

Case No: B5/2012/2510

Neutral Citation Number: [2013] EWCA Civ 758
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MAYOR & CITY OF LONDON COUNTY COURT
(HIS HONOUR JUDGE BIRTLES)

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 1 May 2013

B e f o r e:

LORD JUSTICE AIKENS

LORD JUSTICE SULLIVAN

LORD JUSTICE UNDERHILL

Between:

CHAUDHARY

Appellant

v

CHAUDHARY

Respondent

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Jonathan Upton (instructed by Matwala Vyas LLP) appeared on behalf of the
Appellant

Mr Roman Poplawski (instructed by Huggins & Lewis Foskett) appeared on behalf of the
Respondent

J U D G M E N T
(As Approved by the Court)
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Lord Justice Aikens:

The Judgment below

1. This is an appeal against the order of HHJ Birtles dated 17 September 2012, which was made following a two-and-a-half day trial and then a reserved judgment in the Mayor and City of London County Court. HHJ Birtles then reserved judgment.
2. There were several matters in dispute before the judge. The present respondent, who was the claimant before the judge and whom I shall call Mr Chaudhary, claimed possession of 40 Sunnyside Road, Ilford ("the property"), where the defendant and his stepmother, Mrs Bimla Chaudhary, whom I shall call Mrs BC, had lived with Mr Chaudhary's father ("Mr Chaudhary senior"), from 1996 until Mr Chaudhary senior died in 2003, and with their children. Thereafter, Mrs BC and her children have continued to live in the property.
3. Mr Chaudhary also claimed arrears of rent which he said that his stepmother owed him pursuant to an assured shorthold tenancy granted on 28 June 2004.
4. Mrs BC resisted the claim for possession and rent arrears. She also made a Part 20 claim, asserting that Mr Chaudhary had no right to claim possession of the property because she was, subject to the rights of the mortgagee, the person with sole beneficial interest in the property.
5. The judge rejected the claim of Mr Chaudhary for possession on the technical basis of the invalidity of the notice served pursuant to section 21(4)(a) of the Housing Act 1988. That notice had been served by solicitors acting for Mr Chaudhary, purporting to terminate the assured shorthold tenancy. There is no issue on this appeal relating to the possession claim.
6. The judge rejected Mrs BC's claim that she had the sole interest, or indeed any beneficial interest in the property. That conclusion is the subject of the present appeal for which Rimer LJ gave permission to appeal on paper on 30 November 2012.
7. The third issue before the judge concerned Mr Chaudhary's claim for rent arrears. The judge found that Mr Chaudhary senior and Mrs BC were tenants under a series of assured shorthold tenancies in the property in which Mr Chaudhary had had the sole beneficial interest. He found that Mrs BC continued to live in the property after her husband's death and had held over after the expiry of the latest assured shorthold tenancy. The judge found that the tenancy continued to subsist, so that, in principle, Mrs BC was liable to pay rent arrears. He did not make any ruling on the amount of those arrears at the trial. Subsequently, however, the parties agreed that the rent arrears amounted to £42,790. That sum remains outstanding.

The Issues appealed

8. There are two issues on the appeal. The principal issue is whether the judge was correct to conclude that Mrs BC and her late husband never had any beneficial interest in the property. The second issue is whether, if Mrs BC (following her husband's

death) has any sole beneficial interest in the property, that has any effect on the claim by Mr Chaudhary against Mrs BC for arrears of rent.

The findings of fact

9. Mr Chaudhary is the son of Mr Chaudhary senior by a marriage before Mr Chaudhary senior married Mrs BC. Mr Chaudhary senior and Mrs BC had three children. In 1996 they lived in rented accommodation. They had insufficient income between them to enable them to obtain a loan secured by a mortgage so as to buy their own property. At that time Mr Chaudhary was a single young man aged 22, who was in work and living with his grandmother. Mr Chaudhary senior asked his son to purchase the property so as to provide a home for Mr Chaudhary senior, his wife Mrs BC, and their children. The property was purchased on 20 June 1996 for the sum of just under £65,000 and was registered in Mr Chaudhary's sole name. It has remained registered in his sole name since then.
10. The purchase of the property was funded by a loan totalling £59,850 advanced by the Alliance and Leicester Building Society. The balance of the purchase price, which consisted of a deposit of £5,000, was provided by Mr Chaudhary senior and Mrs BC, who obtained the money by taking loans from another family member and a friend. Those loans were repaid by Mr Chaudhary senior and Mrs BC within two to three years of the purchase of the property.
11. The judge found at paragraph 21 of his judgment that before the purchase there had been a discussion between Mr Chaudhary and his father in which Mr Chaudhary senior had asked his son to purchase the property so as to provide a home for himself, his wife and their children. The judge found, at paragraph 21, that Mr Chaudhary senior had asked that there be an arrangement whereby Mr Chaudhary would be the landlord and that Mr Chaudhary senior and his wife would be the tenants. The judge found that Mr Chaudhary senior had expressed the hope that he would be able to purchase the house from his son as soon as he was able to do so. Mr Chaudhary senior and his wife and children moved into the property as soon as it was purchased. They lived there until Mr Chaudhary senior died in 2003.
12. The judge found (paragraph 15(i) and paragraph 22 of the judgment) that between 1997 and 2003 Mr Chaudhary senior and Mrs BC entered into a series of “sham” assured shorthold tenancy agreements with someone named as Mr K Singh, whereby this Mr Singh claimed to be the landlord of the property and Mr Chaudhary senior and Mrs BC claimed to be the tenants. The judge found as a fact (paragraph 22 of the judgment) that those false tenancy agreements were used by Mr Chaudhary senior and Mrs BC to claim housing benefit, and that part of that benefit was used to pay sums due under the agreement made with Alliance and Leicester. There was a surplus from the housing benefit, but the judge records that it is not known what was done with that money.
13. The judge also found that, from the date of the death of Mr Chaudhary senior until some time in 2005, Mrs BC continued to claim housing benefit for the same purpose. The judge found that Mrs BC was not entitled to claim this housing benefit, at least

after the death of her husband, and that she had made the claim fraudulently: (see paragraph 26 of the judgment).

14. The judge found Mrs BC to be an unreliable witness. He set out his reasons at paragraph 13 of the judgment. That conclusion is not challenged on appeal. The judge also concluded that the witnesses called by Mrs BC were of no assistance to him because they did not have any first-hand knowledge of the arrangement made between Mr Chaudhary and his father when the property was purchased in 1996.
15. Against that background the judge concluded that Mrs BC had no beneficial interest in the property. He held that the deposit of £5,000, which had been advanced by Mr Chaudhary senior and Mrs BC for the purchase of the property, "was akin to a premium or arrangement fee, as without it there would not have been any chance for them to obtain a mortgage and have a home with no monthly overheads": (see paragraph 34 of the judgment).
16. The judge also concluded that Mrs BC has lived in the property for some 16 years and had "literally paid nothing towards it from her own pocket". He held that the housing benefit claimed by Mrs BC had been used to service the mortgage between 1999 and 2005. The judge commented that "living in the property cost [Mrs BC] nothing".
17. The judge accepted that Mr Chaudhary was the mortgagor and legal owner of the property (see paragraph 35). He then held that Mrs BC did not have any beneficial interest in the property under either a constructive or a resulting trust and that there was no proprietary estoppel in her favour. Therefore, he concluded at paragraph 37 that the Part 20 claim must be dismissed.

The argument on the appeal

18. Mr Jonathan Upton, who appears for Mrs BC, the appellant, submits that the judge was wrong to hold that Mrs BC had no beneficial interest in the property in the face of the fact that she and her late husband had directly contributed £5,000 towards the purchase price. That figure constituted 8 per cent of the total purchase price and was significant. He accepted that that was the extent of the beneficial interest to which Mrs BC was entitled.
19. In support of this submission, Mr Upton notes the fact that the judge found that Mr Chaudhary senior and Mrs BC had borrowed the £5,000 and had repaid those loans within two to three years. Therefore the judge was wrong to have held that Mrs BC had "literally paid nothing" towards the property. The judge accepted that Mrs BC had stopped claiming housing benefit in 2005, and, by inference, that she had been responsible for servicing the mortgage for a period of time between 2005 and early 2007, but not after that.
20. The judge found at paragraph 34 that it was the claimant, Mr Chaudhary, who had himself been solely responsible for servicing the mortgage for the last five-and-a-half years, which must mean from early 2007 until the date of judgment in September 2012.

21. Mr Upton notes that it was not Mr Chaudhary's pleaded case that the £5,000 provided by Mr Chaudhary senior and Mrs BC towards the purchase price was either a "premium" or "an arrangement fee", nor was that Mr Chaudhary's evidence. Mr Upton suggests that this idea came from the judge himself in the course of Mr Upton's cross-examination of Mr Chaudhary.
22. Mr Upton submits that it is clear on the evidence that Mr Chaudhary senior and Mrs BC did provide the sum of £5,000 towards the purchase price. Therefore, in the absence of any express finding of fact that this was intended as a gift to Mr Chaudhary, he submits that the judge should have concluded that this transfer created a resulting trust in favour of Mr Chaudhary senior and Mrs BC to the extent of that contribution to the purchase price, viz 8 per cent, which, upon Mr Chaudhary senior's death became a resulting trust in favour of Mrs BC alone.
23. Mr Poplawski, on behalf of Mr Chaudhary, the respondent, submits that the sole question on appeal is whether the judge was wrong to characterise the £5,000 deposit as "akin to a premium or arrangement fee". He accepts that in circumstances where A advances money to B for the purchase of property in B's sole name, there is a presumption that A is not making a gift of that money to B, so that B will, to the extent of the sum advanced, hold the property purchased on trust for A: in other words, that there would in those circumstances be a presumption of a resulting trust in favour of A. But, he submits, any such presumption in the present case can be and is rebutted by proof that Mr Chaudhary senior and Mrs BC intended that Mr Chaudhary should take the property as sole beneficial owner. If necessary, he relies upon the doctrine of the presumption of advancement, which would be applicable in this case, he says, because of the close relationship between Mr Chaudhary senior and his son.
24. Alternatively, he submits that the judge was correct to conclude on the facts that the evidence established a common intention between Mr Chaudhary senior and his son that the latter would take the property as the sole beneficial owner in return for him making it available as a home for Mr Chaudhary senior, his wife and family upon the payment of rent.
25. Mr Poplawski said that there was some evidence in the course of the cross-examination of Mrs BC to suggest that the amount payable in respect of the mortgage payments which was "rent" was less than a commercial rent for such a property in such an area.

Analysis and conclusions

26. We must approach this appeal on the basis that the judge saw and heard the witnesses, and, in particular, we must approach it on the basis of three of his conclusions in particular. The first is that the original arrangement was concluded by Mr Chaudhary senior and Mr Chaudhary alone and that neither Mrs BC nor any other family member was directly involved in that arrangement. The second is that Mrs BC was an unreliable witness. The third is that where the evidence of Mr Chaudhary and witnesses called by him differed from that of Mrs BC and her witnesses, he preferred the evidence of the former (see paragraph 12 of the judgment).

27. The judge found at paragraph 21 that, in the discussion between the father and the son, Mr Chaudhary senior asked his son to purchase the property in order to provide a stable home for himself and his wife and young family "which would be entered into by an arrangement whereby Mr Chaudhary would be the landlord and his father and stepmother would be the tenants". The judge also found that Mr Chaudhary senior stated that he "hoped that he would be able to purchase the house from his son as soon as he was able to do so".
28. The judge found that Mr Chaudhary gave his father a "mortgage payment book" (see paragraph 22). The judge does not explain this further, but I infer that it was intended that payments by Mr Chaudhary senior and Mrs BC in respect of the mortgage would be noted in this book.
29. Apart from these findings and also the critical finding that Mr Chaudhary senior and Mrs BC provided the £5,000 deposit for the purchase, there are no further findings of fact about the arrangements that were entered into at the time the property was purchased. It would appear that although it was agreed that Mr Chaudhary would be the landlord and his father and stepmother would be the tenants of the property, there was no payment of any other rent at all during the time that Mr Chaudhary senior was alive, nor indeed subsequently. The only "rent" was in respect of the discharge of the obligations under the secured loan with Alliance and Leicester.
30. It seems to me clear, on the judge's findings of fact, that neither Mr Chaudhary nor his father expressed any particular intention on whether the £5,000 should be given to Mr Chaudhary or whether the result of this money being used as a deposit for the purchase would be that Mr Chaudhary senior and Mrs BC should have, to that extent, a beneficial interest in the property. In those circumstances, as Lord Phillips of Worth Matravers MR pointed out in Lavelle v Lavelle and others [2004] EWCA Civ 223 at paragraph 13 and following, if there is no evidence of the intention with which the transfer is made, then the law applies presumptions. At paragraph 14 Lord Phillips said:

"Where there is no close relationship between A and B, there will be a presumption that A does not intend to part with the beneficial interest in the property and B will take the legal title under a resultant trust for A. Where, however, there is a close relationship between A and B, such as father and child, a presumption of advancement will apply. The implication will be that A intended to give the beneficial interest in the property to B and the transaction will take effect accordingly."
31. Lord Phillips then reviewed a number of authorities concerning the strength of the presumption of advancement, and came to three relevant conclusions at paragraph 19 of his judgment: first, the presumption of advancement can be rebutted by evidence; secondly that evidence does not have to be contemporaneous with the arrangement in question, it can relate to matters after the transaction has taken place; thirdly, the court's task overall is "to search for the subjective intention of the transferor". The summary

of the law in the latest edition of *Snell's Equity*, 32nd edition, at paragraphs 25-007 to 013 is consistent with Lord Phillips's conclusions.

32. In my judgment, there was no basis for the judge's conclusion that the £5,000 was "akin to a premium or arrangement fee". As I understand it, as a result of the explanation given by Mr Upton and Mr Poplawski, what the judge seems to have had in mind was a premium for an assured shorthold tenancy or an arrangement fee in respect of entering that. However, in my judgment, there is simply no evidence to support such a finding. Moreover, I find it inherently unlikely that there would have been a fee for as much as £5,000 for such a short tenancy arrangement.
33. Accordingly, I would hold that that finding must be set aside. But that alone does not solve the problem. The question remains: what was the intent of Mr Chaudhary senior and Mrs BC as transferors when the sum applied of £5,000 which they had raised was given to be used as the deposit for the purchase of the property? This has to be considered in circumstances where Mr Chaudhary and his father agreed that the latter would live in the property with his wife and family as the tenants of Mr Chaudhary, who would be their landlord, but Mr Chaudhary senior hoped to purchase the house from his son as soon as he was able to do so.
34. It seems to me that the key to the question lies in this last particular finding of the judge at paragraph 21 of the judgment, namely the expressed hope of Mr Chaudhary senior to buy the house from his son as soon as he was able to do so. If, at the time of the arrangement in 1996, Mr Chaudhary senior and his son had been asked the question: "When you come to calculate what sum would be due to be paid to Mr Chaudhary for the purchase of the property by Mr Chaudhary senior, would you take into account the £5,000 deposit paid by Mr Chaudhary senior and his wife or not?", it seems to me that the answer is obvious. That sum would be bound to stand to the credit of Mr Chaudhary senior and Mrs BC in calculating whatever the total purchase sum would be due to Mr Chaudhary on this imaginary purchase.
35. Accordingly, I have concluded that the judge erred in holding that Mrs BC, on her own behalf and as successor to Mr Chaudhary senior, had and has no beneficial interest in the property. If, as Lord Phillips states in Lavelle v Lavelle, the subjective intention of the transferor is the key, then it seems to me, on a balance of probabilities, that Mr Chaudhary senior and his wife must have subjectively intended that the £5,000 would be for their benefit and so was not intended as a gift for Mr Chaudhary. On the contrary, it was their subjective intention that this would be their contribution to the purchase the property, which they hoped to buy in the future. So to that extent they would have a beneficial interest in the property.
36. So on that issue, I would allow the appeal.
37. Mr Upton has submitted that if we allowed the appeal on that issue, then it would be his client's case that Mr Chaudhary must account to Mrs BC for 8 per cent of the rent and profits of the property from 1996, and that any such sum as is found due on such an account should be set off against the judgment for rent arrears in the agreed sum of £42,790.

38. I would reject the submission put in that form. At the moment, there is no claim for such an account on the pleadings. Further, I have to note that the judge made findings about the fraudulent claims for housing benefit by Mrs BC from at least 1999 until some time between 2005 and 2007. As Mr Poplawski notes in his written submissions, this raises the issue of whether the court would lend its hand to a claim for return of rent in circumstances where, on the judge's finding, the claimant has engaged in criminal activity. That matter was not dealt with by the judge. Therefore, in my view, if Mrs BC wishes to try to pursue such a claim, this will have to be done by some means in the County Court. The County Court will have to decide whether Mrs BC is entitled to pursue such a claim at all. Without taking any final view on the merits of such a potential claim, I would venture to suggest that such a claim might be met with a challenge that it is now too late, quite apart from another possible defence that Mrs BC cannot in any event pursue such a claim in the light of her criminal behaviour.
39. Meanwhile, in my judgment, there is no basis upon which there can be a stay of the judge's order in relation to the arrears of rent of £42,790.

Disposal

40. On the main issue, I would allow the appeal and grant a declaration that Mrs BC has 8 per cent beneficial interest in the property.

Lord Justice Sullivan:

41. I agree.

Lord Justice Underhill:

42. I agree.

Order: Appeal allowed