Hardwicke

What's the Matter? Be careful if it's the Quantification of Beneficial Interest under a Trust

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As all property litigators will be only too aware, the fact that one person (A) is registered as the sole proprietor of a legal estate - while it may furnish them with the entitlement to exercise owner's powers (under s. 24 Land Registration Act 2002 ('LRA 2002')) - is no sure indicator of their sole entitlement to the net proceeds arising on a sale. It will often be the case that another person (B) is beneficially interested in the property to some degree and thus entitled to a proportion of the net proceeds.

B's beneficial interest may arise under an express declaration of trust or may be implied (either by way of a resulting trust or a constructive trust in accordance with normal property law principles or possibly under statutory provisions in favour of spouses (s. 37 Matrimonial Proceedings and Property Act 1970) and, by extension, engaged persons (s. 2(1) Law of Property (Miscellaneous Provisions) Act 1970). However, regardless of the manner in which the trust under which the beneficial interest exist arises, neither the trust nor the beneficial interest thereunder will themselves appear on the register. That does not mean that B's beneficial interest is not capable of being protected by an entry in the register: it is. S. 33(a)(i) LRA 2002 provides that no notice may be entered in the register in respect of 'an interest under a trust of land'; however, s. 42(1)(a) LRA 2002 provides that the registrar may enter a restriction in order to 'protect a right or claim in relation to a registered estate or charge' and s. 46(1) LRA 2002 provides that a court may order the registrar to enter a restriction where necessary or desirable to protect a 'right or claim in relation to a registered estate'.

In many cases A will not dispute that B has a beneficial interest and that it should be protected by a restriction. It may be that subsequent to the entry of the restriction there is a dispute as to the extent of B's beneficial interest, or whether there should be a sale, or who is entitled to occupy, or whether the division of the net proceeds of sale should be precisely in accordance with the extent of B's beneficial interest or whether there is to be some adjustment to take account of relevant liabilities between A and B (what was formerly known as 'equitable accounting). Such disputes are commonly litigated in court under CPR 8 in accordance with the provisions of ss. 12-18 of the Trust of Land and Appointment of Trustees Act 1996 ('TOLATA 1996').

However, a dispute may arise in circumstances where no restriction to protect B's interest has (yet) been entered in the register and B may wish to take steps (either at court or by application to HM Land Registry as set out above). If B also wishes to enforce the sale of the property then it will be necessary to issue court proceedings.

However, if he does not (yet) seek to compel a sale to recover his share of the proceeds but merely wishes to obtain some protection he may issue court proceedings or apply to HM Land Registry. The latter course is not necessarily any less contentious because notice of B's application will be given to A who may well thereupon object to the application (under s. 73(1) LRA 2002) and - in the absence of the registrar being satisfied that such objection is groundless (under s. 73(6) LRA 2002) or of the objection being disposed of by agreement - it will be referred to the First-tier Tribunal ('FTT') under s. 73(7) LRA 2002.

Practitioners should be aware of a recent Upper Tribunal decision which has confirmed a further distinction between proceedings at court and applications referred to the FTT on objection. The FTT had dealt with applications referred to it on objection following application for a restriction in both *Whitehouse v Jervis* [2017] UKFTT 805 (PC) and *Hallman v Harkins* [2018] UKFTT 0445 (PC).

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There is an interesting contrast between the differing approaches of the FTT in those two cases: not so much in the manner in which the existence of the beneficial interest was established (although that is also worthy of note), but rather to the different approaches the FTT took in relation to the *quantification* of the beneficial interests.

In *Whitehouse v. Jervis,* Ms Jervis was the sole proprietor of a property in Cannock. Mr Whitehouse applied for a restriction based on an alleged resulting trust based on his contribution to the purchase price. At trial, Mr Whitehouse successfully asserted that he had a beneficial interest in it under a common intention constructive trust ('CICT'). The FTT concluded Mr Whitehouse had contributed £25,000 to the purchase price, undertaken substantial work of renovation and improvement and made regular financial contributions towards the mortgage. resulting trust arising out of his contribution of some £25,000 to the purchase price. Further, the FTT concluded that Mr Whitehouse had done those things in reliance on an express agreement with Ms Jervis that they would jointly own the property such that his CICT claim succeeded. In addition, the FTT said that had it not found that that there was such an express agreement, it would have been prepared to infer one by reason of the reliance matters referred to. Consequently, the FTT directed the registrar to give effect to Mr Whitehouse's application for a restriction. The parties both invited the FTT to determine the quantification of Mr Whitehouse's beneficial interest, the FTT noting that 'Understandably, neither is anxious for there to be a separate round of proceedings in a different forum in which much the same evidence as I have heard will need to be considered afresh to resolve the issue of quantification.' Ms Jervis' Counsel submitted, however, that the quantification question should be adjourned given that the trial had been prepared on the basis of a claim for a resulting trust. The FTT was sympathetic to that position but concluded, in any event, that the FTT had no jurisdiction to make any determination as to quantum and therefore declined to do so.

In *Harkins v Hallman,* Mr Hallman was the sole proprietor of a property in Bootle. Ms Harkins applied for a restriction based on a CICT arising out of his financial contributions to the purchase and improvement and to mortgage repayments. She also alleged express pre-acquisition agreements that they would have a joint interest. The FTT did not accept Ms Harkins' assertion in relation to those alleged express agreements but did 'on all the evidence' infer an agreement that she was to have an interest and to that extent her claim to a CICT succeeded. In addition, because the parties had been engaged the FTT concluded that a payment of £4,400 towards improvements (which Ms Hawkins had jointly borrowed with Mr Hallman) gave her a share in the property regardless of any agreement (express or inferred) by reason of s. 2(1) Law Reform (Miscellaneous Provisions) Act 1970 and s. 37 Matrimonial Proceedings and Property Act 1970 which, together, provide that a fiancé(e)'s substantial contribution in money or money's worth may be treated as the acquisition or augmentation of a share in a property to the extent agreed or, absent agreement, to the extent considered fair. Consequently, the FTT directed the registrar to give effect to Ms Hawkins' application for a restriction. Both parties invited the FTT to determine the quantification of Ms Harkins' beneficial interest. The FTT referred to the total length of the parties' relationship while living together as being 12 1/2 years and their engagement lasting four years (i.e. 32% of the total) and referred, in addition, to Ms Harkins' contribution to improvement before, making an overall determination of 35%.

The crucial difference between the two cases was, therefore, the approach taken by the FTT in each to the respective parties' invitation - in the light of the finding of the applicant's beneficial interest and, consequently, of their entitlement to a restriction - to quantify the beneficial interest.

The difference between the two approaches is now the subject of an authoritative decision by the Upper Tribunal following Mr Hallman's appeal: *Hallman v Harkins* [2019] UKUT 245 (LC). The UT considered that the FTT's approach 'on all the evidence' would not, of itself, have been sufficient to justify a finding that Ms Hawkins had acquired a beneficial interest under a CICT. However, the UT considered the finding of a beneficial interest in the property based on Mr Hallman's claim of having made a substantial contribution to its improvement in accordance with s. 2(1) Law Reform (Miscellaneous Provisions) Act

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1970 and s. 37 Matrimonial Proceedings and Property Act 1970 to be impeccable. Consequently, the UT was not prepared to disturb the FTT's direction to the Land Registrar to give effect to Ms Harkins restriction. However, it concluded that the FTT had no jurisdiction whatsoever in quantifying that beneficial interest.

The UT referred to the House of Lords decision in *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808 as authority for the proposition that a statutory tribunal has only the jurisdiction expressly conferred on it by statute and the parties cannot confer any greater jurisdiction on it by consent and considered precisely what jurisdiction the FTT had. It noted that following an unresolved objection the registrar must refer 'the matter' to the FTT under s. 73(7) LRA 2002 and that the functions of the FTT were limited (so far as is relevant) by s. 108(1) LRA 2002 to 'determining matters referred to it under s. 73(7)'. So, it was necessary to decide what 'the matter' was in such a case which was simply the same matter which had been before the registrar, namely whether the applicant was entitled to the restriction sought.

The UT disapproved of the suggestion in *Megarry & Wade* that the High Court's decision in *Jayasinghe v. Liyange* [2010] 1 WLR 2106 indicated that it could extend to the quantification of a beneficial interest. The UT explained that, properly read, references to quantification in *Jayasinghe* merely indicated that such an issue might well be a reason why the FTT would, under s. 110(1) LRA 2002, require court proceedings to be issued. It was not authority that quantification was within the jurisdiction of the FTT.

The UT further confirmed, referring to *Inhenagwa v. Onyeneho* [2017] EWHC 1971 (Ch), that any findings as to quantification would not have bound the parties because they were not necessary for the determination of the matter which had been referred to it. The Court referred to the fact that, while it was not apparent from the FTT's decision, the parties agreed that the FTT had indicated to them that anything it might determine as to quantification.

Consequently, it is not only in cases where B seeks to enforce a sale that proceedings in court maybe more appropriate. In addition, it is now clear that if B requires (or may shortly require) a determination of the extent of the beneficial interest then he may be better advised to commence proceedings in court. If he does not, he runs the risk of having to conduct two sets of proceedings at inevitably increased cost.

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