

Articles

EXPRESS DECLARATIONS OF TRUST, RECTIFICATION AND RESCISSION: GOODMAN V GALLANT REVISITED

ALEXANDER CHANDLER *Barrister, 1 Garden Court, Temple*

In *Goodman v Gallant* [1986] 1 FLR 513, the property was transferred into the parties' joint names with the signed declaration that they held the property, 'upon trust for themselves as joint tenants'. Some years later, Mrs Goodman and Mr Gallant separated: Mrs Goodman severed the joint tenancy and sought an inquiry and declaration into their beneficial shares; Mr Gallant asserted that their shares had been comprehensively declared as equal in the conveyance. The trial judge, and subsequently the Court of Appeal, agreed with Mr Gallant. Applying *Pettitt v Pettitt* [1970] AC 777, it was held that in the absence of a claim for rectification or rescission, the declaration conclusively and exhaustively declared their shares. On severing the joint tenancy, the outcome was a beneficial tenancy in common in equal shares:

'If . . . the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself.' (per Slade LJ at p 517)

'The overwhelming preponderance of authority . . . oblige us to hold that, in the absence of any claim for rectification or rescission, the provision in the conveyance declaring that the plaintiff and the defendant were to

hold the proceeds of sale of the property "upon trust for sale as joint tenants" concludes the question of the respective beneficial interests of the two parties in so far as that declaration of trust, on its true construction, exhaustively declares the beneficial interests.' (per Slade LJ at p 523)

GOODMAN v GALLANT CONSIDERED IN STACK v DOWDEN

In *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858, the conveyance contained a 'valid receipt' clause, whereby the survivor 'can give a valid receipt for capital money arising from a disposition of all or part of the property'. The Lords confirmed that this clause does not of itself amount to an express declaration of beneficial ownership (*Huntingford v Hobbs* [1993] 1 FLR 736). Accordingly, the court was able to declare the parties held the property in unequal shares (65:35), applying constructive trust principles. However, if the parties had instead declared that they held the property 'upon trust for themselves as joint tenants', that would have comprehensively declared their shares in the property and would have been determinative of the claim: 'No one thinks that such a declaration can be overturned, except in cases of fraud or mistake' (*Stack v Dowden*, per Baroness Hale of Richmond at para [67]).

EXPRESS DECLARATIONS OF TRUST WITHIN TRANSFER DEEDS

Prior to 1998, the standard Land Registry transfer form 19(JP) allowed the purchasers to 'declare that the survivor of them can/cannot give a valid receipt for capital money arising on a disposition of the land'. Although these words are consistent with the right of survivorship inherent in a joint tenancy, they do not in themselves amount to an express declaration of a beneficial joint tenancy see: *Huntingford v Hobbs; Stack v Dowden*, at para [51].

Since 1998, the transfer form TR1 has allowed the transferees/purchasers to confirm that they 'hold the property on trust for themselves as joint tenants', ie as a beneficial joint tenancy which, save for rescission or rectification, conclusively declares their beneficial interests. The trust will be enforceable provided it is in, 'writing signed by some person who is able to declare such trust' (Law of Property Act 1925 (LPA 1925), s 53(1)(b)). It is important, therefore, to confirm that the form TR1 was signed by the purchasers as well as the vendors.

OTHER DECLARATIONS

An express declaration of trust need not be contained in the transfer deed. There is no requirement for a deed, or even formal language, provided the terms of the trust are clear and set out in signed writing:

'Formal words are not required to create an express trust; any words evincing a clear intention to create a trust will suffice and the beneficial interests are determined with certainty as a matter of construction of the words used.' (*Cowcher v Cowcher* [1972] 1 WLR 425, per Bagnell J at 430; LPA 1925 s 53(1)(b))

Furthermore, the required formality of signed writing exists only for real property: other property such as funds in a bank account or a yacht can be subject to an oral express declaration of trust: *Paul v Constance* [1977] 1 WLR 527; *Rowe v Prance* [1999] 2 FLR 787.

RESCISSION AND RECTIFICATION

In the words of Buckley LJ in *Pink v Lawrence* (1978) 36 PCR 98 at 101:

'Once a trust has been effectively declared, it can only be got rid of either by rescinding the document containing the declaration of trust on the ground of fraud or mistake, or rectifying it in the appropriate manner to vary to delete the declaration of trust.'

Neither remedy is easily achieved. In *Tankel v Tankel* [1999] 1 FLR 676, Park J described rectification as 'a rather narrow remedy [which] must be carefully watched and jealously guarded'. Rectification is now covered by Sch 4 to the Land Registration Act 2002 and is defined as a correction of a mistake which prejudicially affects the title of a registered proprietor and can be sought either by way of court order or through the land registrar. No alteration should be made without the proprietor's consent unless:

- (a) he has by fraud or lack of proper care caused or substantially contributed to the mistake; or
- (b) it would for any other reason be unjust for the alteration not to be made.' (Land Registration Act 2002, Sch 4, para 3(2))

A claimant who seeks to go behind an express declaration of trust should plead rescission or rectification: *Wilson v Wilson* [1963] 1 WLR 601; *Singla v Brown* [2007] EWHC 405 (Ch), [2008] 2 FLR 125.

GROUND: FRAUD

Where property is obtained by the fraud of the defendant, he may be compelled to hold it as constructive trustee for the beneficiary. A defendant cannot rely on an express declaration of trust where it has been obtained by his own fraud:

'If the legal owner knows full well that the property was conveyed to him on trust for another, it is a fraud to deny it and accordingly parol evidence of the trust will be admitted.' (*TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, per Nicholas Mostyn QC (sitting as Deputy High Court Judge), at para [41])

In *Lazarus Estates v Beasley* [1956] 1 QB 702, at 712, Denning LJ commented: 'Fraud unravels everything. The court is careful not to find fraud unless it is distinctly

pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever'.

COMMON MISTAKE

Rectification or rescission is not normally available unless there is clear evidence that the mistake was common to all parties, typically, that one owner only had a nominal interest in the property. In *Singla v Brown* (above), the judge commented on the, 'high evidential burden of proving a common mistake for a rectification claim to succeed' (at para [23]). *Wilson* remains the leading case on express trusts and mistake. The parties were two Jamaican brothers the younger of whom made all the financial contributions and, as the court found, the brothers intended he should be the sole owner: the plaintiff's name was only used in order to obtain a mortgage. The conveyancing solicitor misunderstood the position and drew up a declaration that the parties held the property as 'joint tenants in equity'. The plaintiff subsequently severed the joint tenancy and sought a half share in the property. The court found in favour of the defendant and the deed was rectified.

Wilson was recently followed in *Abbey National plc v Stringer* [2006] EWCA Civ 338 (unreported) 7 April 2006, in which the claimants sought to realise their charge over a property owned by an illiterate Italian woman and her son. The woman asserted that her son's interest in the property had only arisen in order to satisfy the mortgagees and was to all intents nominal. The property had been purchased in their joint names without restrictions that would restrain dispositions of the property by the survivor. In 1989, the son entered into a commercial loan secured by way of a legal charge on the property, which both the son and mother signed. The business duly failed and the son was made bankrupt, leading to the claimant's claim to enforce the charge. The court accepted that mother and son intended that his involvement be purely nominal and should be rectified, and the charge was set aside having been procured by undue influence.

ARE THERE FURTHER GROUNDS BEYOND FRAUD AND MISTAKE?

While there is no reported case directly on the point (to the writer's knowledge), it is

conceivable that an express declaration of trust could be rectified or rescinded on other grounds, such as undue influence (actual or presumed) or unilateral mistake, in order to defeat unconscionable conduct. Undue influence was successfully raised as a defence to a claim by a bank to enforce security in *Royal Bank of Scotland v Etridge* (No 2) [2001] UKHL 44, [2001] 2 FLR 1364). In *Commissioner for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, the Court of Appeal noted that:

'in the case of unilateral mistake . . . rectification is not ordinarily appropriate. This follows from the ordinary rule that it is the objective intentions of the parties which determines the construction of the contract and not the subjective intention of one of them.' (per Stuart-Smith LJ, p 277)

However, where the plaintiff erroneously believed a document contained a particular term, the defendant had actual knowledge of the plaintiff's mistake and dishonestly failed to draw it to the plaintiff's attention, rectification was possible.

CAN AN EXPRESS TRUST BE VARIED BY AGREEMENT OR PROPRIETARY ESTOPPEL?

In *Stack v Dowden*, Baroness Hale gave two different formulations to the class of exceptions:

'No one thinks that such a declaration can be overturned, except in cases of fraud or mistake.' (at para [67])

'No one now doubts that such an express declaration of trust is conclusive unless varied by subsequent agreement or affected by proprietary estoppel see *Goodman v Gallant*.' (at para [49])

The first statement is uncontroversial. The second, however, is problematic: *Goodman v Gallant* does not establish that an express trust can be varied by 'agreement or affected by proprietary estoppel'. Co-owners can vary the terms of an express trust by entering into a further express declaration of trust in signed writing (LPA 1925, s 53(1)(b)). However, it is very doubtful that an oral agreement to vary the terms would be recognised or enforced by

the court. In express trust cases, the court is precluded from considering evidence of common intention: 'there is no room for the application of the doctrine of resulting implied or constructive trusts unless and until the conveyance is set aside or rectified' (*Goodman v Gallant*, at 517). While it is conceivable that an express trust could be varied by a subsequent proprietary estoppel (Baroness Hale, *Stack v Dowden*, para 49), authority for the proposition is lacking.

In *Clarke v Harlowe* [2005] EWHC 3062 (Ch), [2007] 1 FLR 1, the court expressed the opinion that:

'It is also clear from the passage from the judgment of Griffiths LJ in *Bernard v Josephs* that it is possible it is possible for the parties to agree to vary their beneficial interest after the acquisition of the house.' (at para [31])

However, when set in context, it would appear that this statement refers only to property owned without an express declaration of trust. *Clarke v Harlowe* and

Bernard v Josephs both confirm the general rule that in the absence of fraud or mistake, an express declaration of trust is conclusive (see *Clarke v Harlowe*, at para [30] and *Bernard v Josephs* [1982] 3 All ER 162, at 170).

COMPENSATORY PAYMENTS/EQUITABLE ACCOUNTING

Finally, in any claim, including one involving a beneficial joint tenancy, a co-owner can seek an account to compensate for monies paid, such as an occupation rent. It should be noted that, post *Stack*, and in respect of a 'domestic' property, regard should be had to ss 12–15 of the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) rather than the doctrine of equitable accounting (see *Murphy v Gooch* [2007] EWCA Civ 603, [2007] 2 FLR 934). In the ordinary course of events, it is open to the court to infer that a common intention that a duty to account is owed only after separation (*Wilcox v Tait* [2006] EWCA Civ 1867, [2007] 2 FLR 871).