in the Court of Appeal in *Turkey v Awadh & Turki* involving presumed undue influence, as well as continuing to appear regularly in the Court of Protection. **Anna Clarke's** recent work has included appearances in the Land Registry in Leicester, the Court of Protection, the Principal Registry (Probate), the Chancery Division of the High Court, and various County Courts. **Leon Sartin** has been acting in professional negligence claims involving tax, disputes involving trusts and estates and giving private client advice. **Sarah Haren** has been treading boundaries in Hastings and fighting about veneers in Milton Keynes and curry-houses in Edmonton. Sarah also spoke on conflicts of law and trusts at the CLT Trusts Seminar. **Thomas Entwistle** has appeared in several VTA applications and has given a number of talks on tax planning and trusts. **Karen Hepworth**, one of our two new tenants, has happily settled into tenancy and continues to consolidate her practice in all of the areas in which Chambers accepts work. **Joseph Goldsmith**, our other new tenant, is developing a practice across a wide range of Chancery work.



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