

Inghilterra e Galles – Chancery Division

Chancery Division, Patten J., 8 febbraio 2002 [Mitchell v O'Brien]

This is an action in respect of an alleged breach of trust

The Claimant, Mrs Sandra Mitchell, and the Defendant, Mr David O'Brien, set up house together between 1992 and 1995. During that time they lived in a property at 16 Kingsthorpe Grove, Kingsthorpe, Northampton, which was a house that Mr O'Brien had purchased in his sole name back in 1989 with the benefit of a mortgage of some £ 65,000. The purchase price then was £ 83,000. Mrs Mitchell had recently been divorced and was able to contribute from her divorce settlement approximately £ 17,000. This money, according to her evidence, went into the family, partly by way of contributions to home improvements on the property, but also by way of payment for various joint living expenses and a tax bill of some £ 6,000 in respect of which Mr O'Brien was currently liable. There is no dispute on the evidence that of the £ 17,000 I have just mentioned £ 6,000 was used to pay that tax bill and £ 2,000 was used to re-roof the house. Mr O'Brien says that a further £ 2,000 was used to replace the central heating boiler in the premises and some £ 3,000 went towards a holiday for Mrs Mitchell and her children in Florida.

It is not, I think, necessary for me to resolve in these proceedings precisely how that £ 17,000 was used. I say that because by 1995 Mr O'Brien had accepted that in return for the contributions, financial or otherwise, which Mrs Mitchell had made during her time with him, it was right that she should receive an interest in the house at 16 Kingsthorpe Grove. To that end, on 6 December 1995, Mr O'Brien executed a deed of trust, under which he declared that the freehold registered title to the house at 16 Kingsthorpe Grove should be held on trust for sale for the benefit of himself and Mrs Mitchell as tenants in common in equal shares.

Mr O'Brien's evidence is that soon after he executed that deed of trust he had second thoughts about it and requested the solicitor who acted for both Mr O'Brien and Mrs Mitchell to cancel the deed. There is no evidence that those instructions were ever carried out, nor in my judgment could there be. The deed as executed contained no express power of revocation, and in those circumstances took effect according to its terms.

It is therefore unnecessary for me to do more than to record that as from the end of 1995 the property at 16 Kingsthorpe Grove was held upon trust for the parties to these proceedings in equal shares.

Soon after the trust deed was executed Mrs Mitchell left the property. However, she did, as the evidence - which was unchallenged - records, continue to remain on reasonable terms with Mr O'Brien and occasionally visited the property to clean once he had indicated to her that he hoped in due course to be able to sell the house and repay to her what was due.

During the period leading up to the execution of the deed of trust, a considerable amount of work was carried out on the house. Mrs Mitchell's evidence is that when she went to live in the house it was in an appalling condition and that improvements were carried out, including the installation of a new gas fire boiler, a new roof, a new kitchen and bathroom, and the redecoration of the entire premises. These works included rewiring, re-carpeting and refurnishing parts of the house.

In respect of most of the work, if not all of it, Mr O'Brien carried out what was necessary with the assistance of Mrs Mitchell's brother, who also gave evidence to me. He said that he rewired four rooms in the house with the assistance of Mr O'Brien - that is to say the kitchen, basement, lounge and bathroom - and also carried out the plastering work to other parts of the premises.

There is really no dispute that that work was carried out. But the difficulty about this case concerns the period of time following the Claimant's departure. After Mrs Mitchell had left and in the period up to January 2000 when the house was eventually sold, Mr O'Brien says that he carried out at his own expense further extensive works to the premises. In his witness statement, he says that he knocked down walls, extended the kitchen, fitted a new ceiling in the hallway, installed fitted units in the laundry room, fitted a new toilet cistern, bricked up the old back door, fitted patio doors, made a new two-sided staircase into the garden, rewired virtually the whole of the house, re-plastered to repair the damage following that rewiring, wallpapered, painted and decorated the interior and re-carpeted the premises. The windows were also double glazed. Mrs Mitchell says that she is unable to speak one way or the other as to the internal improvements which Mr O'Brien says he carried out, but she does accept, following her departure, that the double glazing was installed.

During the early stages of this action Mr O'Brien failed to give disclosure of all relevant documents, with the

consequence that it is only today that the Claimant and the court have been provided with copies of the bills and other documents relating to the expenditure which he alleges was carried out from the end of 1995 onwards. These documents comprise a purchase order from a firm of double glazing installers called Zenith Windows in Norwich, together with a document described as a priority order subsidy analysis under which the double glazing to the house was provided at a reduced price on the basis that the house would after completion of the works be used and presumably advertised as a show house. On the face of those two documents, it appears that on 22 June 1996 - which was virtually exactly the time at which the Claimant departed - Mr O'Brien placed an order for double glazing the house which would have cost £ 19,634, but as a result of the subsidy I have just referred to cost £ 12,144. On the purchase order form there is a handwritten note to the effect that a cheque in full payment of that sum was received with what appears on the face of it to be the signature of the sales agent, a Mr Versadi.

The other document, which is dated 22 August 1998, is an invoice from a firm of builders, called J Bunyan, in Wisbech, Cambridgeshire. This invoice, in the total sum of £ 12,500, is for a variety of works in respect of the house, including the full rewiring of the property, the rewiring of the garage, supplying such things as an extractor for the shower room and security light for the back of the house, the removal of plastering in the laundry and shower room, the fitting of a new toilet cistern, and the supply and fitting of a new shower. The choice of a building firm in Cambridgeshire to carry out works to a house in Northampton was explained by Mr O'Brien on the basis that he - and I should mention that he works as a carpenter - was at the relevant time working on a property in Northampton in conjunction with that firm of builders, who were sub- contractors, and the representative of that firm indicated that there were men available to assist in carrying out work in his house.

The cost of those works is put in Mr O'Brien's witness statement as £ 23,650 which represents materials alone, on top of which there were labour costs in respect of which no figure is given. It seems to me that on the balance of probabilities in the light of the evidence, some further works were carried out to the house following the Claimant's departure in order to make it saleable. Although Mr O'Brien was questioned at some length during his cross-examination as to the authenticity of the double glazing documents, I am not able to say on the basis of that cross-examination that this is evidence which I ought not to accept and I find, so far as it is necessary, that he did in the period following the Claimant's departure pay for double glazing work to the property in the sum of £ 12,144.

I am also prepared to accept that he paid a further £ 12,500 in respect of the work contained in the builders' invoice, but I am not prepared to accept that his expenditure during that period amounted to more than the combination of those two invoices, that is to say the £ 12,500 on the builders' invoice and the £ 12,144 which he paid to the double glazing firm. That means in very broad terms that his expenditure was approximately £ 26,000.

He said to me - and there is really no evidence to the contrary - that this expenditure was financed partly out of his own resources, but mainly out of loans made on an interest-free basis by members of his family and the bank. When the property came to be sold, those loans were repaid.

It seems to me that it would be wrong, notwithstanding the terms of the deed of settlement, were I not to make some allowance in determining how the net proceeds of sale of the property at 16 Kingsthorpe Grove should be divided for the work and expenditure carried out by Mr O'Brien from 1996 until sale. Mr Jones, on behalf of the Claimant, accepted this as a matter of principle, although he submitted, and I accept, that that allowance ought not to exceed the lower of two figures, that is to say the lower of either the amount of the actual expenditure or the increase in the value of the property resulting from the carrying out of those works. That is on the basis that, although some allowance needs to be made to compensate Mr O'Brien for the increase in value which his expenditure has brought about, the court should not require the beneficiary in the form of the Claimant to have her interest reduced on account of expenditure which she did not authorise.

The difficulty that presents the court in this present case is the absence of any valuation evidence as to what effect, if any, the expenditure which I have found was carried out did have upon the sale price as achieved in 2000. In January 2000 the property was sold for £ 115,000. After payment of legal and estate agents' costs and the repayment of the mortgage to the Woolwich Building Society in the sum of £ 71,191, there were net proceeds of sale totalling £ 41,077.31, £ 20,000 of which was retained by Mr O'Brien's solicitors and used in part payment of his new house. That house was acquired for the sum of £ 65,000 with the benefit of an interest only mortgage in the sum of £ 45,000.

It seems clear on the evidence therefore that the house at 16 Kingsthorpe Grove increased in value between the date of its purchase in 1995 and the date of its sale in January 2000 by some £ 32,000. Although there is no real evidence before me as to the state of the property market on those two dates, counsel for the Claimant accepted that it would not be wrong to assume that the market at those times was, roughly speaking, of a similar kind. If that is right, and if it is right as Mr O'Brien told me during the course of his evidence, that during the entirety of the period of ownership of the house more than £ 50,000 had been spent on the property, then it is clear that by no means all of that expenditure was recouped by virtue of an increase in the value of the property over the relevant period of time. In very rough terms, only

three-fifths of that expenditure was recouped on the sale.

That being so, it would, I think, be wrong - and it is not, I think, open to me on the evidence - to find that the increase in the value of the house between the date of its purchase and the date of its sale was exclusively attributable to the £ 24,000 odd worth of work carried out by Mr O'Brien at his own expense between 1996 and 2000. That expenditure has to be discounted by what I consider, doing the best I can, represents the proportion of it that can be attributed to the increase in value of the £ 32,000 that I have just referred to.

It seems to me that, taking a common-sense view of these matters, double glazing was likely to have been an attractive addition to the house and something for which a purchaser would have paid more, than had the house retained its original windows. On the other hand, many of the other works carried out by the builders - such as, for example, replastering and redecorating the interior of the premises and even putting in new showers and the like - in my experience as a judge is rarely realised in its entirety and sometimes even at all in the sale price of the finished property. I have therefore reached the conclusion that some £ 12,000 of the increase in value, and therefore the ultimate sale proceeds as of January 2000 ought to be attributed to work carried out by Mr O'Brien between 1996 and the date of sale.

The consequence of that is that the net proceeds of sale of £ 41,077.31 ought to be reduced by that sum. However, there is one further matter and one further adjustment that needs to be made in that calculation. Although the property was mortgaged to the Woolwich Building Society, it was always the position, both before and after the execution of the declaration of trust, that the expense of the mortgage should be borne by Mr O'Brien. After the Claimant, Mrs Mitchell, had left the premises, Mr O'Brien continued to pay the mortgage instalments, but fell into arrears, with the result that an additional £ 6,191 had to be deducted from the proceeds of sale in respect of those arrears. Although Mr O'Brien in his evidence - which I have treated as his pleadings and submissions for these purposes - contends that he ought to be given credit for the entirety of his mortgage payments, in my judgment that would not be right, for two reasons. The first is that it was always accepted, as is clear from the evidence and the way the parties conducted themselves, that Mr O'Brien would continue to bear that liability, and indeed it was on that basis, in my judgment, that the Claimant, Mrs Mitchell, made her contributions to the family in the way I have described; and, secondly, that after her departure the position was that Mr O'Brien continued to occupy the premises which were jointly owned and which, under the terms of the trust for sale, Mrs Mitchell was entitled to have sold in order to realise her interest.

In those circumstances, over and above the first point that I have already mentioned, equity would I think demand that Mr O'Brien should pay some form of occupation rent, and that would, in my judgment, have been set off against his liability to pay the mortgage.

In those circumstances it seems to me right that, although the net proceeds of sale should be reduced by the £ 12,000 I have mentioned, the sum of £ 6,191 constituting the arrears should be added back to compensate Mrs Mitchell for an expense which should have been borne by Mr O'Brien himself.

Therefore, on my calculations, the net proceeds of sale before deducting the £ 12,000 were £ 47,268, which is reduced to £ 35,268 after deduction of the £ 12,000. Fifty per cent of that sum is £ 17,634, and in my judgment the Claimant is entitled to judgment for that sum with interest.

One issue which has arisen in these proceedings concerns the form of relief. A defaulting trustee is required to make restitution by accounting for the trust assets which he or she has wrongfully dealt with. In this case, sufficient restitution would be made by the payment to Mrs Mitchell of £ 17,634 with interest. However, as part of the relief in this case a tracing order is also sought against the new property at 13 High Street, Kingsthorpe, which, as I have already indicated in this judgment, Mr O'Brien purchased at the beginning of 2000, using the sum of £ 20,000 of the proceeds of sale from the earlier property. That £ 20,000 was trust money in the sense that it was part of the net proceeds of sale of the earlier house to which the Claimant and Defendant were entitled in equal shares. On the basis of my finding that the net proceeds of sale after making the adjustments I have indicated exceed £ 35,000, there is I think no real room for argument but that the entirety of that amount should be treated as part of the monies subject to that trust. In those circumstances, my preliminary view - although I have not heard full argument on this - is that Mrs Mitchell is entitled by way of tracing to an interest in the proceeds of sale of the new house, represented by her half share in the sum of £ 20,000 that was utilised to acquire that property. That means, in arithmetical terms, that she is entitled to ten-sixtyfifths of the beneficial ownership.

That said, however, Mr Jones is I think content that for the purposes of today I should simply give judgment for the sum which on the findings I have made I have held that she is entitled to, and leave any question of the precise remedy and enforcement to be dealt with at a further hearing if necessary. In particular, although the particulars of claim do seek an order for sale, I am not asked to make any such order today.

In those circumstances I will make an order that Mr O'Brien should pay to Mrs Mitchell the sum of £ 17,634 with interest. I will make a declaration that she is beneficially entitled to an interest in the property at 13 High Street, Kingsthorpe, in an amount to be determined if necessary in further proceedings for that sum. I give liberty to apply. To save further costs in this matter, I will make a charging order against the freehold title of the property at 13 High Street, Kingsthorpe, but any further orders pursuant to that can be dealt with either by the Master or, if the parties find it more convenient, by transferring this case to the County Court in Northampton where the District Judge can make the appropriate orders.