Pubs, wills and proprietary estoppel

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Property analysis: Were trustees of a will estopped from evicting a testator's son? David Bowden, freelance independent consultant, comments on the consequences of Preedy v Dunne and talks to Helen Downes, member of the Society of Trusts and Estates Practitioners and partner in the private client team of Geldards LLP, about what lessons can be learned from this case for wills and probate and property lawyers.

Original news

Raymond Preedy and another v Jonathan Dunne and others [2015] EWHC 2713 (Ch)

The High Court has ruled that the trustees of a will were not estopped from evicting a testator's son. The Master trying the case rejected the claim that there was a proprietary estoppel which prevented the court from granting a possession order. If any indications as to future conduct had been given, they were given by only one of the two trustees.

What were the facts in this case?

Mrs Montgomery owned the freehold to a public house in Esher called the Albert Arms. She had three children (Sarah, Peter and Jonathan). Mrs Montgomery died on 6 September 1997. By her will, drafted by her solicitor (Mr Shilson), she left the Albert Arms to her husband (Bruce) for life and on his death the proceeds were to be split equally between her three children. Mr Shilson and an accountant, Mr Preedy, were appointed trustees of Mrs Montgomery's estate.

Mrs Montgomery's son, Jonathan Dunne, initially assisted Mr Montgomery in running the pub and eventually ended up running it on his own. He did this on his own account and through two limited companies. Mr Montgomery died on 1 February 2013.

Mr Dunne spent substantial sums of money renovating the pub--£201,479 was spent renovating the ground floor and a further £140,433 was spent renovating the first floor. Mr Dunne claimed that Mr Shilson, as trustee of Mrs Montgomery's estate, knew about these works and that Mr Shilson orally agreed that any money he put into the business would be repaid out of the proceeds when the premises came to be sold or refinanced.

Trustees have to act unanimously and it was accepted that Mr Preedy had not made or acquiesced in any representations it was claimed that his co-trustee Mr Shilson had made. Following the death of Mr Montgomery, the trustees wanted possession of the pub so that it could be sold and the sale proceeds divided equally amongst Mrs Montgomery's three children under the terms of her will.

Mr Dunne and his two companies resisted the claim for possession on the basis that the claimed representation of Mr Shilson as trustee amounted to a proprietary estoppel.

The trustees' case was that the money Mr Dunne put into the business was to be repaid from the income of the pub. Mr Dunne had paid little, if any, rent for the pub in the 18 years since his mother's death. The money Mr Dunne spent on renovations was not to be repaid out of the capital when the pub itself came to be sold as the business of the pub was separate from the freehold property.

What submissions were made at the hearing by the claimants?

The trustees submitted that the money Mr Dunne had invested in the pub business in carrying out the renovations were to be paid from the takings of the pub business over the previous 18 years. Bank statements were in evidence. Before Mrs Montgomery's death these were addressed to 'Mr & Mrs Montgomery t/a the Albert Arms' but after her death (when the partnership with her husband terminated) this became simply 'Mr Bruce Montgomery t/a the Albert Arms'. The trustees said the trading business of the pub was entirely separate to the freehold of the building where that trade was conducted.

Why did the defendant say that the claim for possession should fail?

The defendant submitted that he should obtain more generous treatment and that the money he invested in renovations should be repaid to him from the capital the trustees obtained when they sold the pub building.

In addition, he submitted that possession should not be granted because of a claimed proprietary estoppel.

What did the trial judge rule?

The judge found that no promises were made by either Mr Shilson or Mr Preedy to Mr Dunne about rights to remain on the premises. In any event, Mr Shilson had no authority to bind Mr Preedy in respect of any such promises. Nor did Mr Preedy stay silent after realising that Mr Shilson had made such a decision or otherwise acquiesce in it. Neither Mr Dunne's sister nor brother promised, or acquiesced in the promises of others, about such rights.

The judge also found that there was no contractual agreement for a licence to entitle Mr Dunne to remain on the premises until he was repaid the money he had put into the refurbishments.

The judge commented that the fundamental problem for Mr Dunne in this case had been that he paid for the refurbishments without securing a clear commitment from the trustees or his siblings as to whether any of them (and if so who) should repay him for them. They were in effect loans to the pub trading business.

His attempts to found a claim on proprietary estoppel, and latterly on contractual licence, had foundered on the need for promises or at least expectations created or acquiesced in by the persons whom he sought to make liable. Mr Dunne may have believed in those promises or expectations, but the judge found that the claimants and Jonathan's siblings were not responsible for them.

What about trustee unanimity?

Trustees have a duty to act unanimously. The rule is that the trustees must, in the absence of authority to the contrary, be unanimous in exercising a power to bind beneficiaries.

It was clear from the evidence that even if Mr Shilson had given indications to Mr Dunne, no such agreement had ever been provided by his co-trustee Mr Preedy.

What did the court say about trustees and beneficiaries?

The judge concluded that neither trustee powers under TOLATA 1996, s 6 nor beneficiary rights under TOLATA 1996, s 12 authorise proprietary estoppel claims binding on beneficiaries who have not at least acquiesced in them.

Under TOLATA 1996, s 6, trustees of land are given all the powers of an absolute owner, which expressly includes the power to purchase a property for occupation by a beneficiary. They must not exercise them in contravention of any rule of law or equity and in exercising them they must have regard to the rights of the beneficiaries.

However, the judge pointed out that this did not permit the trustees to give the trust land away for nothing to a person not otherwise entitled to it. A power to give away the trust property is dispositive--the powers conferred by TOLATA 1996, s 6 are administrative only.

Moreover, TOLATA 1996, s 6 is concerned with administrative transactions which are formally and substantively complete. It would be possible for a settler or testator, or indeed Parliament, to confer power on trustees to commit the trust assets and bind the trust beneficiaries by informal transactions such as proprietary estoppel. However, in this case the testatrix certainly did not do so.

Although the words of TOLATA 1996, s 6(1) are wide ('all the powers of an absolute owner'), the proper protection of the beneficiaries demands that these words be confined to formally and substantively complete transactions. Those which do not meet the requirements of valid contracts of sale, lease, mortgage and so on are simply outside the scope of the section. So a bargain for an interest in land which fails as a contract because of lack of formality is not within TOLATA 1996, s 6 and does not bind the beneficiaries as an exercise of trustees' powers.

Under TOLATA 1996, ss 12 and 13, a beneficiary who is entitled in possession may occupy the land subject to the trust if the trust allows such occupation or if the land is available for such occupation, subject to the right of the trustees to exclude or restrict that right of occupation having regard to:

- the intentions of the settler
- the purposes of the trust, and
- the circumstances and wishes of each of the beneficiaries entitled to occupation of the land

However, this was now simply a dispute between co-owners. More importantly, the mere fact that the trustees might have a theoretical power to exclude the others and enable Jonathan to stay until the court ordered a sale by itself was not an authority for trustees to be able to create a proprietary estoppel equity binding on the beneficiaries. TOLATA 1996, s 13 is essentially a power of management of land that does not take away a beneficiaries' interest in it. Proprietary estoppel, however, is a doctrine which alters beneficial interests.

However, he said that a contractual licence could be created potentially binding on the trust estate and therefore on the beneficiaries, but ruled on the facts that no such binding licence was created here.

What did the court decide in relation to proprietary estoppel?

Mr Dunne alleged that Mr Shilson agreed that any money he put into the business would be repaid out of the proceeds when the premises were sold or were refinanced. On the basis of this alleged promise or encouragement by Mr Shilson, the defendants submitted that this gave rise to a proprietary estoppel.

The judge restated the test in 'The Law of Real Property' (Megarry & Wade) that an equity arises:

- when an owner of land induces, encourages or allows a claimant to believe that he has or will enjoy some right or benefit over the owner's property
- in reliance on this belief, the claimant acts to his detriment to the knowledge of the owner, and
- when the owner then seeks to take unconscionable advantage of the claimant by denying him the right or benefit which he expected to receive

The judge endorsed what Lord Walker said in *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945:

'Most scholars agree that the doctrine [of proprietary estoppel] is based on three main elements, although they express them in slightly different terms: a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance.'

The judge found that a claim for proprietary estoppel failed for three reasons:

- the case is about promises about what would be the position in the future binding in equity although not binding in law
- even if Mr Shilson had made these promises (which the judge found he had not on the terms the defendants alleged), trustees have to act unanimously and his co-trustee, Mr Preedy, made no such promise
- TOLATA 1996 does not authorise proprietary estoppel claims binding on beneficiaries

What lessons can probate practitioners learn from this case?

Probate practitioners may do well to remember the need to remind trustees and beneficiaries that trustees have to act unanimously. No doubt there will be occasions where only one trustee may be consulted, but that trustee must make clear that they need to obtain agreement of their co-trustee(s). Moreover, trustees cannot act to the detriment of beneficiaries unless those beneficiaries consent. There was no such consent here which could have been obtained if needed because all three beneficiaries were over 18 years old.

Helen Downes (HD): This case reinforces the need for practitioners to keep clear and contemporaneous attendance notes. Trustees need to maintain a general awareness of the trust's affairs. There should be regular trustees meetings--at least once a year. There should be proper minutes kept of these trustees meetings. Solicitors should ensure that their files are 'bomb proof'--with clear letters sent out to trustees or beneficiaries and that the file is maintained in good order with all correspondence and file notes promptly filed. The case shows the dangers of word of mouth communications and how these can be misunderstood or misinterpreted. Where trustees have such meetings then what is discussed or asked should be promptly recorded in writing.

PSL practical point: *The limits of the powers under TOLATA 1996, s 6 and the rights under TOLATA 1996, ss 12 and 13 are also interesting.*

Interviewed by David Bowden.

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