

## Articles

# A Modern Day Morality Tale: *Ashby v Kilduff*

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Let no one even dare to suggest that cases under the Trusts of Land and Appointment of Trustees Act 1996 (TOLATA) are dry and boring. All human life is there, squeezed with varying degrees of ingenuity into ancient trust law principles. *Ashby v Kilduff* [2010] EWHC 2034 (Ch) is a good example of the practical workings of this ever shifting area of land law. It also shows the need to think carefully about what evidence can be obtained to support the case and provides an interesting excursion into the use of proprietary estoppel to try to do justice between the parties.

### The Facts

At the heart of this case is a same sex relationship between a former Conservative MP (Mr Ashby) and his doctor lover (Dr Kilduff). The parties had met in 1991 and in October 1992 each bought a flat in a small block in Putney, one flat above the other. The idea was that they could live together as a couple while pretending merely to be neighbours. They were outed in 1994 in the newspapers. Mr Ashby sued in libel and lost. He had a large amount of costs to pay and his wife of more than 30 years was about to divorce him. To protect the shared home, Mr Ashby transferred his flat to Dr Kilduff for £80,000. Dr Kilduff paid a costs liability to Mr Ashby's solicitors of around £20,000 and took out a mortgage of £60,000 for the rest which he paid each month. Both parties carried on living together but Mr Ashby paid rent to his partner each month which was at the same level as the mortgage. All must have seemed well for Mr Ashby.

When Mrs Ashby brought her ancillary relief claim, Mr Ashby's Form E told the court that he was living in rented

accommodation in Putney and that he had no intention of cohabiting. Of course, neither contention was consistent with the case he was advancing in this TOLATA application – a point which did not escape the attention of the trial judge. Mr Ashby told the court at the TOLATA hearing that he had in fact corrected this egregious mistake at the FDR. Bernard Livesey QC, sitting as a Deputy Judge of the Chancery Division, robustly ruled that 'I believe it to be highly unlikely that Mr Ashby has accurately reported in this court what he said to the matrimonial court ...'. Whatever was said at the FDR, Mr Ashby received a net sum of some £450,000 on his divorce. He purchased four buy to let properties in Manchester. One of these was bought in joint names with Dr Kilduff and the intention had been for Mr Ashby to pay for it entirely but, seemingly unintentionally, Dr Kilduff contributed 10% towards it.

With the divorce over Mr Ashby and Dr Kilduff carried on living together. But it was not happily ever after. First, in about 2000, Dr Kilduff took out a new mortgage to cover both flats. Over the next few years he was able to clear the mortgage completely by a combination of two capital payments totalling some £70,000 and by overpayments. He did not tell Mr Ashby about any of this, a fact which caused a certain amount of comment by Mr Ashby at the hearing.

Mr Ashby, for his part, indulged his love of sailing the high seas. Absence, said the Deputy Judge of the Chancery Division, did not make the heart grow fonder and the couple separated in September 2005 at the end of a sailing holiday in the Aeolian Islands. Dr Kilduff apparently told his former partner that he had been thinking of

separating since as long ago as 2003. This all came as a huge shock to Mr Ashby, who had thought that the relationship was strong. Dr Kilduff packed his bags and moved to the downstairs flat, albeit with access to the other flat for use of the office there. Mr Ashby remained in situ upstairs, paying only a contribution towards maintenance expenses. Mr Ashby then moved in his new boyfriend.

At some point thereafter, everyone fell out about who owned the upstairs flat in which Mr Ashby was living. He issued proceedings and sought a declaration that whatever might be the case with the legal estate he was the sole beneficial owner or, alternatively, that he had the right to live there for as long as he wanted to. He also claimed that despite the conveyance into joint names of the Manchester property he was the sole owner. Dr Kilduff defended by seeking possession of the Putney flat and a sale and equal division of the proceeds of the Manchester property or a declaration that he had a beneficial interest in the same, together with an account of one half of the net income.

### Who Said What

Many family lawyers view cases under the TOLATA with some trepidation. The case law is constantly evolving and there are complex debates, even within judgments, as to the precise extent of recent developments. For the purposes of this article, however, just the following painless points need to be absorbed:

- (1) Following *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858 the starting point is that there is a strong presumption that equitable interests mirror the legal estate.
- (2) However, the court can find a different equitable ownership matrix if it is proven that the parties either:
  - (a) agreed (expressly) that they would have beneficial interests that differ from the legal interests; or
  - (b) acted in such a way that an intention to have different beneficial interests can be implied.

Mr Ashby argued that although he transferred the legal estate to his partner they had, over a meal in a Thai restaurant in 2005, agreed that the beneficial interest

would remain with the former MP – in other words, that this was their common intention. (So often, these cases seem to turn around meals in restaurants.) As to the apparent sale of the property and the setting up of a tenancy (albeit unsigned) this was all a sham and should not be taken into account, he said. Dr Kilduff had received the property at an undervalue and Mr Ashby had spent considerable sums on the property. Mr Ashby argued that this meant that the property, although owned solely by Dr Kilduff as far as legal title was concerned, was held on trust for Mr Ashby.

As to the Manchester property, the opposite applied, according to Mr Ashby. Although it was sitting in the joint names of the parties, the former MP argued that this was actually owned on trust for him alone because the primary purpose was to invest and provide a retirement income for him.

Dr Kilduff's riposte was that so far as the Putney flat was concerned, a proper sale had occurred with consideration. There was no evidence that the expenditure had increased the value of the property or that it amounted to anything other than making the flat more comfortable and pleasant to live in. The deal could not be a sham for one purpose but not another and Mr Ashby could hardly use that argument now. As to the Manchester property, it was accepted during cross examination that this had been purchased with a view to providing Mr Ashby with an income in his retirement.

### The Wills

An interesting evidential sub-plot emerged in relation to the parties' wills. Mr Ashby's really did not help his case one bit – practitioners might make a mental note at this point to consider applying for such documents in similar disputes. Mr Ashby left his share of the Manchester flat 'which we own as joint tenants' to Dr Kilduff; he further failed to make any express disposition of the Putney flat which Dr Kilduff said rather supported the fact that he did not think he had any interest to dispose of. Whatever one may have made of this, Mr Ashby had refused to disclose his will in the proceedings until Dr Kilduff supplied his own copy which he held as executor and main beneficiary. This inevitably caused a certain degree of tension in the proceedings.

## **The Ruling**

Bernard Livesey QC had no difficulties in making robust findings of fact on the evidence with which he was supplied. Mr Ashby, he judged 'would be quite prepared to tell a pack of lies if he believed it was just for him and in his interests to do so, in which case he could quite easily persuade himself of the truth and accuracy of an inaccurate account'. Dr Kilduff, for his part, 'appears not often to have turned down an opportunity to receive . . . [He] did not shrink from extracting from newspapers who had told the truth about his relationship with Mr Ashby, substantial damages for libel by falsely representing that he had not been engaging in a sexual relationship with Mr Ashby'.

It was held that the sale of the Putney flat was genuine with no common intention to hold the property on trust for Mr Ashby. The Deputy Judge took into account Dr Kilduff's payment of the £20,000 liability, the mortgage, the payment of rent by Mr Ashby, his Form E, and the contents of wills. As to the Manchester property, the

intention, said the Deputy Judge, was to hold the ownership jointly in equity as well as at law but subject to a trust that the income would be Mr Ashby's and he would pay the outgoings.

## **Proprietary Estoppel: the Sting in the Tail**

Mr Ashby had, during the course of his occupation of the Putney flat, spent significant sums on it after the transfer to Dr Kilduff. £10,000 had been spent on a new kitchen in 1998 but this was held to have been too long ago to have had any impact on the judgment. However, 6 months before separation Mr Ashby spent £10,000 on lighting and flooring. According to the Deputy Judge, this was at the time when Dr Kilduff knew that he was going to bring the relationship to an end and was waiting for the right time to do so.

'While waiting, he not merely did not take any steps to deter Mr Ashby from making the expenditure on improvements but participated in the choices of product which were

made . . . Had Mr Ashby known what was the real state of the relationship and Dr Kilduff's true intentions, I am sure that he would not have expended the money on improvements and Dr Kilduff will have known this. In these circumstances, it seems to me that it would be unconscionable for the court not to intervene, if it has power and if it is just to do so.'

Proprietary estoppel, of course, is the doctrine that prevents a person from asserting strict legal rights where, taking the approach of Lord Walker in *Thorner v Major* [2009] UKHL 18, [2009] 2 FLR 405 there is:

- a representation that the claimant has, or will acquire rights in respect of the property;
- reliance on it; and
- detriment to the claimant in consequence of his (reasonable) reliance.

There are lots of different ways of explaining the categories of proprietary estoppel. Some fall clearly into 'representation' cases, others are 'promise' cases (like contracts), and some are 'acquiescence or standing-by cases'.

Bernard Livesey QC held that it was possible to accept that there was an implied representation by Dr Kilduff that the continued occupation of the property by Mr Ashby was assured and that it would be unconscionable for Dr Kilduff to retain the benefit. Using the flexibility of this equitable doctrine, he found that the appropriate remedy either lay in damages or in Mr Ashby being able to remain in situ for a limited period of time (but not for the rest of his life).

This is a surprising approach. The judge appeared anxious to provide a remedy because he thought that Dr Kilduff behaved unconscionably in not taking steps to stop Mr Ashby from spending money in the belief that they had a continuing strong relationship and that they would be secure living together. While one can see the temptations for the judge, it is submitted that such an approach is not consistent with the case law on proprietary estoppel. It is the case that there is no need for representations to be expressly articulated; indeed, in order to find the estoppel

established in *Thorner v Major* the House of Lords found that a representation could be implied and inferred from the indirect statements and conduct of a taciturn Somerset farmer. But in *Ashby*, although the judge accepted there was 'an implied representation', there was no evidence given of anything resembling a representation, statement or conduct from Dr Kilduff. Further, the representation that had to be proven in *Thorner v Major* was that the claimant would acquire a proprietary interest in specified property, whereas any belief that Mr Ashby held was not concerned with property rights but instead related to the status of his relationship with Dr Kilduff. In *Ashby* the court could not find that Mr Ashby had been led to believe that he had an interest in the property: his case that they had agreed he would have an interest had been rejected. No evidence was accepted that he had been encouraged in such a belief by anyone else.

The need for the belief to be in the acquisition of a property right has also been emphasised by the House of Lords in the 'promise' case of *Yeoman's Row Management Ltd and another v Cobbe* [2008] UKHL 55. The House of Lords there rejected the idea of a claim lying in proprietary estoppel, making the point that there had to be a proprietary right before such a claim could lie – 'a certain interest in land' (per Oliver J in *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 2 WLR 576). Both Lord Scott and Lord Walker emphasised the danger of focussing only on unconscionability: 'To treat a "proprietary estoppel equity" as requiring neither a proprietary claim by the claimant nor an estoppel against the defendant but simply unconscionable behaviour is, in my respectful opinion, a recipe for confusion' (per Lord Scott, at para [16]). As Lord Walker said, estoppel is 'not a sort of joker or wild card to be used whenever the court disapproves of the conduct of a litigant who seems to have the law on his side'. (para [46])

Although the judge used the language of representation in *Ashby*, this is really a case involving, at most, acquiescence. According to *Treitel on the Law of Contract*, ((Sweet & Maxwell, 12th edn, 2007), para 3-144) these cases 'can arise where there is no actual promise: eg where one party

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makes improvements to another's land under a mistake and the other either knows of the mistake or seeks to take unconscionable advantage of it'. But this then would require Mr Ashby to be making a 'mistake' as to his rights and again there is no evidence as to such a mistake being made by him, only a mistake about the strength of the relationship. Here, it seems that there was no representation made by Dr Kilduff and no mistake about property rights made by Mr Ashby. The unconscionable conduct of Dr Kilduff found by the court was letting Mr Ashby spend money on property that was not his in the mistaken belief that their relationship would endure. Although this may give rise to a moral obligation it is difficult to see how this can create any sort of interest in land.

The implications of such an approach could be significant if adopted in other cases involving cohabitation. How often are practitioners faced with an abandoned cohabitant telling them that they paid for all sorts of installations at the house believing that their relationship would endure for ever?

'What did he say?'

'Well, nothing, but he knew I was spending all this money on sorting out the drains ...'

Despite this, it is often worth pleading proprietary estoppel as an alternative to a trust. Make sure, however, that there is a clear identification of the representation (which can be passive – ie acquiescence – if the claimant is mistaken about his or her property rights), the detriment, and the actual property interest which is being sought. It is also important to think creatively about the evidence that is required to deal with the factual disputes. The introduction of the will evidence was clearly important and well worth considering asking for in similar claims. Litigants who have filed Form Es which are consistent with the case they are putting forward in the TOLATA claim might well want to consider supplying a copy of such document, together with any relevant answers to questionnaires; those on the other side might want to consider asking for such documents.