Gone, but not forgotten

Joss Knight examines a claim for a common intention constructive trust where a cohabitee has passed away

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Claims for a declaration that property is held on a common intention constructive trust (CICT) – whether they be single-name or joint-name cases – usually exhibit a broadly similar factual background: a committed, often long-term relationship, the mutual occupation of property with little, if any, consideration of who actually 'owns' it, and still less consideration of the possibility of the relationship not lasting the course. What happens then can seem, with the benefit of hindsight, to be almost inevitable. The relationship ends, the parties split, and one of them belatedly realises they are legally entitled to a good deal less than they thought. Litigation ensues, with the party with less vigorously affirming the existence of an agreement between them to 'share' that property. The party with more trenchantly denies any such conversation.

These cases inevitably share an unhappy background, but *Culliford v Thorpe* [2018] dealt with a different and even more tragic situation. Rather than break-up followed by dispute, the parties were separated by death. With no will in existence, Mr Thorpe had to rely on an oral agreement reached some years previously to claim an interest in property. The administrators found themselves defending proceedings on behalf of the estate and attempting to deny the existence of a conversation to which they were not, on anyone's case, a party.

Background

Mr Rodney Culliford (the deceased) and Mr Jocelyn Thorpe (known as Joe, the defendant) met in 2010. The deceased was a flight attendant, working with British Airways. He was described by the judge as 'an outgoing man, fun to be with'. They commenced a relationship and Mr Thorpe soon moved into the deceased's property in Weston-super-Mare, which he had bought in 2002 with the aid of a mortgage. This property, known as the Weston property, became their home. The parties also frequently stayed at Mr Thorpe's property – the top-floor flat of his family home in Devon – known as 'the Devon property'. While it was in fact owned by Mr Thorpe's parents, neither of them lived there, with the rest of the house occupied by his brother.

In July 2011 Mr Thorpe moved out of the Weston property to look after his father, who eventually passed away in April 2012. Thereafter Mr Thorpe moved back in to the Weston property. It was his case that the all-important agreement was reached during the moving-back-in process. The deceased supposedly said that 'it was time to join forces' and 'what's yours is mine and what's mine is yours.' Importantly, this conversation was had in the context that Mr Thorpe had acquired rights to the Devon property as a result of his father's will, of which he was an executor. Both parties were therefore bringing something to the table.

Mr Thorpe was not employed, but had building experience. In reliance on the agreement, he carried out building and renovation works to the Weston property – usually when the deceased was travelling with work. He estimated the cost of these works to be in the region of £30,000. The joint expert report

suggested the increase in value to the property attributable to the works carried out was a similar figure.

Tragically, the deceased passed away in March 2016 as a result of a drugs overdose. His body was found at the Weston property by Mr Thorpe on his return from the Devon property. He was 49.

The deceased's siblings (the claimants) obtained a grant of letters of administration and the parties initially collaborated in the organisation of the funeral. However, relations soon became strained and Mr Thorpe took occupation of the Weston property, refusing the claimants access. Eventually they brought a claim for possession, to which Mr Thorpe responded with a counterclaim for an interest in the property on the basis of constructive trust and/or proprietary estoppel.

The law on CICTs

Being a single-name case (ie the property was registered in the deceased's name only), the binding authority is the House of Lords decision in *Lloyds Bank plc v Rosset* [1990]. By way of short summary, in order to establish a CICT, Mr Thorpe had to prove the following:

- there was an express agreement between him and the deceased that they would share the property beneficially, or, alternatively, such an agreement could be inferred by their conduct;
- he relied on that agreement to his detriment; and
- it would be unconscionable to deny him an interest.

If an express or inferred agreement was established, the court must then move on to consider how the property should be shared. If there was an express agreement – eg 50/50 – the court will give effect to it. If not, the court can infer the decision based on the parties' conduct, or, if it cannot do so, it will impute an intention to them.

In *Cullifordd* the defendant was relying on an express agreement, and sought to argue that the presumption should be that the intention was to share the property as joint tenants. Were he to succeed, he would receive the property outright, as it would pass to him on the deceased's death by survivorship.

Judgment

The court found for the defendant on the counterclaim on the basis of CICT. The estate therefore held the property on trust for the estate and the defendant in equal shares (rather than on the joint-tenancy basis which would have seen Mr Thorpe take the property outright). HHJ Matthews ordered that the property be sold, with the proceeds used to discharge the mortgage and then be divided between the parties. A deduction from the defendant's share would be made for occupation rent for the period in which the defendant occupied the property after the deceased's death to the exclusion of the claimants.

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Finding an agreement

The claimants' approach on the question of whether there was an agreement was threefold:

Firstly, they contended the court should be extremely wary of accepting the existence of an agreement granting property rights where the grantor was dead, and therefore not in a position to deny it. To do otherwise would surely open the floodgates. The judge gave this short shrift:

> The court must find that the agreement was actually come to, and that there was then detrimental reliance on the agreement. The courts will be astute to evaluate the evidence put forward in favour of such agreements and the reliance on them. There is nothing in this objection.

Secondly, on a factual basis – although the executors could not give any evidence as to the conversation itself, they sought to cast doubt on its likelihood by downplaying the strength and commitment of the relationship during the deceased's lifetime. However, this approach was undermined by the finding that the claimants and the deceased were not particularly close, seeing relatively little of each other. They rarely visited his house (and so could not comment on any works carried out) and were unaware of his HIV diagnosis or his individual voluntary arrangement (IVA).

Finally, they attacked Mr Thorpe's account for lacking sufficient clarity to give rise to property rights. Again, the judge demurred at para 56:

> In my judgment the words used and found by me in the context in which they were used are sufficient for this purpose. If the argument is that they were not clear enough, then I simply disagree. As Lord Walker said in *Thorner v Major* [2009] 1 WLR 776, [56]:
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> > 'What amounts to sufficient clarity, in a case of this sort, is hugely dependent on context.'

Proving detriment

On the question of detriment, Mr Thorpe relied on bank statements demonstrating approximately £10,000 worth of expenditure on materials for works he then carried out. However, only £1,000 of these sums were obviously attributable to materials, the rest being cash withdrawals which he claimed were used to purchase additional items necessary to carry out the works. Nevertheless, a combination of his testimony, the testimony of other

witnesses and the joint expert report was sufficient to satisfy the judge there had been sufficient detriment. The judgment gives useful assistance to claimants struggling to find documentary evidence of expenditure (para 40):

> The defendant cannot have known that he would need to demonstrate to sceptical relatives of the deceased that the expenditure really was made, and so cannot be blamed for not having kept receipts. In the modern world, few people do, and even fewer can find them when they turn out to matter. The defendant's evidence that he spent this money on building materials and fittings is plausible and I accept it.

The claimants argued in the alternative that, even if Mr Thorpe had carried out works at the property, any detriment he allegedly suffered was more than outweighed by the myriad benefits he derived – not least free board, accommodation and (to a disputed extent) living expenses while living at the Weston property. Accordingly, either he had suffered no detriment whatsoever, or else it would not be unconscionable for the deceased (now his estate) to renege on that promise.

However, the judge differentiated between expenditure as a result of the agreement and ordinary relationship spend, which would have occurred in any event. Mr Thorpe would have been living in the Weston property whether the agreement was reached or not, because that is what couples do. By contrast, the judge found as a matter of fact that he would not have carried out any substantial works if the agreement had not been reached (para 78).

An agreement based on a misunderstanding?

A particular difficulty with Mr Thorpe's case was the agreement in question was not simply concerned with the Weston property, it also included the Devon property, and their mutual long-term intention to do up both properties, let out the Weston property and move to Devon. Not only did this never happen (death sadly intervened) but, as the claimants argued, the agreement was built on a mistake: namely that Mr Thorpe did not in fact own the Devon property. In fact, on his father's death shortly before it had passed by survivorship to his mother.

On the question of whether the mistake scuppered the equitable claim, the judge considered it made no difference.

The judge rejected the first submission that the entire agreement was void for mistake on the basis the claim was one of equity, not contract, and in any event, misapprehension about ownership would not void a contract, it would simply mean that one party could be in breach if unable to fulfil its obligations (para 54).

On the question of whether the mistake scuppered the equitable claim, the judge considered it made no difference. It may have done had Mr Thorpe been aware of the precise legal situation and deliberately misrepresented in order to procure an interest in the Weston property, but there was no deceit in this instance. Both parties believed the Devon property was his and capable of being brought to the table. It was also true to say it was treated by his extended family as his to do with as he saw fit. Finally, it was due to pass to him under his mother's will (paras 31, 53).

An agreement which never came to fruition?

Again referring to the 'composite plan' the claimants argued that the court could not simply look at the promise made, one had to take into account the whole course of the relationship, and in particular, whether the parties actually carried out what was required of them under the arrangement. In particular, the claimants relied on the decision in *Gallarotti v Sebastianelli* [2012]. In *Gallarotti* two friends bought a property together. S paid substantially more of the deposit and both the property and the mortgage were registered in his sole name. In light of this, the friends revised their agreement such that G was to pay the mortgage, though it transpired he was unable to do so and they parted ways shortly afterwards. At first instance, G was awarded a 50% interest on the basis of their agreement. However, on appeal, the Court of Appeal reduced this to 25% to reflect the fact that their revised agreement (under which G would make the mortgage repayments) never reached fruition. In *Culliford* the claimants suggested the same should apply – because the agreement did not come to fruition (because Mr Thorpe was never in a position to give the deceased an interest in the Devon property and they never moved there having refurbished and let out the Weston property), the agreement should not be given effect to under the principle of CICT.

Again, this was dismissed. In *Gallarotti*, the court put particular emphasis on the fact the parties were friends, so intended to keep their financial obligations strict and separate, as opposed to a couple, who were merging their income and not liable to account to one another. More importantly, there was no evidence that the parties ever sought to vary their agreement at any stage and indeed it was honoured by Mr Thorpe insofar as he carried out extensive works. Their plan to move to Devon was only thwarted by an intervention – namely the deceased's untimely demise. Absent variation, the original promise stood.

Interestingly HHJ Matthews went further and appeared prepared to cast doubt as to the correctness of the decision in *Gallarotti*. In comments which were strictly obiter,

he queried two things – firstly why Mr Gallarotti's failure to comply with his contractual obligations (by not making mortgage repayments as had been agreed) should affect his equitable entitlement, and secondly, why the court did not simply award Mr Gallarotti the 50% share and then make deductions for non-payment of the mortgage under the principle of equitable accounting. The judge concluded at para 62:

> It seems to me to be a case which turns very much on its own facts, and does not express any principle capable of being followed in another case which does not replicate those facts. It is certainly a case which is very different from the present one.

Some assistance in avoiding *Rosset*?

The House of Lords decision in *Rosset* is often seen as the high-water mark in the court's strict approach against CICTs, however, as HHJ Matthews confirmed, it is still the binding authority in single-name cases. However, useful guidance was provided for those practitioners wishing to avoid the harsher elements of that judgment.

The House of Lords decision in Rosset *is often seen as the high-water mark in the court's strict approach against CICTs.*

Firstly, on the question of finding an agreement between the parties, the claimant homed in on Lord Bridge's view that it was the court's role to ascertain whether (emphasis added):

> ... there has at any time prior to acquisition, *or exceptionally at some later date* been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially.

Agreements could only be found after purchase in exceptional cases, and given the Weston property was purchased in 2002 and there was nothing exceptional in this case, the court should resist finding any such agreement.

This was neatly sidestepped by the judge, who considered it to be nothing more than a reflection of the experience of courts up to that date, rather than imposing an additional hurdle (para 65).

Secondly, *Culliford* was not a case in which the court had to consider whether to infer an

agreement as it found an express agreement on the facts. However, the judge cast doubt on Lord Bridge's (obiter) contention that it was 'at least extremely doubtful' that anything less than contributions to the purchase price of a property would justify an inference of a common intention to share the beneficial interest in the property. HHJ Matthews, referencing *Stack v Dowden* [2007], gave confirmation (if it was needed) that 'the world has moved on since then' (see para 32) and carrying out substantial renovation works is likely to be sufficient, given the right circumstances, to create an inference of an agreement.

> In this case I am not satisfied that the one half share agreement should give rise to a joint tenancy of the beneficial interest in that property, rather than a tenancy in common. If I had been satisfied that at the time of the agreement the parties had considered what might happen if one of them died, then it might have been different.

In Davies, *the Court of Appeal gave some consideration to whether the court in estoppel cases should seek to alleviate the claimant's detriment or satisfy their expectation.*

Remedy: a presumption of tenants in common?

In the ordinary single-name case, the debate between tenants in common and joint tenants is largely academic – the fact the parties have subsequently split means that even if a joint tenancy had been intended it was severed when they split or when the court is dividing the property between them. However, in this case it really did matter, because if the court held that, pursuant to the agreement, Mr Thorpe and the deceased held the property as joint tenants, then the effect of his death would be that Mr Thorpe would take the house absolutely on the principle of survivorship. The strength in Mr Thorpe's argument was the words used in the agreement conversation; 'what's yours is mine and mine is yours' could be understood to reflect the inseparable nature of ownership seen in a joint tenancy, rather than distinct and divisible interests.

However, this was rejected by the judge, who concluded at para 66:

> In cases such as this, where one party has passed away, this seems to indicate a presumption of tenants in common unless a clear contrary intention could be shown (also reflected in para 29), though the rationale for that is not wholly clear. Again, it is likely that future cases will depend on their own facts.

Proprietary estoppel: a few thoughts?

The case was decided on the basis of a CICT and it was therefore not essential for the judge to go on to consider the case pleaded in alternative for proprietary estoppel. Nevertheless, HHJ Matthews took the opportunity to offer some thoughts, in particular on the decision in *Davies v Davies* [2016]. Chief among them was highlighting what he considered to be the neglected differentiation between the two forms of estoppel – those which promise to the representee they will acquire certain rights in the future (promise cases), and those which make representations about the current state of affairs (statement cases).

In *Davies*, the Court of Appeal gave some consideration to whether the court in estoppel cases should seek to alleviate the claimant's detriment or satisfy their expectation. It laid down no firm view either way, but gave some, limited, support to the concept of a 'sliding scale', in which the greater the clarity and repetition of the representation made, the more likely the court is to act to satisfy that expectation, rather than alleviate the detriment.

HHJ Matthews did not consider the sliding scale; instead he appears to take the view that promise cases are akin to an (unenforceable) contract, and therefore the starting point should be to consider ordering that promise to be made good – ie giving the claimant what they were promised. Conversely, in statement cases, there is (emphasis in original):

> … no *expectation* created by the owner, and so no reason to do other than seek to remove the detriment.

Whether this distinction is picked up by later cases remains to be seen.

A final word: costs

Costs did not form part of the reported judgment and were decided at a later date. At that hearing the judge considered the submission that the general rule should be departed from on the basis Mr Thorpe had not got everything he wanted in the sense he had asked for the Weston property absolutely but had only received a 50% interest.

The judge rejected this argument. Citing *Day v Day* [2006] he concluded the court should consider who has to write the cheque at the end of the case. This was evidently the claimants. The general rule therefore applied. ■

Culliford & anor v Thorpe
[2018] EWHC 426 (Ch)
Davies v Davies
[2016] WTLR 1175
Day v Day
[2006] EWCA Civ 415
Gallarotti v Sebastianelli
[2012] WTLR 1509
Lloyds Bank plc v Rosset
[1990] UKHL 14
Stack v Dowden
[2007] WTLR 1053