What's mine is yours…whilst I still love you....(unless you have it in writing or just made a mistake)

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The Statistics

Cohabiting couples are the fastest growing family type in the UK; between 2004 and 2014 there was a 29.7% increase in cohabitees (according to Families and Households). They currently account for nearly 10% of the population.

It has been suggested that divorce rates are at their lowest level for 40 years as a result of the growing acceptance that couples who live together before getting married have a stronger marriage (although of course many cohabitees never marry at all).

So it is becoming the “new normal”, but the protections offered to cohabiting couples are few, with many left high and dry after many years supporting a partner, possibly with children. Evidence continues to suggest the mistaken belief by many that they are “common law spouses” and that they have automatic rights.

Attempts at Reform

Many have tried, and failed, to put cohabitation firmly on the parliamentary and legislative agenda. In 2007 the Law Commission produced a report recommending change and protection for cohabitees, but it went no further than committee stage. Hot on the heels of the report, Lord Lester tried to secure change with a private members bill, and then came Lord Marks, trying in late 2013 and yet again in mid-2014 to secure a Cohabitants Rights Bill. All such attempts have been in vain. There is no doubt that it is a “hot topic”, and Resolution (the organisation for Family lawyers) have tabled the question of whether the law in England and Wales should extend legal rights to those who choose not to marry for a debate in the autumn.

But is the reluctance to deal with this issue simply because the perception is that our Judges are already doing a good job of dealing with it in Court; that the protection afforded through proving that there is a resulting or constructive trust, or proprietary estoppel is enough? Whilst marriage and cohabitation are not the same, is that justification for having no family law in place whatsoever for cohabitees (and no entitlement unless there are children), relying solely on complex rules of trust law and estoppel? Many other EU countries and Australia would disagree.

The Law

If the property is not in joint names (where the presumption is that it is beneficially held equally), for partners who choose not to, or simply cannot afford to, make a direct financial contribution to the purchase of a property legally owned by their cohabitee, the onus is on them to demonstrate that there was a common intention to share the property.

To the extent that this is properly documented, or there is a clear and unequivocal express agreement, that should be the end of the matter, but frequently the Court is having to deal with cases where the “arrangement or understanding” was imprecise, there is nothing in writing, the parties disagree about what, if anything was said or agreed, and/or where the conduct of the parties did not tally with what was said to be the common understanding. Even it if is possible to establish that there is a constructive trust, the Court must then quantify the share of the cohabitee in that property.

If a constructive trust cannot be demonstrated, the only route is to rely on proprietary estoppel, a remedy rarely applied in family law cases, and one which relies on representation, reliance and detriment; it is based on reasonable expectations rather than the finding of an actual agreement; in short, a mistake.
Practical Implications

The Appeal

Ely v Robson – The Facts

The facts can be summarized as follows:

- Mr Ely had purchased the family home in 1987 using his own funds.
- Mr Ely and Ms Robson lived there with their two daughters (and on occasion Mr Ely’s children from a former relationship) until 2005 when the relationship broke down and he asked her to move out (which she refused to do).
- There were other properties belonging to Ms Robson which Mr Ely subsequently claimed he had an interest in (disputed by Ms Robson).
- In August 2007, Mr Ely and Ms Robson met to try to resolve matters, and, subsequently, through his lawyers, Mr Ely wrote to inform Ms Robson’s lawyers that there was “an agreement” (reached orally during their meeting) that Ms Robson would have an interest in the property, but on the basis that he held the property for himself for life, and on his death, Ms Robson would receive 20%. The “agreement” was also that Ms Robson could remain in the property whilst her aunt and mother were alive (and who were both also living there by this time) and on their deaths it would be sold. Part of the deal was that Mr Ely would renounce any claims he had in respect of Ms Robson’s properties.
- The trial was adjourned on the basis of a letter jointly signed by both sets of solicitors informing the Court that the parties were relatively close to reaching a settlement.
- Some 7 years later, on the death of Ms Robson’s mother and aunt, Mr Ely brought proceedings for declaratory relief and an order for sale; he argued that he had stood by the 2007 “agreement” and that there was either a constructive trust or he could rely on proprietary estoppel principles.
- Ms Robson denied that there was any agreement in 2007. Her case was that the settlement discussions had come to nothing (and that these had in fact taken place after Mr Ely’s solicitor had written to hers, not before), as she would accept nothing less than a 50% share. Her position was that there was nothing in writing, and so, no agreement. According to Ms Robson, Mr Ely had repeatedly said to her “what is mine is also yours” and that meant half the property was hers. Her case was that it had become clear to her that Mr Ely was not going to pursue his claim for possession and could not afford to pay his lawyers.
- HHJ Blair QC agreed with Mr Ely; he found that there was an agreement in 2007, but it just hadn’t been drawn up into a formal document and trust deed; the execution of those documents was simply a matter of mechanics and it was inconceivable that if there was no agreement along the terms set out in writing, Ms Robson’s lawyer would not have identified this. The Court found that Mr Ely had been led to believe there was an agreement and relied on it by not taking the litigation further; he had acted to his detriment and equity would come to his aid.

The Appeal

Ms Robson appealed, arguing that the proposed terms of the agreement were “uncertain and incomplete”, and needed to be in writing. The Court of Appeal found for Mr Ely, rejecting the evidence given by Ms Robson:

- The 2007 letter was sufficiently clear to form a binding agreement where both parties were trying to avoid costly litigation.
- Ms Robson had not identified any matters which had yet to be agreed and her meeting with Mr Ely shortly before the letter was written resulted in both parties having a common understanding (ie. an oral agreement) of what their respective interests were.

*Both parties had acted consistently with that understanding and Mr Ely had acted to his detriment in reliance upon it.

- Following the meeting in August 2007, Mr Ely held the property on constructive trust for both of them, Ms Robson’s interest was limited, and she would be estopped from asserting the contrary.

Practical Implications

The facts of this case are somewhat unusual, but what remains troubling for practitioners is the lack of clarity as to whether the Court was relying on constructive trust principles, proprietary estoppel, or both. If there was a clear agreement, why did the question of Mr Ely’s reliance (to his detriment) and unconscionability come into it? Further, the judgment identifies that proprietary estoppel is generally used only to interfere with cases where it would be unconscionable to assert a strict legal right, but on the facts of the case, Mr Ely was already the legal owner and therefore seemingly estoppel was not the correct remedy.

There is an emotional and financial cost in going to Court, and litigants are not aided by the current patchwork of laws in place. They also cannot be reassured at the prospect of having no certainty of outcome given how each case clearly turns on its facts.

This case highlights the importance of clearly documenting all discussions and agreement between cohabitees in a cohabitation agreement, and ensuring that any conversations are consistent with what is set down in writing. It is also seemingly the case that proprietary estoppel can now be used not only by the person trying to gain an interest, but by the party trying to prevent losing part or all of their interest in a property.

In circumstances where marriage is declining and cohabitation is on the up, reform of the law in this area needs to be on The Rt Hon Elizabeth Truss’ agenda. Cohabitees should not continue to be faced with uncertain Court outcomes following what will inevitably be a soap opera performance in the Court room of the “he said she said” variety. At least we can be sure of one thing, there is no EU law on cohabitation, and so whatever we come up with, Brexit cannot undo it.
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