



Unconscionability, Constructive Trusts and Proprietary Estoppel

Culliford v Thorpe [2018] EWHC 426 (Ch)

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I. INTRODUCTION

Recently, there has been much academic and judicial discourse on the relationship between the doctrines of proprietary estoppel and the common intention constructive trust.¹ In particular, the debate has centred on the question whether there is any real difference between the two doctrines when applied in the context of establishing proprietary interests in land, particularly where the land is shared between two or more individuals but the legal title is only taken in the name of one of them. In the recent High Court decision in *Culliford v Thorpe*² the court had to consider, *inter alia*, whether the doctrines of proprietary estoppel and the common intention constructive trust were mutually exclusive or whether they could be applied contemporaneously to the same set of facts to reach the same remedial response. This case note examines the decision in *Culliford v Thorpe*³ and explains that the two doctrines demonstrate the wider notion of unconscionability which lies at the heart of equitable intervention.

II. THE FACTS IN *CULLIFORD V THORPE*

The facts concerned a claim by the claimants to a house in Weston Super Mare (the Weston Property) which belonged to their brother, Mr Culliford, who had died intestate in March 2016. The claimants were the personal representatives of Mr Culliford and therefore were entitled to the legal title to the Weston Property. The defendant, Mr Thorpe, who had been living with Mr Culliford as his partner counter claimed that he was entitled to the beneficial ownership of the Weston Property by way of a constructive trust and/or proprietary estoppel. In this respect, Mr Thorpe sought a declaration that he was the beneficial owner of the Weston Property and that it be transferred in his name.

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¹ See, for example, Terence Etherton, 'Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle' (2009) Conv 104.

² [2018] EWHC 426 (Ch).

³ [2018] EWHC 426 (Ch).

Mr Culliford bought the Weston Property in his sole name in September 2002 with the aid of a mortgage. In 2010, he met Mr Thorpe through an online dating agency and started a relationship with him. The relationship grew stronger and Mr Thorpe moved into the Weston Property permanently from 2010 onwards. Mr Thorpe was not earning a living although had some access to family money. Mr Thorpe carried out some repairs around the Weston Property, however, the principal living costs were borne by Mr Culliford. Mr Culliford was employed as a flight attendant and enjoyed a life of travel, often taking Mr Thorpe and other family members on travels around the world. Mr Culliford was diagnosed as HIV positive and had to reduce the number of hours he could work because of his illness. This had a significant impact on his income and it was also a source of much tension between himself and Mr Thorpe who was not earning an income. As a result of his reduced income, Mr Culliford had to enter an individual voluntary arrangement (IVA) in October 2011. Around about the same time as these issues, Mr Thorpe's father, who lived in Stratford-upon-Avon became very ill which resulted in Mr Thorpe moving into his father's property and caring for him. Mr Culliford and Mr Thorpe remained in their relationship and Mr Culliford would often visit Mr Thorpe in Stratford-upon-Avon. Mr Thorpe's father died in April 2012 and Mr Thorpe moved back to the Weston Property on a permanent basis.

On Mr Thorpe's father's death, Mr Thorpe became an executor of his father's will. Mr Thorpe along with two other siblings became entitled to property under this father's will along with a share in a family home in Devon. As Mr Thorpe had now received a significant amount of money and an interest in the Devon property, the mutual understanding between Mr Thorpe and Mr Culliford was that they would pool their resources together, that is Mr Culliford's property and Mr Thorpe's property and agree that they were entitled to all property as if it was theirs collectively and this was the basis of their relationship and understanding moving forward. This arrangement remained informal as there was no subsequent conveyance, for example, of the Weston Property in the joint names of the Mr Culliford and Mr Thorpe. Mr Culliford and Mr Thorpe agreed that the money that Mr Thorpe had acquired under his father's will would be used to refurbish both the Weston Property and the property in Devon. Furthermore, Mr Thorpe's share in the Devon property would take the form of an apartment on the top floor which would be let out and the income used to help Mr Culliford reduce the number of hours working so as to alleviate the issue with his health. At no time were there any discussions as to how the respective properties of Mr Culliford and Mr Thorpe were held, that is, whether joint tenants or tenants in common. Mr Thorpe proceeded to carry out substantial repairs to the Weston Property adding some £30,000 to its value. Mr Culliford's health continued to deteriorate and was not helped by a substance abuse problem which eventually resulted in his death in August 2016. After Mr Culliford's death, Mr Thorpe claimed the entire beneficial ownership of the Weston Property and this was the question to be decided by Mathews J in the High Court. The basis of Mr Thorpe's claim was that a common intention constructive trust arose in his favour as well as proprietary estoppel. Mr Culliford had promised Mr Thorpe that he was entitled to an equal interest in the Weston Property and that Mr Thorpe had relied on that promise to his detriment

a) *The Relationship between Proprietary Estoppel and the Common Intention Constructive Trust*

The analysis of the case law on common intention constructive trusts illustrates that common intention constructive trusts have a number of similarities with the equitable doctrine of proprietary estoppel. Indeed, many of the cases which appear before the courts are usually argued on both grounds just like in the present case of *Culliford v Thorpe*.⁴ The essence behind proprietary estoppel is to prevent a legal owner of land from denying a proprietary right in land which he has led the claimant to believe will become his. The doctrine is neatly explained by one leading commentary on land law which explains that:

“the doctrine of proprietary estoppel gives expression to a general judicial distaste for any attempt by a legal owner unconscientiously to resile from assumptions which were previously understood, and acted upon, as the basis or relevant dealings in respect of his land. In curtailing the unconscionable disclaimer of such underlying assumption, the estoppel principle is ultimately directed against the abuse of power.”⁵

Judicially, Oliver J explained the doctrine as one which:

“requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.”⁶

A successful claim to an interest under proprietary estoppel requires that the defendant make some assurance or representation that the claimant will acquire an interest in the defendant's land. Secondly, that the claimant has relied on the assurance or representation by changing his position. Finally, that as a result of the representation and subsequent change of position, the claimant has suffered a detriment which makes it unconscionable for the defendant to deny the very rights in the land which he led the claimant to believe would be his.

At the heart of the common intention constructive trust is the element of a common intention or bargain. Typically, the common intention or bargain will have been made at the time of the acquisition of the property. However, it is possible for the common intention or bargain to have been made after the acquisition of the property. Equally important is the element of detriment or change of position. This requires the claimant to have acted upon or relied on the common intention to his or her detriment. In *Capehorn v Harris*⁷ Sales LJ explained the nature of the common intention constructive trust by saying that:

⁴ [2018] EWHC 426 (Ch). See also *Arif v Anwar* [2015] EWHC 124 (Fam).

⁵ K.Gray & S. Gray, *Elements of Land Law* 6th Ed. (2009) at p.1197.

⁶ *Taylor Fashions v Liverpool Victoria Trustees Co Ltd* [1982] Q.B. 133 at 151.

⁷ [2015] EWCA Civ 955.

“In relation to assets acquired by unmarried co-habitees or partners, where an asset is owned in law by one person but another claims to share a beneficial interest in it a two-stage analysis is called for to determine whether a common intention constructive trust arises. First, the person claiming the beneficial interest must show that there was an agreement that he should have a beneficial interest in the property owned by his partner even if there was no agreement as to the precise extent of that interest. Secondly, if such an agreement can be shown to have been made, then absent agreement on the extent of the interest, the court may impute an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances⁸.”

Although the common intention constructive trust is often argued alongside proprietary estoppel, there are some fundamental differences between the two doctrines.⁹ A common intention constructive trust is essentially imposed on grounds of a bargain between a claimant and a defendant whereas a claim for estoppel is based on some assurance given by the legal owner to a claimant on which the claimant has relied. Another difference lies in the remedies that are given in both cases. In the context of a common intention constructive trust, the appropriate remedial response is to recognise that a trust has arisen in the past conferring upon the claimant a beneficial interest in the land. The role of the court, as seen above, is to quantify that beneficial interest. In the context of proprietary estoppel, the role of the court is firstly to establish whether an equity has arisen in favour of the claimant. Secondly, the court, at its discretion, seeks to satisfy the equity by either conferring upon the claimant the property right which he was led to believe would be his or to award him compensation for loss he has suffered as a result of relying on the defendant’s representation or assurance. Finally, in the case of a common intention constructive trust, the claimant acquires a beneficial interest in the land as soon as the common intention is made and acted upon by the claimant. In this respect, the role of the court is to merely recognise that the claimant became entitled to a beneficial interest sometime in the past, which is capable of binding third parties who have notice of it. In the case of proprietary estoppel, the claimant will only acquire an interest in the land after the court, if it decides to do so, awards a proprietary right in the land.

b) *Analysis of the Decision on Culliford v Thorpe*

Mathews J having accepted that the Mr Thorpe’s claim rested on the application of the principles of the common intention constructive trust and the principles of proprietary estoppel, proceeded to apply the relevant law to the facts of the case. In so far as the common intention constructive trust, Mathews J explained that there was an agreement between Mr Culliford and Mr Thorpe to share the respective properties, that is the Weston Property and the property in Devon to which Mr Thorpe became entitled to under his father’s will. In particular, with reference to the Weston Property, Mr Thorpe has relied on that agreement by carrying out substantial work and therefore had suffered a detriment as a result. In the words of the Mathews J “the defendant plainly relied upon that agreement in

⁸ [2015] EWCA Civ 955 at para.16.

⁹ See, T. Etherton, ‘Constructive Trusts and Proprietary Estoppel: The Search for Clarity and Principle’ (2009) Conv. 104.

carrying out the significant works which he did on the Weston property, using his own labour and his own money to purchase materials, as well as occasionally paying others to do work.”¹⁰ Having reached the conclusion that a common intention constructive trust arose in favour of Mr Thorpe with respect to the Weston Property, Mathews J proceeded to answer the question whether Mr Thorpe could also claim an interest in the Weston Property by applying the proprietary estoppel principle. Although the learned judge thought that it was not necessary to consider proprietary estoppel, he nevertheless held that Mr Culliford had made Mr Thorpe a promise which had been relied upon by Mr Thorpe to his detriment and as such proprietary estoppel applied in his favour.

Having applied the common intention constructive trust and the doctrine of proprietary estoppel to the facts, Mathews J proceeded to address the question of the appropriate remedy to be awarded to Mr Thorpe. This part of his judgment raised two interesting questions. Firstly, the relationship between the two doctrines and whether they were mutually exclusive. Secondly, and more importantly, the nature of the remedial response and whether the remedial response depended on which doctrine was being applied. In so far as the relationship between the two doctrines, Mathews J explained that they had their roots in the broader basis of equitable intervention which is unconscionability. The learned judge commented that he “should deal with the question of unconscionability which lies at the heart of both common intention constructive trust and proprietary estoppel. I say “at the heart” because there can be little doubt that these two doctrines spring from the same source.”¹¹

In so far the question regarding the appropriate remedial response to be given to Mr Thorpe, this required a more detailed examination of the doctrine of proprietary estoppel and whether proprietary estoppel varied from case to case. The claimants argued that in the normal case where proprietary estoppel was being argued, the appropriate remedial response required the court carry out a kind of arithmetical exercise to see whether in fact the conduct in reliance put forward in this case has in fact produced a detriment at all.¹² Having carried out this arithmetical exercise, the court should compensate the party claiming under proprietary estoppel.¹³ Mathews J explained that such an exercise was not appropriate in the case before him on the grounds the type of proprietary estoppel argued in the case did not lend itself to such an arithmetical exercise. The learned judge was of the opinion that there were two types of proprietary estoppel. Firstly, the common intention type of proprietary estoppel where there is agreement between the legal owner of land and the claimant that the claimant will have a share in the land belonging to the legal owner. In such cases, the role of the court is to give effect to the common intention by the award of an interest in the land, very much the identical process that takes place under a common intention constructive trust. Secondly, a proprietary estoppel where the legal owner does not agree a bargain or a common intention as to any share in the land, but where he creates an expectation that the claimant may have some future interest in the land but that interest is not defined or quantified. It is only in this latter case that the court is required to carry out an arithmetical exercise to establish what, if any, detriment has been suffered by the claimant and how best that detriment can be remedied, which may include the award of compensation. In the words of Mathews J:

¹⁰ [2018] EWHC 426 (Ch) at para. 66.

¹¹ [2018] EWHC 426 (Ch) at para. 68.

¹² See, for example, *Davis v Davis* [2016] EWCA Civ 463.

¹³ See, for example, A. Robertson, “The Reliance Basis of Proprietary Estoppel Remedies” [2008] Conv 295.

“there is a difference between two quite different kinds of proprietary estoppel cases. There are those, such as in *Dillwyn v Llewellyn*, *Davies v Davies* and indeed the present case, where the property owner in effect makes a *promise*, intended to be relied upon, to transfer ownership wholly or partly to the other, who then relies on it to his or her detriment. In these cases there is an expectation, created by the property owner, to be satisfied. If the promise had been made in a formal way, it would have been a contract. It is not surprising therefore that the court's starting point, at least, is to consider ordering the promise to be made good. In *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501, [44]-[52], Robert Walker LJ subdivides this category into two: cases where there is a bargain in clear terms, and cases where the bargain is unclear or extravagant. This distinction is discussed in the literature. But they are all cases of *promises*, creating expectations.”¹⁴

In the present case, Mr Thorpe was promised an equal share in the Weston Property and, in the absence of a declaration that they were joint tenants or tenants in common, the appropriate remedial response was to declare that Mr Thorpe was entitled to a half share in the disputed property.

III. CONCLUSION

The decision in *Culliford v Thorpe* is an interesting one and clarifies a number of uncertainties that have revolved around the doctrines of the common intention constructive trust and proprietary estoppel. The decision makes it clear that both doctrines have their roots in the equity's traditional jurisdiction to remedy unconscionable conduct on the part of a land owner against a claimant who has been promised an interest in land but has subsequently retracted from that promise. In terms of the appropriate remedial response required in cases where both the common intention constructive trust and proprietary estoppel are argued by a claimant, the court is required to give effect to the common intention or promise which has been relied upon by the claimant. In cases like *Culliford v Thorpe*, where there was a common intention and promise that the disputed property would be shared equally by the parties, the award of a half share in the disputed property was the appropriate remedial response to satisfy the equity in favour of the non-legal owner of the land.

¹⁴ [2018] EWHC 426 (Ch) at para. 74.