Falcon Chambers

Hudson v Hathway [2022] EWCA Civ 1648

Introduction

This was a second appeal from the decision of Kerr J, who summarised the issues as follows:

"This is an appeal in a case about equitable ownership of a family home purchased in joint names, initially with equal ownership rights, where the unmarried parties later separate. Must a party claiming a subsequent increase in her equitable share necessarily have acted to her detriment? Or does a common intention alone suffice to alter the beneficial shares? And if the former, was the judge right to decide that the requirement of detriment was met?"

The Court of Appeal allowed the appeal, holding that a party claiming a subsequent increase in their equitable share as a result of a post-acquisition changed common intention must show detrimental reliance on the changed common intention. In this case there had been sufficient detrimental reliance.

The Court of Appeal's (strictly *obiter*) conclusion on this point affirms what many always understood the position to have been. Of greater interest however is the Court's conclusion and reasoning on the new legal point raised by the Court of Appeal itself for the first time on the second appeal.

The new issue was whether section 53 (1)(c) of the LPA 1925 ("LPA 1925") had been satisfied in respect of an email exchange which had passed between the parties when discussing their financial arrangements following separation. The Court found that the email communications between the parties which expressed their common intention that Ms Hathway should have the whole equitable interest in the family home did comply with the necessary statutory formalities and were sufficient to amount to a release disposing of Mr Hudson's beneficial interest.

The Facts

Ms Hathway and Mr Hudson were an unmarried couple. In 2007 (having jointly owned two previous homes) they bought Picnic House in joint names with no declaration of trusts and a mortgage.

In 2009, Mr Hudson left Ms Hathway and Picnic House. Ms Hathway remained with their two sons. The mortgage was converted to an interest only basis, but continued to be paid from the

joint bank account into which both parties' salaries were paid. Over the years, Mr Hudson substantially paid the mortgage; the amount he contributed greatly exceeded Ms Hathway's contributions.

In 2011, the house was blighted by an oil spill. Over the next 20 months, the parties had email discussions about financial arrangements.

In an email to Ms Hathway of 31 July 2013 (subscribed "Lee"), Mr Hudson said:

"So here it is. We were never married. You have no claim over what is mine. What I consider ring-fenced is what I get from my years of personal graft. They are not up for discussion. I'm not agreeing to give you any. …. The liquid cash, you can have. Savings in the bank, other plans, take it all. Physical property, the contents of the house … again I don't want it; keep it. Which leaves the house, a bad asset which is preventing all of us [from] moving on with our lives…. You know what, I want none of the proceeds of that either. Take it. Buy yourself somewhere you can afford to live….
As for a Will, if I were to die before this financial mess is sorted, Heidi [his wife] will have no rights to Picnic House …
What I want is an end to it. So have everything that's available to have now and when the house is sold."

On 12 August 2013, Ms Hathway emailed:

"So that we can move forward and get to a point of completely severing our financial connections, your suggestion, as I understand it, is you get sole ownership of your shares and pension, I get the equity from the house, the house contents, savings and income from endowments. Is that right? If so, then I will accept this and will do everything I can to get the house ready for sale as soon as the situation with the oil spill is resolved."

Mr Hudson replied (in an email also subscribed "Lee") on 9 September 2013:

"Yes, that's right. …
Under this arrangement, I've no interest whatsoever in the house, so whilst I will continue to contribute, I won't do so forever."

In late 2013, there was some discussion about Mr Hudson buying the whole house. Further emails in 2014 referred to the deal that had been reached, Mr Hudson seeking to speed up a sale. In January 2015, Mr Hudson ceased contributing to the mortgage and Ms Hathway took over the payments.

The trial judge found that a deal was reached, but at that stage it was accepted that the deal did not satisfy the formalities for transferring legal title, an equitable interest, or a declaration of trust.

Mr Hudson sought an order under the Trusts of Land and Appointment of Trustees Act 1996 ("TLATA 1996") for an order for sale and equal division of the proceeds. Ms Hathway agreed the house should be sold but contended she was entitled to all the proceeds under a common intention constructive trust, having relied on the deal to her detriment (the detriment being said to be "paying all interest payments on the joint mortgage from January 2015; desisting from claiming against assets in Mr Hudson's sole name acquired during their relationship; not claiming financial support for the benefit of the children under the Children Act 1989; accepting sole responsibility for the oil spill and insurance claim; at her own expense, maintaining and redecorating the property from January 2015; relying from 2014 on the understanding that she was sole beneficial owner, in conducting her finances and lifestyle; and living frugally to afford the upkeep and mortgage.")

The trial judge rejected most of the claimed elements of detriment as amounting to detrimental reliance of sufficient substance when taken individually but held that by giving up potential claims against Mr Hudson's shares and pension which both she and Mr Hudson perceived she had (whether or not that belief was well-founded) did amount to relevant detrimental reliance.

Kerr J held that the trial judge had been entitled to reach his decision as a matter of evaluative judgment, but that it was not in any event necessary for Ms Hathway to show she had changed her position or acted to her detriment, holding that any such requirement had been abrogated by Stack v Dowden and Jones v Kernott.

A Re-cap on the Relevant Legal Principles

Before turning to the decision, it may be useful to summarise some of the rules and statutory formalities which apply to this technical area of property law.

There are two forms of co-ownership which exist in modern law: the joint tenancy and the tenancy in common. Formerly, under the LPA 1925 a trust for sale was imposed on both forms of co-ownership. This brought into play the doctrine of conversion, meaning that the interests of the co-owners were treated as personalty and not as an interest in land. TLATA 1996 replaced the trust for sale with the trust of land. This change meant that the doctrine of

conversion was abolished and the interests of beneficiaries under a trust of land are no longer interests in personalty but are recognised as interests in the land itself.

The legal estate in land, if vested in more than one person, must be held jointly. The beneficial interest may be held either on a joint tenancy or a tenancy in common. The legal estate cannot be severed but an equitable joint tenancy may be, thereby converting the joint tenancy into a tenancy in common and preventing the application of the doctrine of survivorship, under which, where a joint tenant dies, the survivor takes the whole (or, strictly, retains the whole, the entire equitable interest having been jointly vested in both joint tenants prior to the death).

Section 34 of the LPA 1925 applies to tenancies in common and section 36 to joint tenancies, in both cases as amended by the TLATA 1996 to reflect the change from a trust for sale to a trust of land. Section 36 (as amended) provides:

"(1) Where a legal estate (not being settled land) is beneficially limited to or held in trust for any persons as joint tenants, the same shall be held in trust, in like manner as if the persons beneficially entitled were tenants in common, but not so as to sever their joint tenancy in equity. (2) No severance of a joint tenancy of a legal estate, so as to create a tenancy in common in land, shall be permissible, whether by operation of law or otherwise, but this subsection does not affect the right of a joint tenant to release his interest to the other joint tenants, or the right to sever a joint tenancy in an equitable interest whether or not the legal estate is vested in the joint tenant…"

Lewison LJ, who gave the lead judgment, with Andrews LJ and Nugee LJ agreeing, explained, at paragraph [32]:

“We are concerned in this appeal with property rights in land, not with discretionary adjustments to property rights. The creation and transfer of property rights in land must, as a general rule, comply with statutory formalities. Such formalities are necessary in order that property rights in land should be certain. The most important of such formalities are those laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (contracts for the sale or creation of interests in land must be in signed writing) and section 53 (1) of the Law of Property Act 1925 (declarations of trust of land or an interest in land to be manifested by signed writing; and dispositions of subsisting equitable interests to be made by signed writing). Section 2 applies to executory contracts for the disposition of interests in land, but not to instruments which effect an immediate disposition. Section 53 (1), on the other hand, applies to instruments which effect an immediate disposition of an interest.”

Section 53 (1) of the Law of Property Act 1925 provides, so far as relevant:

"(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; …

(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."

What is Signed Writing for s.53?

In this case, the family home was held by Mr Hudson and Ms Hathway as joint tenants at law and in equity. As Lewison LJ noted, logically the new issue, namely whether the emails effected a release by Mr Hudson of his interest in the beneficial joint tenancy to Ms Hathway, sufficient for s.53, came first.

It is not possible for a joint tenant to assign his beneficial interest to another joint tenant. This is because both joint tenants are entitled to the whole of the land and are already the owner of the whole. A joint tenant does not have separate and distinct interests which can be assigned. Section 36(2), however, expressly reserves the right of a joint tenant “to release his interest to the other joint tenants”. A release operates to extinguish an interest, not to assign it. A release of an equitable interests does not operate by assignment or conveyance and no particular words are necessary.

At paragraph [50] Lewison LJ said:

“In my judgment Mr Hudson's emails of 31 July and 9 September 2013 are sufficient in point of form to amount to a release of his equitable interest in the house. They evince a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future. His email of 30 July 2013 said in relation to the house, "Take it"; and in his follow up on 9 September he disavowed any interest in it. Further emails, with which Mr Learmonth supplied us at the end of the hearing (and in particular those of 2 July 2014 and 25 August 2014) confirm the finality of that decision.”

But did this release amount to the disposition of an interest in land or an equitable interest?

A disposition is defined in section 205(1)(ii) of the LPA 1925 as follows:

"Conveyance" includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or an interest therein by any instrument, except a will; "convey" has a corresponding meaning; and "disposition" includes a conveyance and also a devise, bequest or appointment of property contained in a will; and "dispose of" has a corresponding meaning.”

‘Disposition’ has generally been given a wide meaning – see IRC v Grey [1960] AC 1; Newlon Housing Trust v Alsuleimen [1999] 1 AC 313; and IRC v Buchanan [1958] Ch 289, where the surrender of a life interest under a trust amounted to a disposition for the purposes of s.21(9) the Finance Act 1936. Having regard to these decisions, and other passages as to the nature of a release, Lewison LJ held that in view of the wide meaning of "disposition" the release of his interest by one joint tenant to another joint tenant would be a disposition. Accordingly, the emails of 30 July 2013 and 9 September 2013 amounted in point of form to a "disposition" for the purposes of section 53.

However, such a release would also need to satisfy the statutory formalities.

There was no dispute that the relevant emails were “writing” as defined by schedule l to the Interpretation Act 1978. But were they signed? Lewison LJ said, at paragraph [55]:

“…There is no relevant statutory definition of "signed". The touchstone for determining what is a signature is an intention to authenticate the document: *Caton v Caton* (1867) LR 2 HL 127. Applying that principle, it has been held that a printed name may amount to a signature (*Schneider v Norris* (1814) 2 M & S 286); as may the name on a telegram form (*Godwin v Francis* (1869-70) 5 CP 295), or a rubber stamp (*Goodman v J Eban Ltd* [1954] 1 QB 550).”

Noting the general principle of statutory interpretation that an Act of Parliament is regarded as "always speaking” and referring to the following decisions, Lewison LJ concluded, at paragraph [67]:

“There is … a substantial body of authority to the effect that deliberately subscribing one's name to an email amounts to a signature. Given that so much correspondence takes place nowadays by email rather than by letters with a "wet ink" signature, it is, in my judgment, entirely appropriate that the law should recognise that technological developments have extended what an ordinary person would understand by a signature. I would hold, therefore, that Mr Hudson's emails of 31 July and 9 September 2013 were "signed" for the purposes of section 53 (1) (a) and (c) of the Law of Property Act 1925.”

Lewison LJ did refer to a substantial body of case law: J Pereira Fernandes SA v Mehta [2006] EWHC 813 (Ch), where it was held that an email address automatically inserted by the sender's internet service provider was not a valid signature for the purposes of section 4 of the Statute of Frauds 1677 (relating to guarantees); Orton v Collins [2007] EWHC 803, concerning the acceptance of a Part 36 offer which had been contained in an email from solicitors; Lindsay v O'Loughnane [2010] EWHC 529 (QB) - another case about the validity of a signature for the purposes of section 4 of the Statute of Frauds; Re Stealth Construction Ltd [2011] EWHC 1305 (Ch) - where the question was whether a valid charge had been created, an email signature

being sufficient for the purposes of s.2 LP(MP)A 1989; Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265 - another case about the signature of a guarantee; Bassano v Toft [2014] EWHC 377 (QB) -here the question was whether a consumer credit agreement had been validly executed; and finally Neocleous v Rees [2019] EWHC 2462 (Ch), where the question was whether an email subscribed "Many Thanks David Tear", which signature appeared to have been automatically generated, was "signed" for the purposes of section 2 of the Law of Property (Miscellaneous Provision) Act 1989.

Neocleous v Rees was a controversial decision concerning a dispute over a right of way. The parties' solicitors, in an exchange of emails which constituted a single email chain agreed to compromise the dispute by the defendant transferring a small piece of land to the claimants for consideration. On a subsequent claim for specific performance the Defendant argued that the exchange of emails did not satisfy the requirement of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 on the basis that the purported signature by the defendant's solicitor arose from the automatic generation of his name at the foot of the email. However, HHJ Pearce held that it did. The name in the footer would be a signature for these purposes, provided that the name was applied with authenticating intent.

It was common ground that the relevant words in the footer were added automatically to every email without any action on the part of the solicitor but it was also agreed that this had involved the conscious action at some stage of a person entering the relevant information and settings into Microsoft Outlook. The solicitor know that his name was added and HHJ Pearce thought it relevant that the solicitor had also added the words "Many thanks" before the automatic footer. The judge said:

"In such circumstances, it is difficult to distinguish between a name which is added pursuant to a general rule set up on an electronic device that the sender's name and other details be incorporated at the bottom from an alternative practice that each time an email is sent the sender manually adds those details. Further, the recipient of the email has no way of knowing (as far as the court is aware) whether the details at the bottom of an email are added pursuant to an automatic rule as here or by the sender manually entering them. Looked at objectively, the presence of the name indicates a clear intention to associate oneself with the email—to authenticate it or to sign it."

Citing the decision in Neocleous v Rees without disapproval, the Court of Appeal held that "deliberately subscribing one's name to an email amounts to a signature". It therefore followed that by the emails sent by Mr Hudson (to which he subscribed his name "Lee") he released his beneficial interest in the property to Ms Hathway.

Nugee LJ added:
"Mr Hudson added his name "Lee" to the bottom of the e-mails. That is an entirely conventional way to end (or "sign off") an e-mail and I have no doubt that it satisfies the requirement in the authorities that it was added to authenticate the document. Adding your name at the end of an e-mail confirms that the e-mail comes from you. That seems to me enough to mean that the e-mail is signed by you for the purposes of s. 53(1) LPA 1925."

Detrimental Reliance and Constructive Trusts

It followed from the Court's decision that Mr Hudson had released his beneficial interest that it was not necessary to decide the point initially raised in the appeal. However, the court regarded it as an important point of principle which was appropriate for it to decide.

Can a constructive trust arise simply as a matter of common intention and without the need to show any detrimental reliance? According to the Court of Appeal, no, it can't.

According to Lewison LJ, equity acts where the application of the common law would produce an unconscionable result, but it is necessary to have some principles about what equity would recognise as an unconscionable result to avoid palm tree justice. Lewison LJ therefore asked, at paragraph [73]:

"What, then, would cause equity to regard a common law result as unconscionable? Until recently, at least in the context of the creation of constructive trusts, the answer would not have been in doubt. What makes it unconscionable to resile from a promise or agreement unenforceable at common law is detrimental reliance on that agreement or promise."

Lewison LJ, referring to the well-known cases Gissing v Gissing [1971] AC 886; Grant v Edwards [1986] Ch 638; Yaxley v Gotts [2000] Ch 162; Lloyds Bank plc v Rosset [1991] 1 AC 107; Stokes v Anderson [1991] 1 FLR 391 and Oxley v Hiscock [2004] EWCA Civ 546, concluded that "the stringency of the requirement of express discussions has been overtaken by subsequent developments in the law, but the requirement of detrimental reliance has not" and that "the need for detrimental reliance is plain".

At the first appeal, Kerr J, disagreeing with the trial judge, concluded that any requirement that it was necessary for Ms Hathway to have changed her position or acted to her detriment had been abrogated by the decisions of the House of Lords and the Supreme Court respectively in Stack v Dowden and Jones v Kernott. After a review of these decisions Lewison LJ explained: at paragraphs [107] and [108]:

"I do not … detect in either *Stack v Dowden* or *Jones v Kernott* any intention on the part of the court to abrogate the long-standing principle that what makes an unenforceable agreement or promise enforceable in equity is detrimental reliance. The principle of detrimental reliance was not challenged in either case, and that it why it was unnecessary for the court to deal with it. As Professor Dixon put it (*Non-problems, future problems and fairy dust* [2022] Conv 119):

"… detrimental reliance was not in issue in either *Stack* nor *Jones*, not least because its existence was blindingly obvious on the facts. It was not pleaded as an issue, and was not argued as an issue. To infer therefore that the silence about detrimental reliance in those cases means that it is not required is imaginative. I may not specifically mention that you may not steal my laptop, but I am not authorising you to take it."

In my judgment it would have been astonishing if Lord Walker and Lady Hale intended to overrule a long-standing principle that detrimental reliance is necessary to crystallise a common intention constructive trust and to depart from two decisions of the House of Lords affirming that proposition without saying so, particularly in the light of their approving references (in *Stack v Dowden*) to *Stokes v Anderson* and (in both cases) to *Grant v Edwards*. Moreover, if that had been their intention, they would have needed to explain how a mere oral agreement (without more) overcame the statutory formalities laid down by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 and section 53 (1) of the Law of Property Act 1925. Apart from a brief tangential mention of section 53 (1) (b) (not section 53 (1) (a) or (c)) in paragraph [55] of Lady Hale's speech in *Stack v Dowden*, they are not referred to at all in any of the majority speeches or judgments."

Subsequent decisions (and the many leading text books) reinforced the Court's conclusion that detrimental reliance remained an essential ingredient.

Lewison LJ thus concluded that the overwhelming weight of authority both before and after Stack v Dowden and Jones v Kernott was that detrimental reliance was essential.

The same principles applied both to an initial common intention and also to a change of common intention post-acquisition. (per Lewison LJ at [151])

Comment

The Court's *obiter* consideration of the detrimental reliance requirement for common intention constructive trusts will be regarded by many as a welcome step back in the direction of orthodoxy. If a common intention constructive trust could be generated absent detrimental reliance in the context of property transactions, an exception to statutory formalities requirements for constructive trusts would substantially abrogate those requirements. Although the Court's decision on this point was *dicta*, it decided the point in order to resolve an important point of principle, and it is likely be an uphill struggle to persuade a lower court to depart from the detailed conclusions expressed.

It might nevertheless be suggested that there may be an air of unreality in some cases about the conclusion that a court may infer an intention to vary the beneficial shares in which a property is held on trust from the parties' conduct, the impression given by and the inference to be drawn from which might vary over time and depending upon the trial date (the so-called "ambulatory" constructive trust approved in Jones v Kernott) but that for such a variation in shares to take place, there must be detrimental reliance on that intention (which may only have been inferred in such a case as at the date of the trial, from the totality of the parties' conduct). The answer may lie in the acknowledgement (see e.g. Lewison LJ at [150]) that at the quantification stage the court may be able to take a broader view of what amounts to detrimental reliance. Disputes are likely to continue to arise as to whether particular conduct is sufficient for a constructive trust to be generated.

In many informal promise or agreement cases, there may be a substantial similarity between the requirements for a common intention constructive trust and the requirements for an equity to be generated by proprietary estoppel.

Lewison LJ recorded the following submission on behalf of Mr Hudson at [39] without adverse comment: "Constructive trusts should not be at odds with proprietary estoppel, where the equitable remedy is confined to what is proportionate to remedy any unconscionable taking of advantage. In a constructive trust case that was not so, but that did not mean that there need not be any detriment at all."

That submission is consistent with the apparent effect of a finding of common intention constructive trust generally having been to enforce the agreement intended to be immediately binding (as to which see further e.g. Boncey & Ng (2017) 2 Conv 146 at 154-155).

The UK Supreme Court in Guest v Guest [2022] UKSC 27 has recently confirmed that the true purpose of the remedy of proprietary estoppel is to deal with the unconscionability constituted by the promisor repudiating his promise, and not to compensate for the detriment suffered. Although the starting point is an assumption that the simplest way to remedy the unconscionability is to hold the promisor to his promise, there is no rule that the claimant's expectation should be enforced. The remedy remains discretionary and may appropriately fall short of satisfying the expectation in an appropriate case.

Since it is at least strongly arguable that a common intention constructive trust might enforce an agreement where a remedy by proprietary estoppel might not have similar effect, it may accordingly behove a disappointed party in an appropriate informal agreement case to seek to rely primarily upon a common intention constructive trust and to argue proprietary estoppel in the alternative.

The more significant aspect of the Court of Appeal's decision is the apparent approval of Neocleous v Rees. Lewison LJ cited that case (along with other earlier decisions) in support of his conclusion that "deliberately subscribing one's name to an email amounts to a signature". A number of comments may be made:

(1) The implicit approval of Neocleous v Rees was not necessary for the Court's decision, in that Mr Hudson had typed "Lee" at the bottom of the relevant emails. Previous authority had held that deliberately typing one's name at the bottom of an email could amount to a signature: Golden Ocean Group Ltd v Salgaocar Mining Industries Pvt Ltd [2012] EWCA Civ 265. It would have been sufficient to reach the Court of Appeal's conclusion that typing "Lee" was equally a signature.

(2) In Firstpost Homes v Johnson [1995] 1 WLR 1567, a case about compliance with s.2 LP(MP)A 1989, the Court of Appeal held that the ordinary meaning of "signed" is that a person writes his name with his own hand. Peter Gibson LJ said that is "... an artificial

use of language to describe the printing or the typing of the name of an addressee in the letter as the signature by the addressee when he has printed or typed that document". He agreed with Denning LJ in an earlier case, saying: "In modern English usage, when a document is required to be 'signed by' someone, that means that he must write his name with his own hand upon it." The decision in Neocleous v Rees [2019] EWHC 2462 is seemingly at odds with this reasoning (albeit First post might be distinguished, as it was in Neocleous, on the basis that the automatically generated signature in Neocleous was in the conventional style of a signature, at the end of a document, rather than a name and address heading the letter, in the conventional manner of inserting the addressee's details).

(3) It was also notable that the signed writing found to be s.2 compliant in Neocleous was contained in an email chain. The point that the email exchange did not comply with the requirement of s.2(1) in that it failed to incorporate all the terms of the agreement was conceded by the Defendant at trial and Neocleous accordingly proceeded on the arguably dubious basis that the two emails in question amounted to a single document signed by or on behalf of each party. One might wonder how this could have been said to be a single document or an exchange of contracts, as required for section 2. This point was not, of course, considered by the Court of Appeal in Hudson v Hathway, but may be significant in a future s.2 case.

(4) Nevertheless, the Court in Hudson v Hathway has cited without disapproval HHJ Pearce's discussion in Neocleous, which concluded that a signature could be deliberately subscribed to an email even in circumstances where that signature is automatically generated.

(5) An automatically generated name at the bottom of an email may accordingly constitute a signature for the purposes of statutory provisions (and presumably contractual provisions) which require a signature.

(6) There may also be scope for argument as to whether a sender of a given email footer with an automatically generated signature deliberately subscribed it with the intention to authenticate the email in circumstances where no text is inserted by the person

sending the email linking the body of the message and the signature (such as the "many thanks" in Neocleous). There is a risk that it could be held that this is not necessary.

(7) The Court of Appeal's decision undoubtedly has commercial ramifications. An informal email exchange may now have unintended consequences if, as is often the case, a party automatically generates email signatures.

(8) Before s.2 of the Law of Property (Miscellaneous Provisions) Act 1989, formalities for the sale of land were governed by s.40 of the Law of Property Act 1925. This required "some memorandum or note' in signed writing. In the event of non-compliance the contract was unenforceable by action. To avoid the contractual consequences of a letter constituting a signed memorandum everyone had to remember to include the words "subject to contract", thereby denying a contract: see Tiverton Estates Ltd v Wearwell Ltd [1975] Ch 146 CA.

(9) Following the Court of Appeal's decision, it is once again important to ensure that pre-contract exchanges of emails dealing with proposed dispositions of property are headed 'subject to contract'.

A further issue is the nature of the email correspondence held to amount to a "release". Whilst it is correct to say (as Lewison LJ did at [48]) that there is no particular form of words required for a release, it is notable that the language of Mr Hudson's 31 July and 9 September 2013 emails was held to be "sufficient in point of form to amount to a release of his equitable interest" on the basis that they evinced "a clear intention to divest himself of that interest immediately, rather than a promise to do so in the future".

It is not obvious that there could sensibly be an effective release or disposition in the form of two separate emails. Either the first email was a release made in signed writing or it was not. It is not clear whether the Court considered the 31 July email or the 9 September email to be the operative disposition, but one might conceivably have pause for thought about either conclusion.

While unnecessary for a release to be in any particular form of words, one might expect given the formality requirement in s.53(1)(c) that the party purporting to release its interest should

need to be purporting to release the interest *by that document*. (For a similar argument that the formation and expression of an intention to hold rights for another will not, in and of itself, count as a declaration of trust, but rather the requirement of a declaration is satisfied by that intention by the settlor together with the intention that, by their words or actions, they thereby hold rights for the benefit of another, see Agnew & Douglas (2019) 135 LQR 67.)

The 9 September email purported to refer to an existing arrangement rather than to release an equitable interest then in existence.

The 31 July email was expressed in colloquial language in a manner which might have been considered by some reasonable readers to be intended as a proposal to be agreed rather than an attempt to make an immediate disposition by that email. This appears to have been how it had been understood by Ms Hathway, who referred to it as a "suggestion" in her 12 August email. Nevertheless, Lewison LJ considered that the intention to immediately divest the equitable interest was "clear", perhaps reasonably reinforced by the content of Mr Hudson's later email. Nugee LJ agreed that "he was there and then agreeing that the equity in the house should thenceforth belong entirely to her, something that he confirmed on more than one occasion".

Of course, whether any particular piece of correspondence is intended to be an immediate release or disposition will be a question of fact upon which there may be a range of reasonable views (lawyers are of course used to arguments of construction and as to the effect of particular words). One can understand how the Court of Appeal in Hudson arrived at the conclusion it did, given the language of the particular emails before them. The difficulty is that there may be a risk that unguarded language intended to be by way of proposal could be found to have dispositive effect, even in a less clear case, and there will be no protection in the form of a want of compliance with statutory formalities if an email signature has been "deliberately", even if automatically, subscribed.

Practical Points

A wise practitioner will now ensure that pre-contractual emails are headed "subject to contract". Parties should also be guarded in the drafting of correspondence relating to property, so as to be clear as to their intentions. Otherwise, they might find that they have disposed of

property or entered a contract (or perhaps varied it, in the not uncommon case of a contractual requirement that variations be in signed writing).

Elizabeth Fitzgerald

Toby Boncey