Neutral Citation: [2023] UKFTT 00858 (TC)

Case Number: TC08959

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/02972

CAPITAL GAINS TAX – section 58 Taxation of Capital Gains Tax Act 1992 – whether there was a transfer of beneficial interest in a joint property in the year of separation – agreement preceding consent order indicative of timing of transfer – constructive trust arose until eventual sale of property – appeal allowed

Heard on: 24 April 2023
Judgment date: 06 October 2023

Before

TRIBUNAL JUDGE HEIDI POON
MEMBER MICHAEL BELL

Between

ABIGAIL WILMORE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Slavka Lukashuk of Lukashuk Tax Accounting

For the Respondents: Darren Bradley, litigator of HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. Ms Abigail Wilmore (the 'appellant') appeals against a discovery assessment issued by the respondents ('HMRC') in the sum of £14,376.60 for the tax year 2016-17.

2. The assessment is for Capital Gains Tax ('CGT') in relation to the disposal of a property in the year ended 5 April 2017 which HMRC held the appellant to be a beneficial owner.

3. The issue for determination is whether the appellant had a beneficial interest in the relevant property in its year of disposal for capital gains tax to be assessable on her.

EVIDENCE

4. For HMRC, Officer Gary Turkish gave evidence as the decision maker for raising the discovery assessment. Ms Wilmore gave evidence in relation to the background surrounding the acquisition and disposal of the property. We find both witnesses credible, and accept their evidence as to matters of fact.

RELEVANT LEGISLATION

5. The statutory provisions from the Taxes Management Act 1970 ('TMA') relevant to this appeal are the following:

(1) Section 29 TMA provides for an assessment to be raised where a loss of tax is discovered and where the requisite conditions have been met. Under s 29(4), the requisite condition is that the loss of tax has been brought about 'carelessly or deliberately' by the taxpayer or his agent.

(2) Section 34 TMA provides for the ordinary time limit for an assessment under s 29 to be made within 4 years after the end of the year of assessment to which it relates.

(3) The Tribunal's appellate jurisdiction is provided under s 50 TMA. On an appeal to the Tribunal, if the Tribunal decides that the appellant is overcharged by an assessment, 'the assessment is to be reduced accordingly, but otherwise the assessment or statement shall stand good' as provided by s 50(6).

6. Under Taxation of Chargeable Gains Act 1992 ('TCGA'), s 58(1) provides as follows:

> **58 Spouses and civil partners**
>
> (1) If, in any year of assessment, –
>
> (a) an individual is living with his spouse or civil partner, and
>
> (b) one of them disposes of an asset to the other,
>
> both shall be treated as if the asset was acquired from the one making the disposal for a consideration of such amount as would secure that on the disposal neither a gain nor a loss would accrue to the one making the disposal.

7. The Law of Property Act 1925 ('LPA') provides for the instruments of transfer:

> **53. Instruments required to be in writing**
>
> (1) Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol –
>
> (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by his agent thereunto lawfully authorised in writing, or by will, or by operation of law;
>
> (b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will;

(c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be in writing signed by the person disposing of the same, or by his agent thereunto lawfully authorised in writing or by will.

(2) This section does not affect the creation or operation of resulting, implied or constructive trusts.

8. The Law of Property (Miscellaneous Provisions) Act 1989 ('LPMPA') specifies:

2 Contracts for sale etc of land to be made by signed writing

(1) A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each.

(2) The terms may be incorporated in a document either by being set out in it or by reference to some other document.

(3) The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party to the contract.'

THE FACTS

Background

9. Ms Wilmore and Mr Cohen had been together for 5 years when they married in 2012. Ms Wilmore works as an HR Director in the fashion industry and her 'high paying job' was the main source of income for the couple for most of their time together before they married.

10. In 2010, Mr Cohen started a property development business with a partner, which was 'the first real venture' that brought him 'a good return'. Ms Wilmore supported Mr Cohen's business venture initially by helping him to obtain two mortgages using her salary. Mr Cohen's property business was profitable, and he was able to obtain mortgages for further properties for his business without help from Ms Wilmore, who did not share any of the profits derived from the sale of Mr Cohen's business properties.

Purchase of Thornfield

11. The subject matter of this appeal is concerned with the capital gains arising on the disposal of Thornfield Avenue ('Thornfield').

12. At the time Thornfield was purchased, the couple was living at Ravenshurst Avenue ('Ravenshurst'), which was purchased in May 2009 with a deposit from both Ms Wilmore and Mr Cohen. The title of Ravenshurst was in Ms Wilmore's sole name because it was her salary that allowed the mortgage to be obtained.

13. In or around April/May 2015, Ms Wilmore and Mr Cohen viewed Thornfield with the intention to purchase Thornfield to become their main residence. Thornfield was purchased jointly for a consideration of £541,100. The following financial arrangements took place in order to fund the purchase of Thornfield:

(a) Cash deposit of £100,000 by re-mortgaging Ravenshurst to release equity;

(b) A mortgage was secured on Thornfield and raised on Ms Wilmore's salary;

(c) The mortgage on Ravenshurst was converted to a buy-to-let, 'as that was what the bank would agree to'.

14. At the time of purchase, the plan was already afoot to carry out extensive renovations of Thornfield, which included a new loft, back and side extension and the entire interior and some of the exterior of the property. The renovations were anticipated to take around 12 months to complete. Mr Cohen was in the business of property development, and the renovation of Thornfield was his undertaking.

Separation

15. At the time when Thornfield was purchased, the marriage was already under much strain. Between April and July 2015, the couple went to marriage therapy for many weeks. In August 2015, the couple decided to separate. There are no children from the marriage.

16. On 10 September 2015 (as the date of separation stated in subsequent divorce proceedings), Mr Cohen moved into Thornfield which was still under renovation, and Ms Wilmore continued to live in Ravenshurst.

17. As soon as she could after Mr Cohen moved out, Ms Wilmore changed her mortgage on Ravenshurst back to a residential mortgage with a different bank, but date unspecified.

18. In December 2015, Ms Wilmore stopped contributing towards the mortgage payments for Thornfield.

Divorce proceedings

19. In early October 2015, Ms Wilmore contacted Mishcon de Reya LLP ('Mishcon') for advice in bringing divorce proceedings. In December 2015, Ms Wilmore had her first meeting with Mishcon, spoke with a Ms Yorke, solicitor, with a view to instruct Mishcon to commence divorce proceedings. In this meeting, matrimonial properties were discussed. Ms Wilmore was able to indicate that she had agreed with Mr Cohen that he would 'take Thornfield' since he was already living there and 'had invested all the money into it', and that she would take Ravenshurst, given that she was living there and 'paying the mortgage directly'.

'Sort of' agreement reached in February 2016

20. Mr Cohen was not readily contactable during the months of December 2015 and January 2016 to move matters forward. In early February 2016, the couple reached an understanding as regards the division of assets which was outlined to Ms Yorke by Ms Wilmore in an email dated 2 February 2016. In this email, Ms Wilmore described what was '(sort of) agreement on things' with Mr Cohen, and that 'if possible we'd like that he gets the new house [i.e. Thornfield] and I stay in this one [i.e. Ravenshurst] although he may need to pay me something'. Ms Wilmore then made the following points:

> '2) … without me he would not have been able to get any mortgage since it was always my salary and credit history that enabled us to get approved …
>
> 3) For … Ravenshurst … we both put in the same money … around 50 or 60K. He then put in an additional 40K for renovations. We both paid the mortgage on this house …
>
> 4) We remortgaged and took 100K out of … Ravenshurst last year to put into … Thornfield [which] was purchased for £541,000 with a mortgage of £379,100.
>
> 5) … I paid in bonus amounts of around 15K into [Thornfield] …
>
> 6) We both paid the mortgage on both properties … The plan was to move into Thornfield.
>
> 7) Ravenshurst is now worth approx. 750K … and the mortgage left is around 400K, although I will need to change this as its [sic] currently a buy to let since we are going to move into Thornfield.

21. Ms Wilmore continued in her 2 February 2016 email by stating:

> 'So there is more equity in Ravenshurst but Thornfield is worth more … I'm not sure how to work out if he should pay me anything? I'd like to get my bonus back if possible.'

22. By email dated 5 February 2016, Ms Yorke of Mishcon wrote to Ms Wilmore as follows:

> 'I have now been through your email and the various attachments. I am glad that you and Rubi [ie. Mr Cohen] have been able to discuss matters and agree a way forward. … If we can finalise a settlement with Rubi, this will be embodied in a Court Order and approved by the Court without the need for protracted proceedings. … To draft the divorce petition … please can you let me have the following information:- [followed by a list of 6 questions]'

23. By letter dated 10 March 2016, Ms Wilmore (as '[AW]') replied to Ms Yorke's (as '[MDR]') six questions conveyed by email of 5 February, and in relation to Thornfield, the exchanges are as follows:

> '[MDR] 4. If we reach a settlement before [Cohen] sells Thornfield, is the intention that the mortgage will be transferred into his sole name? I would think the bank would want your name removed if you are to take on Ravenshurst alone before Thornfield is sold. In relation to the sale, [Cohen] should hold off on selling the property until we have an agreement. If a purchaser is found then to protect your position I would want the proceeds of sale held in a bank account until everything is resolved. I would not want [Cohen] to reinvest them until we had a binding Order.
>
> > [AW] I don't know his timing but we agreed that he will give me £75K which includes any bonuses I put in and also part of the equity we took out of Ravenshurst to invest into Thornfield. I am ok with this.
>
> [MDR] 5. … taking the current value and the outstanding mortgage – it appears that Thornfield has more equity [than Ravenshurst]. When looking at the equity in a property the Court would not usually take into account refurbishment costs … [which] are taken into account in the current value and the fact that your savings have reduced accordingly.
>
> > [AW]…I've been miscalculating [that there is more equity in Ravenshurst]. But I am ok with the above as [Cohen] will not touch any of my pension.
>
> [MDR] 6. What is the value of the investment property [Cohen] holds with his [business] partner?
>
> > [AW] … I believe it is around £650K but he also has many other properties that they are renovating, which I want nothing from.

The lump sum payment to Ms Wilmore

24. At some stage during the discussion of the terms for the Consent Order, a lump sum payment was being discussed. Ms Wilmore's evidence is that:

> 'My lawyer looked at the sum of the assets and having listened to how much of our lifestyle I had supported during our time together, she advised that I could ask for £70K; however when Reuven did not agree I reduced it because again I just wanted to be over and finalised. We settled on the much lower amount of £30K which was really not even a drop on what I had paid for over the years of our relationship …'
>
> 'The sum of money agreed was not connected to the houses at all but was to demonstrate some acknowledgement of the huge amount of money I had paid out … over the years.'

The divorce settlement

25. By letter dated 4 April 2016 from MDR, Mr Cohen was notified and sent a draft petition for response. By letter dated 11 May 2016, Mr Cohen was informed that he should receive the

sealed petition and notice of proceedings from the Court and to return the Acknowledgement of Service. The letter continued with the solicitor writing as follows:

> 'In respect of financial matters, I understand that you and Abigail have agreed to divide the matrimonial assets as follows: –
> 1. You are to retain Thornfield Avenue property subject to the Santander mortgage;
> 2. Abigail is to retain Ravenshurst Avenue property subject to the Woolwich mortgage;
> 3. You are to retain the development property held with a third party;
> 4. You are to make a lump sum payment to Abigail of £75,000 (upon her signing over her interest in Thornfield Avenue property); …'

26. By letter dated 16 June 2016, MDR wrote to Mr Cohen to advise that the lump sum would be amended to £35,000 and attached the Statement of information for a consent order in relation to a financial remedy signed by Ms Wilmore on the same date. The Statement was signed by Mr Cohen on 13 July 2016 (before the eventual disposal of Thornfield in September 2016).

Disposal of Thornfield

27. On 9 September 2016, Thornfield was sold for £905,000. (The sales history from Land Registry records that the property was listed for sale in April 2016 for £925,000.)

28. The date of redemption of the Santander mortgage for Thornfield in joint names of Ms Wilmore and Mr Cohen was 9 September 2016.

29. Land Registry records confirmed the transferors of Thornfield on 9 September 2016 to be Mr Cohen and the appellant.

Consent Order

30. The lump sum order was stated at £35,000 in the Consent Order sealed by the Family Court sitting at Bury St Edmunds on 17 October 2016. The Order stated, inter alia, that:

> '15. The respondent [i.e. Cohen] shall use his best endeavours to release the applicant [Wilmore] from her obligations in respect of the Santander mortgage upon the transfer of Thornfield Avenue as provided for at paragraph 19.
>
> **Lump sum order**
>
> 18. Upon the transfer as provided for at paragraph 19 the respondent shall pay, or cause to be paid to the applicant the sum of £35,000.
>
> **Transfers of property**
>
> 19. The applicant shall transfer to the respondent all her legal estate and beneficial interest in Thornfield Avenue subject to the Santander mortgage on or before 31 August 2016.
>
> 20. The respondent shall transfer to the applicant all his legal estate and beneficial interest in Ravenshurst Avenue subject to the Woolwich mortgage on or before 31 August 2016.'

31. The Consent Order confirmed that it was to take effect from the Decree Absolute, which was subsequently issued on 23 December 2016.

Discovery Assessment

32. On 29 March 2017, HMRC wrote to Ms Wilmore in relation to her 2013-14 self-assessment return ('SA return') to consider a possible capital gain on the sale of a property at Prior Park Road. Further enquiries were made into properties on which Ms Wilmore had taken out a mortgage and subsequently sold, including (by then) Ravenshurst and Thornfield.

33. By letter dated 28 September 2020, HMRC set out their views on each of the three properties: (a) Ravenshurst was Ms Wilmore's principal private residence and therefore no CGT arising; (b) Prior Park was accepted to be a property of which Ms Wilmore was not a beneficial owner, so no CGT accrued, and (c) that Ms Wilmore was liable to CGT as a joint owner of Thornfield upon its disposal, on the basis that there was 'no formal transfer' of her beneficial interest in Thornfield in the year of separation 2015-16 for s 58(1) TCGA to apply.

34. On 5 November 2020, HMRC raised a discovery assessment in relation to the CGT liability accruing to Ms Wilmore, and the relevant figures for the calculation are as follows:

(1) The property was sold for £905,000 and fees to estate agents estimated at 1.5% being £13,575 and solicitors' fees of £1,000;

(2) The development costs per information supplied total £224,434 (excluding mortgage payments of £16,364);

(3) The purchase price of the property was £541,100, giving rise to a capital gain of £124,891, with half share thereof being £62,445;

(4) The taxable gain is £51,345 after applying annual exemption of £11,000.

(5) The tax payable on the gain at 28% is £14,376.60.

APPELLANT'S CASE

35. In summary, the appellant's case is that her beneficial interest in Thornfield was transferred to Mr Cohen before 5 April 2016, and as such, s 58 TCGA applies to treat the transfer on a no gain no loss basis. In that respect, Ms Lukashuk submits:

(1) It is not disputed that the appellant did not formally transfer her legal interest in Thornfield in accordance with s 53 of LPA until after 5 April 2016, but it is the date of transfer of the beneficial interest which is the deciding factor.

(2) Following her separation from and on reaching a verbal agreement with Mr Cohen, the appellant 'effectively relinquished her beneficial interest' in Thornfield because:

(a) She was no longer able to live in the property;

(b) She stopped contributing towards the mortgage payment in December 2015;

(c) She no longer had any control or influence in the decision making process regarding the property renovations and refurbishments;

(d) She had no access to any of the legal documents relating to Thornfield;

(e) She had no interest or control over when the property was put up for sale;

(f) She did not receive any of the proceeds of sale.

(3) The appellant therefore transferred her beneficial interest in Thornfield by agreement reached with Mr Cohen before the end of the tax year 5 April 2016, and this was evidenced by Mishcon's letter of 4 April 2016.

(4) Further, it is contended that the appellant's disposal of beneficial interest in Thornfield cannot be determined as occurring on the date Mr Cohen sold the property, which was 9 September 2016 because by the Consent Order, the appellant's legal and beneficial interest in the property was to be transferred on or before 31 August 2016. The proceeds of sale received by Mr Cohen on 9 September 2016 cannot be used as the quantum to assess any capital gains arising for the appellant.

(5) While there was a variation in the final agreement prior to the Consent Order of 17 October 2016, that variation concerned the lump sum payment only and did not affect the transfer of interest in Thornfield which had been agreed by 5 April 2016.

36. Finally, and on reflection, the appellant believes Mr Cohen may have persuaded (or duped) her to purchase Thornfield jointly as yet another property for him to develop for profit and as part of his ongoing business ventures rather than as a principal private residence. Even if Mr Cohen's original intentions were sincere, it is evident that he used the property for development purposes after he and the appellant had separated and that he had full control over the works and ultimate sale.

HMRC'S CASE

37. HMRC's case is that the appellant did not transfer her beneficial interest in Thornfield until after 5 April 2016, by which time she was already separated from Mr Cohen to enable the transfer to be deemed as on no gain no loss basis under s 58 TCGA. Mr Bradley submits that:

(1) No evidence has been provided to show that agreement was reached between the appellant and Mr Cohen in December 2015 as contended. HMRC consider that '(sort of) agreement' meant that any agreement with Mr Cohen had not yet been finalised.

(2) Mishcon's letter of 4 April 2016 is indicative that no binding contract had been made in the year 2015-16. While Mr Cohen was advised that an agreement had been reached, the letter also made it clear that the agreement needed to be formalised by means of a Consent Order. While the divorce petition was referred to Mr Cohen for his agreement, the Petition did not specifically refer to Thornfield. In response to the petition, Mr Cohen simply said: 'it seems ok to me.'

(3) Mishcon's letter dated 11 May 2016 refers to the terms of the agreement which were not the final version. The non-binding nature of any agreement made prior to 5 April 2016 is illustrated by the variation in the lump sum payment, (from £75,000 on 11 May to £35,000 on 16 June 2016). HMRC consider that this clearly demonstrates that as of 11 May 2016, the appellant had not yet transferred her interest in Thornfield or finalised the amount to be paid to her in return for the transfer of her interest to Mr Cohen.

38. HMRC do not dispute that the couple separated on 10 September 2015, but any agreement reached between 10 September 2015 and 5 April 2016, whether verbal or written, was not legally binding and could have been varied at any time. It follows therefore that there as 'no formal transfer of the appellant's interest' in Thornfield prior to 5 April 2016.

39. In the absence of any formal agreement, HRMC contend that any informal arrangement in respect of Thornfield could have been revoked or amended at any time, in a similar manner as to the reduction in the lump sum payment.

40. Section 53 of LPA and section 2 of LPMPA provide that a transfer of an interest in land and a contract for the sale of land must be in writing. The appellant has not provided any written evidence of the formal transfer of an interest in Thornfield or a contract for sale of such an interest during 2015-16 which would have complied with the legal requirements.

41. Existing documentary evidence, however, indicates that the appellant's disposal of her interest in Thornfield took place in the year 5 April 2017 by reference to:

(a) Redemption of mortgage and Land Registry records of transfer on 9 September 2016;

(b) Date of Consent Order of 17 October 2016;

(c) Decree Absolute dated 23 December 2016.

42. The appellant has not provided evidence to prove the contrary; the discovery assessment shall stand good in terms as provided under s 50 TMA.

DISCUSSION

43. In relation to the validity of the discovery assessment, HMRC bear the burden on the 'competence' and 'time limit' issues after the Upper Tribunal's decision in *Burgess & Brimheath Developments Limited v HMRC* [2015] UKUT 578 (TCC). The appellant's appeal, however, raises no challenge on the validity of the discovery assessment, and HMRC have not covered these issues in their submissions. The parties have made their respective case on the applicability of s 58 TCGA as the central issue in this appeal.

44. We have considered whether HMRC should be directed to make submissions on the competence and time limit issues. If we had not been able to determine the appeal on the substantive issue in favour of the appellant, we would have needed to be satisfied that HMRC have met the initial burden as respects the validity of the discovery assessment. For completeness, and in the event of an onward appeal by the respondents, we note here that we have not heard any submissions on the 'competence' and 'time limit' issues.

45. With reference to the parties' submissions, the issue for determination in this appeal is whether Ms Wilmore's beneficial interest in Thornfield was transferred to Mr Cohen by 5 April 2016 for s 58 TCGA to apply.

Relevant legal principles

Distinction between legal and equitable interests

46. The term 'interests in land' pertains to both legal and equitable interests. However, there is a fundamental distinction between legal and equitable interests, in that legal interests in land are rights recognised by law while equitable interests in land are rights recognised in equity.

47. Legal rights are enforceable as of right, and once the existence of the right is established it is not really open to the court to consider the merits of the situation before giving a remedy. In contrast, a right recognised only in equity and not at law means that there is no absolute right to the protection by the courts of an equitable interest, and remedies to enforce equitable rights are at the discretion of the court.

Formality requirements for conveying legal estates

48. In a standard land transaction (land and/or buildings) under English law, there are two stages: (i) the *exchange of contracts* wherein the parties enter into a contract for sale of the land; (ii) the *completion*, wherein the parties execute a deed to transfer ownership of the land from the vendor to the purchaser.

49. In relation to the first stage, where a contract exists for the conveyance of a legal estate, the law of equity recognises the contract as a contract for the disposition of the equitable interest in a legal estate. In terms of formality requirements for stage one, it is governed by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (as cited above) under the section heading of '*Contracts for sale etc of land to be made by signed writing*'.

50. The formality requirement for the second stage of a land transaction is governed by section 52 of LPA, and subsection 52(1) states: 'All conveyances of land or any interest therein are void for the purposes of conveying or creating a legal estate unless made by deed.' Section 53 LPA, to which HMRC's submissions refer, requires the instruments to be in writing.

Equitable interests cannot be conveyed or created at law

51. While no technical argument as a point of law has been advanced by either side as to the formality requirements for the transfer of equitable interests, pertinent to the appellant's case is that equitable interests are incapable of being conveyed or created at law: sub-section 1(3) of LPA. As defined under subsections 1(1)(a) and (b) of LPA, the only estates capable of being conveyed or created in law are 'legal estates':

> ‘1(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are –
>
> (a) An estate in fee simple absolute in possession;
>
> (b) A term of years absolute.
>
> […]
>
> 1(3) All other estates, interests, and charges in or over land take effect as equitable interests.’

When a trust of property arises

52. In most instances, the legal and equitable interests concur and are vested in the same person(s) over the same property. In other instances, where the legal and equitable interests are vested in different persons, a trust arises. The essential characteristic of a trust is the separation of the title to a property from the right to use and enjoy it. The trustee is the owner of the property by having the legal title, but he/she holds it not for own use, but for the beneficiary who has the right to use and enjoy the property. The right of the beneficiary is protected by equity and accordingly has an equitable interest in that property. This equitable interest is also referred to as ‘the beneficial interest’.

53. An express trust is created by a declaration and the instrument must be in writing, as stipulated under sub-section 53(1)(b) of the Law of Property Act 1925:

> ‘(1)(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; […]’

54. It is relevant to our consideration that an express trust is not the only form of trust recognised by the law of equity. A trust may still arise without being expressly created by an instrument in writing, but through recognition by the courts. The exact categorisation of trusts is complex, but in broad terms, trusts fall into three categories: (i) express trusts, (ii) non-express trusts, and (iii) statutory trusts. For non-express trusts, the encompassing term ‘implied trusts’ is often used to refer to trusts that have not been expressly created: see *Cowcher v Cowcher* [1972] 1 WLR 425 at p. 430. The types of implied trusts that the courts can give effect to are either a *constructive* trust, or a *resulting* trust.

55. For present purposes, we are concerned here with whether a constructive trust arose in the tax year 2015-16, whereby Ms Wilmore, having transferred her beneficial interest in Thornfield to Mr Cohen, became a trustee holding the legal title of Thornfield jointly with Mr Cohen until the eventual sale of Thornfield in September 2016.

Case law on constructive trust

56. A constructive trust arises by operation of law; that is to say, by the court recognising such a trust as being imposed by the law of equity on the owners of property, so that instead of enjoying the property as the beneficial owners, they are required by law to hold it, in whole or in part, for the benefit of some other person. Case law authorities on constructive trusts include:

(1) In relation to a ‘definition’ for a constructive trust, Davies LJ’s remark in *Carl-Zeiss Stiftung v Herbert Smith & Co (No. 2)* [1969] 2 Ch 276 at p.300 is instructive:

> ‘English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand.’

(2) In the Court of Appeal decision in *Paragon Finance v DB Thakerer* & Co [1999] 1 All ER 400, Lord Millet stated at p.409 the circumstances when the law of equity would impose such a trust:

> '[A] constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually the legal estate) to assert his beneficial interest in the property.'

(3) In *Bannister v Bannister* [1948] 2 All ER 133, the purchaser bought a cottage from his sister-in-law on the understanding (not in writing) that she could continue to live in it rent-free for the rest of her life. The purchaser tried to obtain possession of the cottage; the defendant claimed that the oral agreement amounted to an informal declaration of trust whereby the purchaser would hold the property on trust for her during her lifetime. The formality for such a declaration of trust over land would normally have to be in writing (s 53(1)(b) of LPA), but the Court of Appeal held that the purchaser's action to take possession was unconscionable, and imposed a constructive trust to give effect to the defendant's lifetime interest in accordance with the oral agreement.

(4) The court in *Bannister v Bannister* also held that the oral agreement had created a settlement under the Settled Land Act 1925 ('SLA'). Under the SLA settlement imposed by the court, the sister-in-law became the tenant for life, and had the power to call for the estate to be conveyed to her and the power to sell it.

(5) In *Yaxley v Gotts and Anr* [1999] 3 WLR 1217, Yaxley (a self-employed builder) was promised by Gotts, that Yaxley would be given the ground floor of a three-storey house (to be purchased by Gotts) in exchange for his labour and materials to convert the house into flats for letting, and for managing the letting of the flats afterwards. The agreement was reached with Gotts Snr, but it was the son who bought the house, and Gotts Jnr refused to grant Yaxley an interest in the property. The oral agreement which would have been void and unenforceable for failing to be in writing (s 2 of LPMPA 1989) was held to be enforceable on the basis of a constructive trust under s 2(5) of LPMPA.

(6) In *Yaxley v Gotts*, Robert Walker LJ described the constructive trust at 1231 as:

> '… the species of constructive trust based on "common intention" is established by what Lord Bridge in *Lloyds Bank Plc. V Rosset* [1991] 1 AC 107, 132, called "agreement, arrangement or understanding" actually reached between the parties, and relied on and acted on by the claimant. A constructive trust of that sort is closely akin to, if not indistinguishable from, proprietary estoppel. Equity enforces it because it would be unconscionable for the other party to disregard the claimant's rights.'

(7) The doctrine of estoppel is generally used as a defence against a claim, but the doctrine of proprietary estoppel is an exception to this general rule and was used as a cause of action in *Gillett v Holt* [2000] 2 All ER 289. The claimant Gillett had worked for some 40 years from childhood for little pay for Holt, a gentleman farmer, and had incurred expenditure on the farmhouse, refused offers of alternative employment, and gone far beyond the extent of employee's duties, on account of the repeated assurance from Holt that he would leave the entire estate to Gillet. In giving the leading judgment, Robert Walker LJ stated (at p. 301) that 'the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments' (i.e. assurance or encouragement, reliance and detriment), but that:

> '… the quality of the relevant assurance may influence the issue of reliance, that reliance and detriment are often intertwined, and that whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round.'

Findings of fact

57. With the legal principles and relevant provisions as regards different formality requirements pertaining to a transfer of legal interests and equitable interests in land, and from Ms Wilmore's evidence and contemporaneous communications, we make the following findings of fact and inferences relevant to determining the appeal.

(1) As the main earner of the household for most of the time of her relationship with Mr Cohen, it was Ms Wilmore's earnings and credit history that enabled the purchase of Ravenshurst, two other properties that started Mr Cohen's business, and Thornfield.

(2) The mortgage on Ravenshurst, which was in Ms Wilmore's sole name, was converted to a buy-to-let mortgage at the time Thornfield was purchased. From this primary fact, we infer that Thornfield obtained a home-owner mortgage which would be at a more favourable rate than the buy-to-let mortgage on Ravenshurst.

(3) The mortgage on Ravenshurst in Ms Wilmore's sole name was augmented by £100,000 to release equity, which was used as deposit for Thornfield.

(4) On 10 September 2015, the date adopted as the date of separation, Mr Cohen moved into Thornfield as his main residence.

(5) In December 2015, the separated couple agreed that Ms Wilmore would take Ravenshurst, and Mr Cohen would take Thornfield. Consequently, Ms Wilmore stopped contributing to the mortgage payment of Thornfield.

(6) Following the December 2015 agreement, Ms Wilmore was able to convert the buy-to-let mortgage on Ravenshurst back to a home-owner's mortgage. Ms Wilmore assumed the £100,000 extra borrowing on the mortgage on Ravenshurst that was deployed as deposit towards Thornfield without any recompense from Mr Cohen.

(7) Mr Cohen had the full benefit and enjoyment of Thornfield (which started from 10 September 2015) without any curtailment from Ms Wilmore until the property was sold in September 2016. We find that Ms Wilmore never occupied Thornfield; that she took no part in any decision making concerning the renovations or the sale of the property; that she did not share the costs nor the benefits from the renovations of the property; that she took no proceeds from the sale of Thornfield.

Whether transfer of beneficial interest by 5 April 2016

58. From our findings of fact, we conclude that by the agreement entered into by the separated couple in December 2015, Ms Wilmore in effect had transferred all her beneficial interest in Thornfield to Mr Cohen. From December 2015 onwards, a constructive trust arose whereby Ms Wilmore was the legal joint owner of Thornfield, but no longer held any beneficial interest in the property. In line with the relevant authorities, the species of constructive trust that arose in December 2015 was based on 'common intention' and 'mutual understanding', and was established by 'the "agreement, arrangement or understanding" actually reached between the parties' as in *Yaxley v Gotts*.

59. By virtue of the constructive trust that arose following the December 2015 agreement, there was a full disposal of Ms Wilmore's beneficial interest in Thornfield to Mr Cohen. The disposal of Ms Wilmore's beneficial interest in Thornfield therefore took place in the tax year ended 5 April 2016 for section 58 of TCGA to apply to deem the transfer as having been effected on a no gain no loss basis.

60. The appellant's self-chosen term of '(sort of) agreement' to characterise the December 2015 agreement does not detract from our conclusion that a constructive trust arose consequent upon the December 2015 agreement in relation to Ms Wilmore as the legal owner of Thornfield.

The substance as related by Ms Wilmore in the '(sort of) agreement' encompassed other aspects which were to form the divorce settlement, such as any potential claims on her pensions, or whether she could 'get back' her bonus. While the final details of the other aspects to form the divorce settlement were not set in stone in December 2015, the only relevant fact for the purpose of this appeal remained unchanged, namely that Mr Cohen had become the only holder of the beneficial interest of Thornfield, and Ms Wilmore had no beneficial interest in Thornfield and held *only* the legal title of Thornfield as a trustee jointly with Mr Cohen.

The relevance of the Consent Order

61. A consent order in a divorce petition as a procedural measure is to enable the parties to have a once-and-for-all agreement that cannot be varied by the parties, nor can the agreement be supplemented or diminished by the court. The essential purpose of a consent order is to achieve finality for the parties concerned in a divorce settlement. In the Privy Council's decision in *de Lasala v de Lasala* [1980] AC 546 (which is relied on by HMRC), the wife's application to the court for financial provision subsequent to new powers vested with the court was dismissed. Lord Diplock observed at 559:

> '… the grant to the court of power in 1972 to make the two new kinds of orders did no more than enlarge the ways in which the court could exercise the jurisdiction it already had to order one spouse to make a once-for-all financial provision for the other. The difference between a lump sum order which the court already had power to make and a property transfer order that it acquired power to make in 1972 is the difference between providing money and money's worth. The finality of the break effected by the consent order dismissing the wife's application for financial relief cannot in their Lordships' view be prejudiced by the court's having acquired at some later date a power to make once-for-all orders for financial position of kinds which were not available at the time that the "final break" which the court then approved was made.'

62. The significance of *Lasala* is to establish that a party to a consent order cannot seek to re-open the provisions embodied in an order by the court, because the legal effect of those provisions is derived from the court order itself. The legal function of a consent order is therefore to enable the parties to an agreement to apply to the court to enforce the agreed terms, should that become necessary, without having to commence new proceedings.

63. It is important to appreciate that a consent order is always preceded by an agreement reached by the parties; the court does not make the agreement for the parties. No matter in what manner or pressure an agreement is reached between parties petitioning for divorce, there is an agreement reached by the parties behind a consent order. The 'sanctity' of agreements freely entered into between parties is fundamental in law.

64. In the present case, we find as a fact that by virtue of the agreement reached in December 2015 between Ms Wilmore and Mr Cohen so far as Thornfield was concerned, a constructive trust arose whereby Mr Cohen became the full beneficial owner of the property. We accept that as in December 2015, the parties had not finalised all the terms that came to be embodied in the Consent Order, but so far as Thornfield was concerned, the agreement gave rise to a constructive trust that was extant from December 2015 onwards until September 2016 when Thornfield was sold.

65. For this reason, we find that neither the timing of the Consent Order, nor the date of 31 August 2016 stipulated therein as the compliance date for the transfer of the respective properties, supplanted the date of the December 2015 agreement which gave rise to the constructive trust as the timing when Ms Wilmore transferred her beneficial interest of Thornfield to Mr Cohen.

66. We also reject HMRC's submissions that the lump sum order and the variation of its quantum was indicative that there was no transfer of the equitable interest in Thornfield until after 5 April 2016. We find as a fact that the quantum of the lump sum order was in no way pitched as a payment to Ms Wilmore for transferring her equitable interest in Thornfield to Mr Cohen. We find the lump sum payment to be a ball-park figure towards recognising the greater financial contributions made by Ms Wilmore in the marriage over the years. While the timing of the lump sum payment might be predicated on the timing of the proceeds being available from the sale of Thornfield, the lump sum payment in itself was in no way tied to the transfer of Ms Wilmore's equitable interest in Thornfield in December 2015.

DISPOSITION

67. For the reasons stated, the appeal is allowed. There was a transfer of the appellant's beneficial interest in the relevant property in the tax year 2015-16 for section 58 of TCGA to apply to treat the transfer as on a no gain no loss basis.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

68. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

HEIDI POON
TRIBUNAL JUDGE

Release Date: 06th October 2023