A CASE-LAW UPDATE ON CONSTRUCTIVE TRUSTS AND PROPRIETARY ESTOPPEL

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At the time of writing, the Supreme Court decision on *Guest-v-Guest* is awaited. This is a farming proprietary estoppel case where the appeal will relate to how to fashion the remedy in such cases, particularly whether it should be expectation-based or not. One anticipates the decision will also have much to say about the concept and requirement of detriment generally. The hearing itself was completed in December, 2021, and the anticipated timescale for judgment was 6-9 months thereafter. Although primarily concerned with testamentary capacity, the outstanding appeal of *Guest* was noted *in Hughes-v-Pritchard* [2022] EWCA Civ 386 where an additional question of proprietary estoppel had to be remitted to enable the judge to reconsider issues of detriment because his initial reasoning had been *"superficial"* with insufficient consideration of the advantages enjoyed and *"no proper assessment of unconscionability."* As considered below, is 2022 to be the year of unconscionability?

The concept of detriment within constructive trust cases featured recently in *Hudson-v-Hathway* [2022] EWHC 631 where it was argued that detriment did not need to be established at least in joint name property cases. *O'Neill-v-Alexander* [2020] EWCA Civ 1583 had, on its own facts, previously rejected the argument that there was no need to establish detriment. *O'Neill* reiterated the need for there to be a causal connection between the detriment and the common intention.

Hudson was a post-separation ambulatory trust argument where Ms Hathway was seeking to recover a greater share than the original 50/50 split. Whilst Mr Hudson's argument that she had not established detrimental reliance initially succeeded on the first appeal, it was rejected by Kerr J. who found detrimental reliance was not necessary in a joint names ambulatory trust in a domestic consumer context. His reasoning may be summarised as:-

- the need for detriment was not referred to in *Stack v Dowden* [2007] 2 AC 432 and in *Jones v Kernott* [2012] 1 AC 776 and he rejected the notion that this was an oversight.
- At [70] where there is a clear express agreement then the question of detriment tends to merge with the agreement itself.
- At [79-80] the detriment may be supplied by the agreement itself.
- There is the suggestion (at least made in submissions -see [95]) that where there is an informal oral agreement, as here and in a domestic context, then the hurdle for detriment is low.

Whilst *Hudson* must be viewed specifically within a joint names domestic consumer context (and Kerr J. was quite specific that different considerations may apply to sole name constructive trust cases), it does raise the element of unconscionability becoming the tail that wags the evidential dog for establishing a constructive trust; for example, Kerr J. states:-

66. It does not follow that the manner in which a constructive trust is established and the kind of evidence that the court will require for it to be established, is necessarily the same in a sole name case and a joint names case. If it were, I agree with Mr Horton that the Supreme Court would be likely to have said so. It is consistent with principle for the law to permit a constructive trust to be established by whatever evidence is necessary to show that it would be unconscionable for the party denying the equitable interest to do so.

67. I remind myself that the issue is always ultimately one of unconscionability, in the broadest sense. The question in each case or each kind of case is what factors and what kind of evidence will satisfy, or not satisfy, the requirement of unconscionability, i.e. persuade the court that the party denying the equitable interest is not permitted to do so. The Supreme Court answered that question in Jones v. Kernott, for cases of the kind they were considering, in the manner I have quoted, at [51]. The present case is of the same kind.

Does the shade of Lord Denning walk once more along the ways of equity? Will everything else flow from a finding of unconscionability?

Given the proximity of the doctrines of constructive trust and proprietary estoppel, it is not difficult to see how the latter may be affected by *Hudson*, particularly where there is an express informal agreement. The domestic consumer context setting will not be a bar to proprietary estoppel cases given the inappropriateness of that doctrine to commercial/contractual contexts post *Cobbe-v-Yeoman's Row Management Ltd* [2008] UKHL 55. Pending the Guest decision, the demotion of the requirement of detriment also renders the remedy for estoppel more uncertain, more expectation-based as per the agreement, if there is no detriment to be considered.

The elasticity between domestic consumer settings and more commercial ones has been conventionally illustrated by constructive trusts applying to the former and resulting trusts to the latter: see *Laskar -v-Laskar* [2008] EWCA Civ 347. But there are a number of authorities to suggest that a constructive trust may arise in a commercial context; for example:-

- *Klahrmann-v-Harrison-Morgan* [2019] EWCA Civ 2094 was where the parties had agreed to hold the freehold, once acquired, in equal shares. Said to be an intermediate case as the house had been Dr K's home. Lewin on Trusts at 10-064 applied.
- *Ravendark Holdings Ltd-v-Rotenbery* [2021] EWCA Civ 1429
- *Oberman-v-Collins* [2020] EWHC 3533
- BUT see *Akinola-v-Oyadore* [2020] EWHC 2038 (Ch) where, applying *Laskar*, that the law as it stands requires a different approach to the question of whether a constructive trust exists as between domestic and commercial situations. As per *Geary v Rankine* [2010] EWCA Civ 555 the burden of establishing a "common intention" constructive trust is all the more difficult to establish where the property was bought as an investment rather than as a home.

Other recent-ish cases on detrimental reliance are:-

- *Hussain-v-Hussain* [2021] EWHC 1954, recognised that detriment may be established by the transfer of the legal title in reliance of any agreement

- Similarly in *Archibald-v-Alexander* [2020] EWHC 1621 where one sibling unsuccessfully established a 100% beneficial interest against the other two where the latter's detriment was to stand by and to permit their sister to be the legal owner. That case also distinguished between imposing a constructive trust (1) pursuant to an informal promise/intention of having a beneficial interest where detrimental reliance is required; and (2) where a gratuitous transfer on terms is involved where unconscionability is needed (the beneficiaries may be unaware of their rights).
- *Pickering-v-Hughes* [2021] EWHC 1672.

Finally, what if the express declaration within the TR1 has not been completed? In *Ralph-v-Ralph* [2021] EWCA Civ 1106 the appeal overturned two previous decisions allowing rectification of a TR1 containing an declaration of joint ownership in Box 11 on the ground of common mistake. The TR1 had been signed by the transferor but not the transferees. On appeal, the High Court considered the cross should be removed from Box 11. The Court of Appeal held that the TR1 could not be rectified on the facts of the case because the Trial Judge had not found a *"continuing common intention"* for the TR1 to contain no declaration of beneficial ownership, but only an absence of agreement or indeed discussions between the purchasers as to such ownership. Drawing a distinction between the absence of agreement and an actual agreement, Sir Geoffrey Vos (with whom LLJs Peter Jackson and Popplewell agreed) found that "no agreement" could not be equated with "an agreement" for the purposes of rectification even if, by deduction, this was the correct legal analysis of the parties' failure to agree, as:-

"The law does not make contracts for people unless they have … agreed to them or shown a continuing common intention as to the term or terms in issue."

The Court of Appeal also doubted, but without hearing argument, on whether *Taylor v Taylor* (2017) was correctly decided. There, HHJ Matthews had held that it made no difference to the validity of the declaration of trust if the TR1 was signed by the transferor, but not by the transferees, because a properly completed TR1 could only be impeached on the grounds of fraud, undue influence, mistake or proprietary estoppel. Whilst *Ralph* may be limited to its own unusual facts (not least because mistake had not been pleaded), the Court of Appeal questioned whether the rectification principles, as applied to commercial transactions, also applied to TR1s.

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Law is correct as at 1st June 2022.