

## Seminar - New Square Chambers and VWV LLP - Property and probate for cohabiting couples - 2 February 2022

### Crib sheet for Scenario 1 - John and Tracy

#### Ownership – Starting Position

The couple are joint legal owners of the flat as a result of the joint names registration. The couple therefore have joint control of the flat vis-à-vis sale.

In the absence of a binding express declaration of trust the starting point is given by *Stack v Dowden* and *Jones v Kernott* [2011] UKSC 53. The purchase was in the domestic consumer setting by two co-habitees in a relationship together.

The presumption is that equity follows the law and the flat is held by the couple as joint tenants.

A factual question arises as to what claims, if any, Tracy's parents have. The available options are that they have no claim to the return of the £25,000 paid towards the deposit as this sum was given as a pure donative gift. Alternatively, the express or tacit understanding may at all times have been that the sum was a loan to both Tracy and John repayable upon sale of the flat. Finally, Tracy's parents may attempt to argue for an interest by way of resulting trust in the absence of any discussions as to the character in which the funds were given.

In the absence of evidence a number of presumptions potentially conflict:

- 1) The presumption of a loan implied from payment: *Chapman v Jaume* [2012] EWCA Civ 476 (doubted in Hong Kong, not applied in Australian authorities and questioned in Lewin).
- 2) The presumption of advancement from a parent to a child as between Tracy and her parents: *Singh v Ali* [1960] A.C. 167 and *Ralph v Ralph* [2020] EWHC 3348 (QB) – a weak presumption where a child is over 18 and financially independent: *Kelly v Kelly* [2020] 3 WLUK 94.

*Quare* whether this applies equally as a presumption to John: *Abbott v Abbott* [2007] UKPC 53 applying the presumption of advancement jointly in respect of a gift by a parent to a married couple.

- 3) If the presumption of advancement does not apply to both Tracy and John then further query whether the presumption of resulting trust/loan applies vis-à-vis John giving rise to irreconcilable conflicting presumptions.

It appears most likely that John and Tracy would hold the property as joint tenants at the outset. It appears unlikely that Tracy could appropriate the £25,000 paid by her parents towards the deposit as “her funds” and therefore a contribution towards the purchase price. In any event the discussions/shared intentions of the couple appear to reflect a desire for equal ownership.

### John's Mortgage Lump Sum Contribution

Does this amount to a subsequent variation of ownership shares? The discussion between the couple arguably indicates a shared awareness that this contribution may impact ownership or beneficial entitlements, albeit both parties considered such an eventuality unlikely when the payment was made.

John could advance three potential arguments:

- 1) That the parties held a shared common intention to vary the beneficial interests in the flat in accordance with his increased contribution.

It is possible to rely upon later conduct and an inferred or express common intention to vary shares: *Jones v Kernott* at [51].

As noted in *James v Thomas* [2007] EWCA Civ 1212 (a sole name case) *"in the absence of an express post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficial interests established at the time of acquisition."*

This argument also struggles as the couple's discussion was knowingly conditional/reflective of one potential future scenario.

- 2) That the same shared intention was acted upon by John to his detriment in the expectation that the £25,000 contribution would be reflected by a proportionate increase in John's ownership share if the couple ever had to sell in the event of a breakup. John seeks a remedy by way of proprietary estoppel in the circumstances. See generally *Davies v Davies* [2016] 2 P. & C.R. 10.

The difficulty in this case will be in treating the discussion surrounding the £25,000 contribution as giving rise to a legitimate belief upon which John was reasonably entitled to rely that he would acquire an increased share, or that the discussion was in any way intended to be acted upon with the result that John's ownership stake would increase.

Further difficulties arise as to the potentially wider scope of remedy which may extend from a proportionate increase in ownership down to a contribution to the mortgage lump sum: *Guest v Guest* (watch this space for the Supreme Court's decision).

- 3) John is entitled to contribution of ½ of the lump sum payment from Tracy upon sale as a co-liable debtor under the mortgage.

### Improvements to the Property

Similar issues as above arise regarding the characterisation of the payment/contributions whether as loan or gift.

If we were to treat the payment as made by Tracy alone the starting point is *Lyle v Bedborough* [2021] EWHC 220 (Ch):

*"94. Following Wilcox v Tait, I am entitled to infer that, while they lived together, there was no common intention that either should have to account to the other for sums spent on the Property while living together, for their joint benefit. I am satisfied that the improvements to the Property were indeed for the Bedboroughs' joint benefit. I will, therefore, make the inference."*

The period of the accounting is typically inferred to be only post-relationship breakdown: *Wilcox v Tait*.

If there is to be an allowance the general principle (subject to the balancing of factors under TLATA 1996) is that the spending party may upon sale often recover the lesser of a proportion of their expenditure and a proportion of the attributable increase in value: *Re Pavlou* [1993] 1 W.L.R. 1046. – subject to any contrary common intention of the parties.

Where one of two joint owners improves or repairs the common property, she normally has no lien in respect of her outlay: *Re Pavlou* [1993] 1 W.L.R. 1046

There is no evidence before us that the property value increased because of the works. Equally, the contribution was made at the outset of the relationship and the *Wilcox* inference is likely to prevail in that the expenditure was for shared benefit.

### Occupation Rent and Mortgage Contributions

Formal ouster is not required before an occupation rent can be accounted for: see *Bailey v Dixon* [2021] EWHC 2971 (QB).

The *prima facie* position is that where Tracy has retained and paid the full mortgage contribution in respect of which she was only ever intended to contribute 50% she will be entitled to a credit for the overpayment. The mortgage contributions through the term were £1,000 per month giving a £500 credit

Correspondingly, Tracy has sole occupation and use of the shared home, whereas John has expended £1,200 per month on his alternative accommodation. A valuation would be required of the rental charge for the property and Tracy charged with ½ of this sum in keeping with a finding that she held 50% of the beneficial ownership as a joint tenant: *Akhtar v Hussain* [2012] EWCA Civ 1762.

In appropriate circumstances the interest element of mortgage repayments can be approximated with an occupation rent charge, unless the values are likely to differ significantly between the interest component and true market rent: *Ketteringham v Hardy* [2011] EWHC 162 (Ch).

### **Conclusion**

50/50 ownership division likely with the parties capable of severing their joint tenancy in equity with a notice of severance if they so elect.

Upon a sale the equity following repayment of the mortgage would be £237,000 with each laying claim to £118,500.

It would be unlikely that Tracy would be able to claim any increased share for the £20,000 works contribution if the funds were treated as her own.

It is unlikely John could claim a proprietary benefit from his mortgage contribution but may claim a greater share of the equity reflecting half of the lump sum payment.

An occupation rent may be assessed and charged. This may in large part be set off against John's unfulfilled mortgage obligations since his departure.

Tracy's parents' position would need further evidence on the status of the contribution towards the deposit. This question would be unlikely to turn on presumptions and it is difficult to see which the court would apply in the absence of evidence.