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Court of Appeal dismisses pub operator's claim for improvement costs against pub owner

Preedy & Baker v Dunne, Blue Mango Investments Holdings Ltd and the Albert Arms Pub – A3/2015/3458

Article by David Bowden

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The Court of Appeal has dismissed the pub operator's claim for improvement costs against the trustees who owned a pub which was held in trust in equal shares for the 3 children of a dead couple who owned the freehold of a substantial public house. In a written reserved judgment handed down immediately after the hearing, Lord Justice Vos dismissed the application of the Mr Jonathan Dunne and his 2 pub operating businesses against the trustees which owned the freehold. Mr Dunne claimed that it was unfair that despite having borrowed substantial sums of money to repair and improve the pub, which benefitted the trustees which owned the pub, that the pub owners did not have to account to him for the pub operating companies investments. Whilst agreeing that there was a general legal principle to this affect, Lord Justice Vos ruled that in the facts in this case the pub owners did not have to pay anything because the pub operator's claim was based on 'a vague idea that somehow someone will be able to obtain repayment of monies expended for a worthy purpose'.

Raymond Preedy and Philip Baker v Jonathan Dunne, Blue Mango Investments Holdings Ltd and A3 Trading Limited (trading as 'The Albert Arms Pub')
A3/2015/3458 20 and 21 July 2016
Court of Appeal, Civil Division (Lord Justice Longmore, Lord Justice Vos and Lady Justice King)

What are the facts?
Mrs Montgomery owned the freehold to a public house in Esher called the Albert Arms. She had 3 children – Sarah, Peter and Jonathan. She died on 6 September 1997 and her Last Will and Testament was drafted by her solicitor (Mr Shilson). In it she left the Albert Arms to her husband (Bruce) for life and on his death the proceeds were to be split equally between her 3 children. In 2015 the Albert Arms received the 'Pub of the Year' award from the Campaign for Real Ale

Bruce died on 1 February 2013. Mrs Montgomery's son Jonathan Dunne initially assisted Bruce in running the pub and eventually he ended up running it on his own. He did this on his own account and through 2 limited companies (Blue Mango and A3 Trading Limited).

Mr Shilson and an accountant, Mr Preedy, were appointed trustees of Mrs Montgomery's estate. Jonathan Dunne spent substantial sums of money on renovating the pub after an electrical fire. £201,479 was spent in 1999-2000 renovating the ground floor and a further £140,433 was spent in 2003 in renovating the first floor. Mr Dunne claims that Mr Shilson as trustee of the estate knew about these works and 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 Bruce's death, the Trustees wanted possession of the pub so that it could be sold and the sale proceeds divided equally amongst Mrs Montgomery's 3 children.

Mr Dunne and his 2 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 that Jonathan put into the business was to be repaid from the income of the pub. Jonathan had paid little, if any, rent for the pub in the 18 years since his mother's death. The trustees' case was renovation costs were not to be repaid out of the capital when the pub itself came to be sold.

What happened when the case came before Master Matthews in the Chancery Division of the High Court?
A fuller note on the hearing is here. The judge ruled that Bruce Montgomery carried on a pub business at The Albert Arms after the death of his wife in premises belonging to the trustees of Mrs Montgomery's Will. In 1999-2000 Jonathan Dunne paid over £200,000 for the refurbishment of the ground floor of the pub as a loan to the business and not to the trustees. The trustees, and Jonathan Dunne's sister and brother knew about those refurbishments and did not object.

The judge found that no promises were made by either Mr Shilson or Mr Preedy to Jonathan 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 Jonathan Dunne's sister nor brother promised, or acquiesced in the promises of others, about such rights.

In 2001 Bruce Montgomery sold 50% of his interest in the business to Jonathan Dunne. In 2003 Jonathan Dunne paid over £100,000 for the refurbishment of the first floor, again as a loan to the business and not to the trustees. The trustees, and Jonathan Dunne's sister and brother once again knew about those refurbishments (some of them in advance) and did not object.

Again the judge ruled that no promises were made by either Mr Shilson or Mr Preedy to Jonathan 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 Jonathan Dunne's sister nor brother promised, or acquiesced in the promises of others, about such rights. The judge found that there was no contractual agreement for a licence to entitle Jonathan to remain on the premises until he was repaid the money he had put into the refurbishments.

Finally the judge commented that the fundamental problem for Jonathan 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.

What grounds did Mr Dunne advance for Master Matthews' ruling?
Mr Dunne sought permission for an appeal to the Court of Appeal. He sought repayment of £351,922 from the pub owners on these grounds:

- There was an estoppel by convention binding the pub owners and pub operators that there was a partnership between them all or between Mr Dunne and his late father (Bruce),
- The monies spent on the pub by the pub operator were loans to that partnership, and
- The 2 trustees who owned the freehold of the pub as partners were liable to pay 50% of these loans to the pub operator because Mr Dunne was a 50% partner.

On what basis did Lord Justice Briggs grant permission for this appeal?
On 2 October 2015 Briggs LJ granted permission for an appeal saying that the grounds of appeal disclosed a real prospect of success in establishing that the trustees who owned the pub, Mr Dunne and his brother & sister '*shared an assumption that the trustees….were 50% co-owners with Bruce'*. Briggs LJ said '*this assumption meant that the trustees undertook as trustees a personal liability with Bruce to repay the sums advances in 2000 and a 50% liability to repay the sums advanced in 2003*'. Briggs LJ refused permission to appeal on the proprietary estoppel point.

What were the issues the Court of Appeal was asked to address?
By the time the appeal came on for hearing, there were these 3 issues between the pub owners and the pub operators:

- Was there an estoppel by convention here?
- Did what Mr Shilson say as trustee bind his co-trustee?
- Was in unfair in a general sense not to order the pub owner to compensate the pub operators for the repairs/improvements given that this benefitted the pub owners?

What does the respondent (who are the trustees owning the pub freehold) say?
It had prepared and served a skeleton argument. It was represented at the appeal hearing by Mr Fenner Moeran QC and Mr Andrew Child, neither of whom appeared below before Master Matthews. The pub owners submit:

- The point about an estoppel by convention is a new point which was not run before the judge below and the pub operators should not be allowed to run it on appeal,
- There was no such partnership in the terms alleged by the pub operators,
- There is no personal liability by the trustees who own the pub to the pub operators, and
- There was no common understanding that the pub operators would be reimbursed for the sums spent by the pub operators on improvements or repairs to the pub.

What do the pub operators say?
They were represented at the appeal by Mr David Halpern QC (who did not appear below). The pub operators say there was a 50/50 partnership between the pub owners and the pub operators. They say there was a common understanding (despite the lack of any written agreement) that the pub operators would be reimbursed by the pub owners for the capital works on the pub which increased the value of the asset. As a fall back, the pub operators say the effect of the judge's ruling is unfair

as they are out of pocket and the court should exercise a general equitable jurisdiction to rebalance the finances between the pub owner and pub operator.

Are there any prior authorities of any relevance?
These authorities are highly relevant:

Fielden v Christie-Miller **[2015] EWHC 87 (Ch)**
Where a proposed amendment sought to raise a new claim, the claim had to have a real prospect of success. An amendment which sought to raise a version of the facts which was inherently implausible or was not supported by evidence was unlikely to be permitted. Subject to those considerations and to the overriding objective, amendments ought in general to be allowed, provided that any prejudice caused to the other party could be compensated in costs and that the public interest in the administration of justice was not significantly harmed.

ING Bank NV v Ros Roca SA **[2012] 1 WLR 472**
There was a relevant shared assumption and it would be unjust or unconscionable to allow 1 side to go back on that assumption. There was accordingly an estoppel by convention. There was a shared assumption about the estimated figure for total transaction costs. Before completion, all the elements needed to make an accurate estimate of fees were available which was inconsistent with a calculation of fees based on EBITDA 2006. The estimate implied a shared assumption that (notwithstanding the reference to EBITDA 2006 in the contract) that was not the basis on which the fees were to be calculated. In the circumstances, 1 side to the contract was required to do more than simply acquiesce in the other party's continued use of a figure which it believed or had reason to believe was wrong. The acquiescing party should have taken steps to make its position known and if it had done so, the other side would have renegotiated. If the acquiescing party had to show detriment, loss of that opportunity was sufficient.

Trusts of Land and Appointment of Trustees Act 1996 **1996 Chapter 47**
Section 6(5): "In exercising the powers conferred by this section trustees shall have regard to the rights of the beneficiaries."
Section 12 "**The right to occupy.**
(1) A beneficiary who is beneficially entitled to an interest in possession in land subject to a trust of land is entitled by reason of his interest to occupy the land at any time if at that time—
(a) the purposes of the trust include making the land available for his occupation….. or
(b) the land is held by the trustees so as to be so available."

What did the court decide on estoppel by convention?
The court referred to a leading text book called by *Wilken and Ghaly* called '*The law of waiver, variation and estoppel*'. This says (at paragraph 10.01):

'*(i)* *It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.*
(ii) *The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon int.*
(iii) *The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.*
(iv) *That reliance must have occurred in connection with some subsequent mutual dealing between the parties.*
(v) *Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make in unjust or unconscionable for the latter to asset the true legal (or factual) position*.'

The court carefully examined all the facts in this case by reference to the judgement below, the Will of Mrs Montgomery, the witness statements and all the items of correspondence. When it did so it found there was no common assumption shared between the pub owner and the pub operator that the pub operator should be reimbursed for the repair and improvement costs from the capital value of the pub. The trustees held the pub on trust for the benefit of all 3 children in equal shares. If the pub operator's submission was correct, then this would diminish the value of the shares for the other 2 children. There was accordingly no common assumption that both the trustees shared and it followed applying the test that there was not an estoppel by convention here.

What did the court decide on the authority of 1 co-trustee to bind another?
The Court of Appeal endorsed what Master Matthews had found when he ruled that '*it was inconceivable that Mr Shilson as a solicitor and Mr Preedy as an accountant would have agreed to*

taking a substantial loan as trustees without a formal agreement and discussion with the beneficiaries, of which there is no trace.'

What did the court decide on the general unfairness point?
Lord Justice Vos (in delivering the unanimous judgement) deals with this at paragraph 59 of his judgment. He summarises the pub operator's case as being one of '*overall justice'* which is that '*the beneficiaries of the Will all agreed the Jonathan ought not to have to pay personally for the renovations that benefitted the property. Those renovations maintained the property and it is simply unfair that Jonathan should have had to finance them alone. All the beneficiaries tried to obtain a loan from the bank, and only when that failed did Jonathan do the decent thing and pay for them himself.*'

Vos LJ said that whilst this '*argument has much to recommend to it in terms of common-sense'*, that '*it is problematic'*. Vos LJ ruled that '*what actually happened was that the parties never did agree anything. Not only that, there never was a shared understanding of how the monies that Jonathan had spent were to be treated. The correspondence makes this abundantly clear.*' Concluding on this issue Vos LJ rules that:

> '*Estoppels are indeed intended to meet the justice of the case. But they must be based on legal principle, not a vague idea that somehow someone will be able to obtain repayment of monies expended for a worthy purpose*.'

What are the practical implications of this decision?
This is a decision of the Court of Appeal and so it is binding on judges sitting in the High Court and County Court. It shows the dangers of embarking on major capital expenditure before obtaining a clear agreement as to how that is to repaid, who will repay it and when. It also starkly illustrates that the ownership of a public house can be complex. Here the freehold of the pub was owned by the late Mrs Jean Montgomery, but following her death (and that of her husband) the building was held on trust for the benefit of all 3 of her children in equal shares. Her son Jonathan carried on running the pub business and this was done personally and through 2 limited companies. The pub operating companies borrowed nearly £350,000 to repair and then improve the pub. This not only preserved and then enhanced the capital value of the pub, but it also boosted the goodwill of the business carried on by the pub operating business. Sadly despite Jonathan clearly being a skilled business man in running and boosting the business of the pub, he did not stand back and get the deal documented. His brother and sister had full capacity (being over 18 years old) and so there was no bar as such to a written agreement being stuck between the pub operators, the trustees who owned the pub building and the beneficiaries.

Are there any unresolved issues in this area of law?
It is a useful endorsement of what is stated in the academic textbooks on estoppel by convention. The judgement of Master Matthews on the Trusts of Land and Appointment of Trustees Act 1996 remains unscathed by this decision.

What action should those owning or operating a pub take in light of this decision?
This case illustrates what can go wrong when there are no proper agreements in place. Those operating a pub business in a pub owned by someone else, should negotiate an agreement before they start that business. This agreement should cover goodwill, its valuation and ownership as well as who is responsible for payment of repairs or improvements. A pub operating company cannot assume that if it undertakes renovations that benefit the pub owner that it will be reimbursed for them without a clear agreement to this affect. Although a partnership can exist under the Partnership Act 1890 without a written agreement, it is rarely safe to leave business matters involving valuable assets without a proper written agreement. As can be seen in this case, a general plea at the end that "this is not fair" will usually simply not wash.

22nd July 2016