Beyond dodgy: how to defend an intervener claim

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One of the rites of passage for the trainee lawyer is receiving a copy of *The Law Suit*. This eighteenth-century cartoon depicts two litigants contesting a cow ('Litigation') while a judge (who for the less observant is captioned 'Judge') looks on. The joke, such as it is, is that while the parties are in dispute, the cow is being milked by a fat and bewigged milkmaid ('Lawyer').

Had the cartoon depicted an intervener claim, there would be (at least) two parties pulling the cow's horns (for the purpose of this article, 'Husband' and 'Father') with the other party ('Wife') at the tail, and the cow's udders connected to an automatic milking system to ensure sufficient flow for the myriad of instructed lawyers. The cartoonist might even give the Wife a blindfold to illustrate the often asymmetrical nature of the hearing, ie:

(1) Father asserts that the Husband holds property on trust for his sole benefit.

(2) Father relies on a declaration of trust which was signed by Husband and Father (and witnessed by a family friend), and also discussions that took place between them. Father – enthusiastically supported by Husband – asserts that, save in cases of fraud or mistake, the signed declaration of trust speaks for itself and proves Father's interest (*Goodman v Gallant* [1986] Fam 106, [1986] 1 FLR 513; *Pankhania v Chandegra* [2012] EWCA Civ 1438).

(3) Wife objects to the Father's claim. She says she always understood these properties to be owned by the Husband. However, she cannot give direct evidence about the declaration of trust or the discussions relied upon, as she was not party to them.

(4) Her evidence may boil down to asserting that the Father's claim is just 'dodgy'; which is rarely an adequate defence, as Munby J (as he then was) commented in *A v A* [2007] EWHC 99 (Fam), [2007] 2 FLR 467 at [17]:

> "… a spouse who seeks to extend her claim for ancillary relief to assets which appear to be in the hands of someone other than her husband must identify, and by reference to established principle, some proper basis for doing so. The court cannot grant relief merely because the husband's arrangements appear to be artificial or even "dodgy".'

How in these circumstances can Father's claim be defended? This article suggests four points which should be borne in mind, beyond asserting that an intervener's claim is 'dodgy'.

Burden of proof

The first and obvious starting point is that an intervener claim involves a burden of proof. As it generally well known that:

> '… the task of the judge determining a dispute as to ownership between a spouse and a third party is, of course, completely different in nature from the familiar discretionary exercise between spouses. A dispute with a third party

> must be approached on exactly the same legal basis as if it were being determined in the Chancery Division' (*TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 at [34]).

Accordingly, directions should be given for the parties should fully plead their cases, with separate witness statement, and for there to be a separate trial of the preliminary issue (*TL v ML* at [36]).

It follows that the hearing of such a claim will be adversarial and not, as in financial remedies, 'quasi-inquisitorial' (*Parra v Parra* [2002] EWCA Civ 1886, [2003] 1 FLR 942 at [22]). The significance of which is explained by Lord Bingham in *The Business of Judging* at p 4:

> '… the judge . . . is not concerned with establishing the truth of what did or did not happen on a given occasion in the past but merely with deciding, as between adversaries, whether or not the party upon whom the burden of proof lies has discharged it to the required degree of probability.'

The burden of proof is on the party who asserts the existence of a trust of land (ie Father in the above example), to prove his case on the balance of probabilities (*Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 at [68]). If he fails to discharge the burden of proof, the intervention fails: there is no overarching duty of the court to consider the overall fairness of the outcome. As Lord Hoffman explained in *Re B (Care Proceedings: Standard of Proof)* [2008] UKHL 35, [2008] 2 FLR 141 at [2]:

> '… If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.'

Unreliability of oral evidence

The second point is that a burden of proof will rarely be capable of being discharged on uncorroborated oral evidence alone, ie in the absence of contemporaneous documentary evidence.

It has long been acknowledged in the commercial courts that human memory is fallible, and that it is difficult – if not impossible – to tell whether a witness is telling the truth based on uncorroborated oral testimony. In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, Robert Goff LJ commented at para [57]:

> '… Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, references to the witness' motives and to the overall probabilities can be of very great assistance to a Judge in ascertaining the truth.'

In *Gestmin SGPS, S.A. v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm), Leggatt J set out comprehensive guidance on the unreliability of oral evidence (paras [15]–[22]). A century of psychological research has demonstrated that memory is not a 'flashbulb' which fades over time; rather:

> '[17] . . . memories are fluid and malleable, being constantly rewritten whenever they are retrieved . . . External

> information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).'

The process of litigation subjects the memories of witnesses to powerful biases:

> '[20] . . . A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents . . . The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events
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> [22] In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length . . .'

In *Lachaux v Lachaux* [2017] EWHC 385 (Fam), [2017] FLR (forthcoming) and reported at [2017] Fam Law 589, a case involving a jurisdictional dispute with the United Arab Emirates, Mostyn J reviewed *Gestmin* and concluded the guidance is not confined to cases of commercial fraud but has wider application, and concluded that:

> '[37] . . . These wise words are surely of general application and are not confined to fraud cases (although this case includes allegations of fraud). It is certainly often difficult to tell whether a witness is telling the truth and I agree with the view of Mr Justice Bingham that the demeanour of a witness is not a reliable pointer to his or her honesty.'

Earlier in the judgment, Mostyn J had concluded:

> '[35] When making my findings about the disputed facts I have relied first on those contemporary documents which I am satisfied are authentic. I share the misgivings of Leggatt J [in *Gestmin*] in placing weighty reliance on carefully prepared "remembered" accounts of past events as expressed either in a witness statement or orally from the witness box.'

Accordingly, the court's enquiry should be based primarily on contemporaneous documentary evidence.

Proper scrutiny of documentary evidence

Thirdly, that documentary evidence should not be taken at face value, but should be 'properly scrutinised'. In *Arif v Anwar and Rehan* [2015] EWHC 124 (Fam); [2016] 1 FLR 359, Norris J concluded that he could place little reliance on the oral evidence or witness statements of the husband and intervener (in that case, the husband and his elder son, who claimed a 50% interest in the FMH):

> '[5] . . . This is not a case in which I can treat the oral evidence as the primary source of reliable material. The

> recollection of each party is significantly coloured by what each sees as his or her best interests.'

At para [43], Norris J considered the intervener's assertion an agreement had been reached that he should have a half-share in the property, and explained the need for appropriate scrutiny. In most cases this will be a matter of contention between the parties. However, in an intervener claim where one party cannot give direct evidence in relation to the document, it is "especially important" to remember the general policy of the law that interests in land are formally recorded, and any departure from that must be corroborated or 'soundly evidenced':

> '[43] . . . The effect of any such an agreement intended to have some legal effect is to make the registered title and the formal record of the beneficial ownership materially inaccurate . . . so in my judgment such an agreement must be established on the balance of probabilities by clear evidence that has survived appropriate scrutiny. In most cases that scrutiny will arise from the fact that the existence of the constructive trust or the estoppel will be a matter of contention between parties to the alleged agreement or understanding, whose respective cases will be tested at trial. But that is not so in every case. Where the issue as to the existence of the agreement or understanding is not (in reality) being argued out between the parties to it then it is especially important to remember that the general policy of the law is that interests in land should be formally recorded and formally transferred and that that policy would be defeated if interests in property could be readily transferred simply by conversations between parties interested in a particular outcome which are not corroborated or otherwise soundly evidenced.'

The legal basis of the defence?

Fourthly, how might a defence be put? The classic exceptions to a signed declaration of trust having conclusive effect are fraud and mistake. An alternative is to allege sham, the principles in which have been comprehensively rehearsed in *ND v SD and Others* [2017] EWHC 1507 (Fam), [2017] FLR (forthcoming), where Roberts J concluded

> '[184] . . . two headline points emerge at the outset: (i) there must be a dishonest intent before the court will find an instrument to be a sham, and (ii) where instruments or agreements are properly and formally drawn (i.e. "perfectly proper agreements on their face"), absent a dishonest intent, there is a strong presumption that the parties intend to honour their rights and obligations thereunder
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> [186] . . . The next headline point . . . before transactions or documents will be construed by the court as sham transactions, all the parties to them must share a common intention that the documents themselves will not create the legal rights and obligations which they give the appearance of creating.'

None of the above (fraud, mistake or sham) are easy to establish, especially in a case where the defending party (Wife) cannot give direct evidence about a document which might pre-date the marriage.

Is the declaration of trust ineffective?

Arif v Anwar (see above) might provide an effective answer to the legal conundrum presented by a signed declaration of trust. In that case, the husband and his son relied upon a 2001 signed declaration of trust:

> '[33] I can now turn to an analysis of the available material. The first main issue is: what is the effect of the 2001 Declaration? If it is an effective declaration of trust then its effect is conclusive and cannot be undone by anything that happened subsequently (short of a disclaimer by Raziz or the creation of some superior equitable obligation). The fact that the husband has acted inconsistently with it cannot undo its effect; though such acts might

> indicate that it was intended to be effective in the first place.'

The wife in that case alleged sham, but the court concluded that the declaration was ineffective:

> '[36] In truth I think the effect of the 2001 Declaration is resolved at a more fundamental level. In my judgment the 2001 Declaration was not an effective declaration of trust. I find that it was probably not intended to have immediate effect, was prepared in readiness for possible implementation, but was not implemented.
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> [100] . . . In creating the document the husband was "musing" about how he might dispose of his affairs at sometime in the future, not intending thereby immediately to dispose of them.'

Any examination of the effectiveness of a declaration of trust will be intensely fact specific. But at para [37], Norris J sets out eight reasons of differing weight ('none of which is in itself determinative') which in combination led to that conclusion: (a) including the form of the document ('… on business paper, with the signatures on a separate sheet, giving the wrong age for Raziz and the wrong name for the husband . . . raises doubts as to whether it was intended to be a document that was immediately legally effective rather than a record of something that might later be implemented formally'); (b) that the document was not stamped or circulated but was simply kept in a drawer; and that (c) the husband acted contrary to its terms.

Conclusion

Some practitioners may remember watching Jon Pertwee as the eponymous scarecrow in the 1980s ITV's show *Worzel Gummidge*. Worzel had a collection of interchangeable heads (eg made of turnip, mangel wurzel and swede) which he used for particular tasks (eg singing, reading and adding up). Faced with an intervener claim (or a TOLATA claim) it is important that family practitioners have their civil heads firmly screwed on, and to bear in mind the following:

(1) Who has the burden of proof? The court's enquiry will be adversarial and not quasi-inquisitorial, and the claim will be dismissed if the intervener fails to prove his case to the balance of probabilities;

(2) In terms of evidence, the court will look principally for contemporaneous documentary, ahead of oral recollection of historic conversations, which (per *Gestmin*) is generally an unreliable source;

(3) The documentary evidence should be properly scrutinised, especially where the defending party cannot given direct evidence relating to it;

(4) In addition to the classic defences of fraud, sham and mistake, consideration might be given to asserting that any express declaration of trust is ineffective.