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IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CAMBRIDGE COUNTY COURT
His Honour Judge O'Brien
CB04D00854

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th May 2010

Before :

LORD JUSTICE THORPE
LORD JUSTICE PATTEN
and
SIR PAUL KENNEDY

- -

Between :

TRACEY ANN DE BRUYNE	**Appellant**
- and -	
(1) JOHN ADRIAN DE BRUYNE	
(2) ABIGAIL ANNE PILE DE BRUYNE	
(3) LEILA ELMA CURTIS DE BRUYNE	
(4) ANITA LILIAN DE BRUYNE	
(5) JESSICA ELIZABETH DE BRUYNE	
(6) JOHN ALFRED ADRIAN DE BRUYNE	**Respondents**

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Mr Grant Crawford (instructed by Birketts LLP) for the Appellant
Geraint Martyn Jones (instructed by direct public access) for the 1st, 2nd and 3rd Respondents
Mr Duncan Kynoch (instructed by direct public access) for the 4th, 5th and 6th Respondents

Hearing dates : 21st and 22nd April 2010

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Judgment

Lord Justice Patten :

Introduction

1. This is an appeal by Mrs Tracey Ann de Bruyne ("the Wife") against an order of His Honour Judge O'Brien dated 16th October 2009 which was made following the hearing of two preliminary issues in ancillary relief proceedings brought by her against her former husband, Mr John Adrian De Bruyne ("the Husband"), in the Cambridge County Court.

2. Included as assets in the Wife's Form E financial statement were a property known as Anstey Hall Farm in Trumpington and the entire issued share capital (minus one subscriber share) of a company called Trumpington Investments Limited ("TIL") together with the sums standing due under the directors' loan account. The Husband and the Wife are the two directors of this company which itself owns Anstey Hall, the former matrimonial home. Anstey Hall and Anstey Hall Farm are substantial properties worth in the region of £4.7m and £400,000 respectively.

3. The marriage between the Husband and Wife broke down in about 2004. The Wife petitioned for divorce and there was a decree nisi pronounced on 6th December 2004. The wife moved to Italy where she still lives. The Husband has continued to live at Anstey Hall with his five children and runs an events business in part of the premises with his daughter, Abigail, through a company called Anstey Hall Limited which is a subsidiary of TIL. Abigail and her sister, Leila, are the children of the Husband's first marriage which was dissolved in 1988. Abigail was born in May 1981 and Leila in May 1984. There are three children of the second marriage (Anita, Jessica and John) who are triplets born on 5th March 1989.

4. The Husband is the son of the late Dr Norman de Bruyne and his wife, Elma. Dr de Bruyne was an inventor and much of the family fortune appears to have been derived from Araldite glue which was one of his inventions. He established a company based at Duxford near Cambridge called Techne (Cambridge) Limited which developed and manufactured medical and laboratory equipment. In May 1971 he placed 999 shares in the capital of this company into a US trust ("the 1971 trust") governed by the law of the State of New Jersey. The evidence before the judge was that Dr de Bruyne spent about half of each year in Princeton, New Jersey where there was a manufacturing facility owned by the company and the remainder of the time in Duxford where he retained a home. In time Techne (Cambridge) Limited became a subsidiary of a New Jersey holding company called Techne Corporation ("Techne") and by 1991 the assets of the 1971 trust consisted of 257 of the 511 issued shares in Techne.

5. The 1971 trust was irrevocable and created a discretionary trust of both capital and income during Elma de Bruyne's life for the benefit of a class which included Elma together with Dr de Bruyne's descendents (of whatever degree and whenever born) living from time to time. The trustee was given power under Article One of the trust deed to appoint capital and income to any one or more persons within the class as he might in his discretion select and in any amount up to and including the entire value of the fund. But this power was subject to a proviso that during the settlor's life no distribution of capital or income should be made to Elma and further that no such distribution should be made to a descendent of Dr de Bruyne without Elma's consent.

The trustee was directed in terms to give primary consideration to the widow's needs during her life.

6. Upon the death of Elma the fund was to be distributed to such of the settlor's descendents and in such shares as Elma should direct in her will but, absent the exercise of this testamentary power of appointment, the trust property was to be divided between the Husband and his sister, Anne, with gifts in substitution for their issue should the Husband and his sister pre-decease their mother.

7. In July 1986 the Husband and his first wife (Leila) arranged through Mr Henry J. Clay Jr, a New York attorney, to set up two New York trusts for the benefit of their daughters. Mr Clay acted as the trustee. The trust funds consisted of 63 Techne shares which the Husband had purchased from the estate of one of his father's former business partners together with some cash received from his wife's parents. 42 of the shares were placed in Abigail's trust and the remaining 21 in Leila's.

8. By 1988 when the Husband and his first wife divorced most of the 511 issued shares in Techne were split between the 1971 trust (257), Dr de Bruyne (148) and the two children's trusts (63). The remainder were held by Techne employees. It appears that from mid-1988 onwards Dr de Bruyne (who was then about 84) made various attempts to re-gain control of Techne by offering to acquire the shares held by the 1971 and the children's trusts both personally and through a purchase of its own shares by Techne using a loan provided by him. The Husband (who was a director of Techne (Cambridge) Limited at the time) was opposed to the sales of shares and in November 1988 made his own offer to Mr Clay to buy the 63 shares held by the children's trusts. But in December 1988 Mr Clay sold the shares to Dr de Bruyne.

9. In 1991 the family came under pressure from the trustee of the 1971 trust (Mr Alton Peters, also a New York attorney) to sell Techne. The evidence before the judge (in the form of a witness statement by Abigail based on information obtained from her father) was that the company's financial position had deteriorated during an economic recession in the United States and that the trustee was concerned about retaining the Techne shares as the trust's principal investment.

10. As the controlling shareholder in Techne, he asked the Husband to seek offers for the company. This led to a proposed management buy-out which the family was asked to consider. Their response appears to have been entirely hostile to any suggestion of an outside takeover. The bundle contains a statement sent to Mr Peters and to the Techne management signed by Dr de Bruyne, Elma, the Husband and the Wife in which the signatories state that they have no intention of selling the company now or in the foreseeable future. But, later in September of that year, there was a family meeting at which agreement was reached to terminate the 1971 trust.

11. Abigail's evidence is that the terms agreed were contained in a document which was signed by Dr and Mrs de Bruyne, and the Husband and Wife, but not by the Husband's sister, Anne, who was not able to attend the meeting. This document is lost but its contents were almost certainly identical to those of a letter to Mr Peters dated 30th September 1991 which is in evidence. This document was typed by the Wife but not signed by her. It replaced the earlier letter because Mr Peters required the proposals to be signed by Anne de Bruyne who was one of the discretionary beneficiaries rather than by the Wife who was not a beneficiary.

12. The letter reads as follows:

> "We are writing to suggest that we take the following action:
>
> By mutual consent, the Trust be wound up as per the terms of Mrs de Bruyne's will.
>
> (1) The Techne Corp shares conveyed to a US domiciled corporation established for the benefit of J A de Bruyne's five children.
>
> (2) The Duxford house be conveyed to AC de Bruyne.
>
> (3) The one third interest in the Duxford house held by P N Fluck to be satisfied in cash by a payment of £75,000 by J A de Bruyne to the Trust.
>
> Independent valuation @ September 1991:
>
> Real Estate Agent A £205,000
> Real Estate Agent B £235,000
>
> On basis of market price between parties, one third of median price is £75,000.
>
> (4) Legal fees incurred to date and in winding up the Trust will be paid by a dividend from the Company.
>
> (5) N A de Bruyne's employment contract with Techne Corporation to be amended to provide half remuneration to E de Bruyne for life in the event that N A de Bruyne pre-deceases her.
>
> (6) You will know that under separate arrangements A C de Bruyne has received a house and property in Essex, property in Duxford, a double house and property in Cornwall and will receive the house and staff cottage belonging to E L de Bruyne under the terms of her will. When the Trust is wound up she will receive the house and P N Fluck will receive £75,000.
>
> (7) Winding up the Trust will enable yourself and George Marchese to resign current directorships with Techne Corp and subsidiaries.
>
> The undersigned are in agreement with the above proposals."

13. The proposal that the Techne shares held by the trust should be dealt with in the manner described in paragraph 1 called for the other discretionary beneficiaries to be compensated in other ways. Anne was therefore to receive the Duxford property (also a trust asset) and Elma was to receive a pension from Techne in place of income

under the trust. At the time this letter was written all five children were still minors but their interests were to be held by a US trust corporation on their behalf.

14. In order to give effect to these proposals Mr Peters was required to exercise the power of appointment under Article One of the trust deed. As mentioned earlier, the settlement was irrevocable and the exercise of this power of appointment required the consent of Elma de Bruyne. On 26th November 1991 an agreement under seal was executed under which Mr Peters exercised the power of appointment with the consent of Mrs de Bruyne in return for a general release and indemnities from the trust beneficiaries. The agreement was signed by the Husband both in his personal capacity and as guardian for his five minor children. The other signatories were Elma de Bruyne, Anne de Bruyne, her children and the trustee.

15. The agreement recites the terms of the 1971 trust deed and details of the beneficiaries. Then in recital (h) it states:-

> "The trustee has received a communication dated September 20, 1991, a copy of which is annexed hereto as Exhibit H, from the grantor, the said Elma de Bruyne, the said John Adrian de Bruyne and the said Anne-Cecile de Bryune, indicating their joint wish that the trust be terminated and that the stock in Techne Corporation held by the trust be distributed to the said John Adrian de Bruyne and the real property be conveyed and distributed to the said Anne-Cecile de Bryune."

16. Clause 5 then provides:-

> "In the exercise of his sole discretion under Article ONE of the indenture, the trustee hereby terminates the trust and distributes to the said John Adrian de Bruyne the 257 shares of Techne Corporation, $1 per value, held by the trust; conveys by deed to the said Anne-Cecile de Bruyne the real property located in Duxford, County of Cambridge, United Kingdom, held by the trust and delivers to her the remaining balance of cash held by the trust after making the payments set forth in paragraphs 2 and 4 of this agreement."

17. It is common ground that the date in recital (h) is wrong and should read as a reference to the letter of 30th September 1991 which was exhibited to the agreement. Abigail says in her witness statement that Mr Peters had contacted her father after receiving the September letter and told him that the shares could not be transferred to a US trust corporation because such a corporation would not be within the class of discretionary beneficiaries under the trust and therefore a permissible object of the power of appointment. Mr Peters therefore proposed that the shares be transferred directly to the Husband who could set up the US corporation himself.

18. I rather doubt whether Mr Peters was right in the advice which he gave. Unless New Jersey law is very different from English law on this point, it seems to me that the terms of Article One of the 1971 trust deed would probably have permitted an appointment out to a trustee on behalf of the grandchildren. A US trust corporation would not take beneficially under such an appointment and it is therefore irrelevant

that it would not have been within the permitted class of appointees. But the importance of Mr Peters' view on this matter is that it provides an explanation as to why the terms of clause 5 of the November 1991 appointment do not replicate paragraph 1 of the letter of 30th September. No contrary evidence was adduced by the Wife. The November 1991 appointment was prepared by Mr Peters' firm in New York (Kelley Drye & Warren) and was obviously drafted to reflect the advice which Mr Peters had given.

19. As a consequence of the November appointment, the 257 Techne shares were then transferred to the Husband who almost immediately transferred them on to the Wife. She says in her witness statement that she was not told the reason for the transfer but, importantly, she accepts that, at all material times, she has held the shares (and the assets derived from them) as her husband's nominee. She does not therefore assert any independent title to the assets in these proceedings but she disputes that the shares were trust assets in the Husband's hands in relation to his children. Her case, in essence, is that any promises which the Husband may have given either in the September letter or thereafter to the effect that he would place the shares into a trust corporation or trust for the benefit of the children was no more than a statement of intention and did not impose on him any kind of fiduciary obligation in respect of the shares whether on an express or constructive basis. If this is right then the assets now representing the shares are available for distribution in the ancillary relief proceedings.

20. What is not in dispute is that in December 1993 Protean plc (an English company) agreed to acquire the 257 shares in Techne held by the Wife (along with one other share that had been purchased) for a total of £5.43 million. The sale was completed on 12th January 1994 when Protean also acquired all the other outstanding shares in the company. There is no direct evidence as to how the proceeds of sale were dealt with but it is not disputed that significant sums of money have been used to meet the personal expenses of the Husband and Wife. It is, however, common ground that what remains of the proceeds of sale is represented by the 1,174,999 issued shares in TIL (which owns Anstey Hall) and by the separate property known as Anstey Hall Farm. No claim is made by the children to the contents of Anstey Hall (some of which were undoubtedly purchased by the Husband using what is said to be trust money) or to a property at Barton Mills which, although acquired with the proceeds of sale, was sold to meet the mortgage debts secured on the property and some of the debts of the Wife. Neither the 257 Techne shares nor the assets derived from them have ever been placed into any form of express trust for the children by the Husband, although the triplets will now receive their share of the assets as a result of an order made by Judge O'Brien at the conclusion of the ancillary relief proceedings. There was therefore ample material for the Wife's counsel to explore in cross-examination in relation to the issue of whether these were trust assets at all.

21. The procedural history leading up to the ancillary relief hearing was less than satisfactory. The trust issue was flagged up in the Husband's Form E statement on 12th March 2008 and was contested by the Wife. Directions were given by the District Judge on 18th March 2008 for disclosure in relation to the trust claim. At the same time leave was granted to all five children to serve notice of intention to intervene in the proceedings in relation to that issue and notice was given in April 2008. That application was adjourned to be dealt with at a hearing on 30th October

2008. But the triplets then withdrew their application leaving Abigail and Leila as the only potential intervenors. They were ordered to file and serve a narrative statement together with copies of all the documents which they relied on to support their contention about the trusts by 30th October. The Husband and Wife were given leave to file evidence in reply by 20th November. The 30th October hearing was therefore vacated but on 5th December Judge Yelton ordered the two children to be joined.

22. By then the Husband had filed a witness statement dated 17th November which said no more than that he agreed that he had an obligation to place the disputed assets into a trust for the benefit of all five children. Judge Yelton gave him permission to file a further witness statement dealing with the trust issue but no further witness statement was in fact filed. The substantive evidence about the trust came in the form of Abigail's witness statement and its exhibits dated 29th October 2008; the witness statement from the Wife of 19th November 2008; and various (but not a complete set of) documents derived from some earlier proceedings in New York relating to the Techne shares.

23. These proceedings began in 1994. The Husband commenced a suit in New York against Mr Clay alleging, inter alia, that the sale of the 63 shares to Dr de Bruyne referred to earlier had been at an undervalue compared with the amount which he had been willing to offer at the time. Mr Clay responded by alleging that the Husband and Wife were themselves in default of the 1991 agreement to place the 257 shares in trust for the children. As a result, the New York District Court appointed Mr Stanley Futterman to act as guardian ad litem for Leila and Abigail and to continue the action on their behalf. The pleadings and some of the documents and other material adduced in support of that claim are exhibited to Abigail's witness statement in these proceedings and form the basis of some of Judge O'Brien's findings in this case.

24. The claim by Abigail and Leila was eventually compromised on the terms of a written agreement of 5th November 1999 under which the Husband and Wife agreed to make payments from the proceeds of sale of a New Jersey property in satisfaction of their liabilities in the suit. In the ancillary relief proceedings the Wife objected to the intervention by Abigail and Leila in relation to the trust issue on the ground that they had received money under the settlement agreement in satisfaction of any claims they might have had for breach of trust arising out of the November 1991 appointment. The response of the two children was that the settlement agreement only extended to trust assets situate within the jurisdiction of the New York court at the time of the compromise and did not therefore apply to the English assets in issue in the ancillary relief proceedings.

25. This separate issue about the scope of the compromise was raised by the Wife in her November 2008 witness statement and on 5th December Judge Yelton gave all the parties permission to file further statements in relation to this issue. Abigail appears to have made a further statement dated 12th February 2009 in which she said that Mr Futterman had advised her that she would have to take action in the UK to safeguard the trust assets there but the statement contains no confirmatory evidence from Mr Futterman himself about the advice which he gave or the assumptions made in drafting the settlement agreement.

26. No other witness statements were filed in relation to the compromise issue nor were any specific directions given for the trial of any preliminary issues. But at the

commencement of the ancillary relief hearing on 13th October Judge O'Brien indicated that he would decide the trust and the compromise issues first before going on to deal with the question of what relief should be granted to the Wife. By then the triplets had revived their application to intervene following the Wife's indication that she would ask for Anstey Hall to be sold. They were made parties to the proceedings and were represented by counsel (Mr Kynoch) at the hearing. Abigail, Leila and the Husband acted in person in relation to the preliminary issues. On the first day of the hearing (13th October) Abigail and the Husband and Wife each gave evidence and were cross-examined. The Wife's evidence continued into the morning of the second day after which Judge O'Brien then gave judgment on the compromise issue holding that the agreement extended to the entirety of Abigail and Leila's respective trust claims and was not limited to the New York assets. As a consequence, the trust issue became limited to the 60% of the disputed assets claimed by the triplets. The judge then heard further submissions on the trust claim. On 15th October he gave judgment on that issue holding that the triplets were entitled to 60% of the disputed assets on the basis of a constructive trust.

27. The Wife appeals against the decision on the trust issue with the permission of the judge. The triplets have filed Respondents' notices seeking (if necessary) to uphold the decision of the judge on the trust issue on three additional grounds. Abigail, Leila and the Husband apply for permission to appeal the judge's decision on the compromise issue. If successful in that appeal they also rely on the three additional grounds for upholding the judgment on the trust issue. The Husband has a separate application for permission to appeal the ancillary relief order in the event that we allow the appeal on the compromise issue but uphold the judge's view that these were trust assets. It is not, however, necessary for me to deal with that application in this judgment because it is common ground that if we either allow the appeal on the compromise issue or allow the Wife's appeal on the trust issue there will have to be a further hearing of the ancillary relief application in order to allow the judge to re-consider his ancillary relief order in the light of the assets then available for distribution.

The compromise issue

28. The compromise issue turns on the construction of the 1999 agreement. In the New York proceedings Abigail and Leila sued the Husband for failing to carry out his promise to establish a trust in favour of his children in respect of the shares appointed out of the 1971 trust. The complaint sets out details of that trust and refers to the September 1991 letter to Mr Peters and the November 1991 appointment. It also pleads the subsequent transfer of the 257 Techne shares to the Wife and the sale in 1994 to Protean. In paragraphs 73-76 it alleges that the Husband's failure to transfer the 257 shares to a trust was a breach of the promise contained in the September 1991 letter agreement and that the plaintiffs, Abigail and Leila, are each entitled to damages for the misappropriation of their property equal to one-fifth of the value they would have received on the sale of the shares to Protean. This amounts to £1,018,790.68 or US$1,611,867.90 at an exchange rate of $1.49 to the £. A similar claim of misappropriation was made against the Wife. Judgment in the sum of $1,611,867.90 with interest was sought against both defendants.

29. The Wife applied to the New York court to dismiss the complaint against her on the grounds that the court had no personal jurisdiction over her. The judge dismissed the

motion holding that the claim included an allegation that the New York trustee had been induced to appoint the 257 Techne shares in favour of the Husband as part of a conspiracy between the Husband and Wife to misappropriate the shares which was given effect to in New York. Alternatively it could be said that the Husband acted as the Wife's agent in procuring the transfer. The conditions for the court to assert jurisdiction under the New York Long-Arm statute were therefore satisfied. It was not necessary for the Wife or the Husband to be resident within the jurisdiction.

30. The settlement agreement recites details of the New York action and then contains the following two recitals and provisions:

> " WHEREAS the deBruyne plaintiffs, Clay, John, Tracey, The Home, Dewitt, Abberley, Whiteman Breed Abbott, the guardian ad litem and Leila P. seek to resolve all issues concerning the deBruyne Action and the Declaratory Judgment Action; and
>
> WHEREAS a settlement of the deBruyne Action has been agreed to by all the parties including a total settlement contribution by The Home of $650,000 and settlement contributions by John, Tracey and Leila P. as set forth herein; and
>
> ……
>
> 1. Within ten business days of the entry of an Order by the United States District Court, Southern District of New York (the "Court") approving this Agreement (the "Order"), The Home will pay $650,000 to the deBruyne plaintiffs' guardian ad litem, Stanley Futterman, to be held in an interest bearing escrow account, until the determination by the Court, as to the portion of the $650,000 settlement amount payable to the guardian ad litem as fees and disbursements for his recovery of an amount in settlement of all claims asserted against Clay, Abberley, Dewitt and The Home.
>
> ……
>
> 10. John and Tracey will sign a demand note for $375,000, with interest at the rate of [?]½% per annum, payable to the Children's Trusts (50% to each), payable in two years of the date from this Agreement, or upon the sooner sale of the unsold portion of property known as ----------------- located in Princeton, New Jersey (the "Princeton property"), to be held by the Children's Trusts, together with a mortgage on the Princeton property.
>
> ……
>
> 14. All claims, counter-claims, cross-claims, and third-party claims made in the deBruyne Action will be discontinued,

> with prejudice and without costs, except as provided in this Agreement. [sic]
>
> ……
>
> 17. The parties agree that this is a compromise in settlement of disputed matters and shall not be deemed or construed to be an admission of liability or responsibility of any kind by any party or an admission of any factual or legal assertion. Each party expressly denies any liability to any other party and agrees that the execution of this Agreement shall not be deemed an admission."

31. The scheme of the settlement agreement was therefore to meet the claims against Mr Clay out of the insurance payment received from his insurers (the Home Insurance Company) and for the claims against the Husband and Wife to be met out of the proceeds of sale of the Princeton property. Judge O'Brien held that it was a compromise on these terms of the entirety of the claim by Abigail and Leila and was not intended merely to compromise their claim to the New Jersey property. It seems to me that he was clearly right about this. The claim being made against the Husband and Wife was for the payment of a sum equal to the children's 20% interests in the value of the 257 shares as at the date of the sale to Protean. It sought compensation for the alleged misappropriation of the shares without limitation. It was not simply an action to trace or recover any US-based trust assets. The terms of clause 14 of the agreement make it clear that all claims in the proceedings were to be discontinued under the compromise and the complaint was subsequently withdrawn in accordance with this agreement.

32. Mr Jones, on behalf of Abigail, Leila and the Husband, submitted that the agreement should be construed in the light of the limits on the power of the New York court to enforce any judgment in the proceedings. Most (if not all) of the trust assets were by then in England. The United States is not party to any treaties with the UK governing the reciprocal enforcement of judgments between the two countries and could not enforce the execution of any judgment in the claim outside its own jurisdiction. It would therefore be wrong, he says, to treat the compromise agreement as extending beyond the assets which were liable to execution. If this is right it remains open to Abigail and Leila to pursue their trust claim in relation to the English assets.

33. I am not persuaded by any of these submissions. The settlement agreement, as I have said, is not limited in terms to a recovery of any US-based assets. The claims against the Husband and Wife are *in personam* claims for damages or equitable compensation and were not proprietary or tracing claims for the recovery of specific assets. Had the action proceeded successfully to judgment the Husband and Wife would each have been ordered to pay the $1,611,869.90 plus interest, the court having determined that it had jurisdiction over them to try the claim. Although these judgments could not have been enforced in England under any treaty or under the provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933, Abigail and Leila could have commenced proceedings in England and sued the Husband and Wife on the New York judgment here at common law. As things stand, they can sue the Husband and Wife here in England on the settlement agreement and have in fact taken steps to serve a statutory demand on the Wife in respect of part of the settlement monies

which remain unpaid. It is therefore difficult to see why the compromise should not be given literal effect and construed as extending to the entirety of Abigail and Leila's trust claims against the Husband and Wife.

34. I would therefore grant permission for the cross appeal on the compromise issue but dismiss the appeal. I should mention for completeness that, in his skeleton argument, Mr Jones took the point that there is nothing to indicate that the settlement agreement was approved by the Court on behalf of Leila who was an infant at the time. But he now accepts that in the light of the opening words of clause 1 of the agreement, it is reasonable to assume that court approval was obtained for the settlement.

The trust issue

35. The starting point for any consideration of this issue has to be the terms of the letter of 30th September 1991 in which Mr Peters was asked to transfer the shares to a US corporation for the benefit of the five children. The circumstances which led to the shares being appointed out of the 1971 trust to the Husband rather than directly to a trust for his children are controversial. Abigail's evidence referred to earlier is that the change was due to the technical objection raised by Mr Peters. The Husband's evidence to Judge O'Brien, which mirrors evidence given by him in a 1998 deposition in the New York proceedings, was that he received the shares with a continuing intention to place them on trust for his children but that, as a result of tax advice received from Arthur Andersen, there had to be an extended procedure for placing the shares in trust which involved a transfer of them to the Wife and her then establishing a place of residence outside the UK. The Wife's evidence at the hearing was that they did, indeed, look at a house on the Isle of Man, although nothing came of it.

36. This evidence is, however, difficult to reconcile with the fact that the Techne shares were sold by the Wife in 1994 and that, since then, what are said to be trust assets have been treated by the Husband (and, until the divorce, also the Wife) as available to meet their personal expenses. The allegations made on behalf of Abigail and Leila in the New York proceedings were, as I have mentioned, that the Husband (with the Wife's assistance) procured the transfer of the shares from the trust by deception for his personal benefit by representing that the shares were to be held for the benefit of the children. In this context there are also issues as to whether Mrs Elma de Bruyne was persuaded to consent to the November 1991 appointment by the assurance that the shares were to be held on trust for her grandchildren or was in fact willing to consent on the basis that she knew and was content for them to be transferred to and managed by the Wife and was happy to accept a pension from Techne in lieu of income from the trust.

37. In her witness statement the Wife says that there was a significant argument at Duxford during a family meeting to discuss what became the September 30th letter, although she does not recall what was said. But in her oral evidence to Judge O'Brien she went much further. She described the 30th September letter as "a load of waffle by John to get control of Techne Corporation. The only way he was going to get other family members to consent was by these proposals". She said that at the time she thought that she was "part of the ruse by John to get control of the company". The judge quotes more of her evidence on this point in paragraph 32 of his judgment:-

> "… I didn't know anything about grandfather Norman wanting the assets to skip a generation. The momentum for changing the arrangements came from John. My understanding of this is that John wanted control of the Techne Corporation shares. I don't think that it shows that this trust was a genuine intention. I think this was a cunning trick on his part. Anne was getting property she wanted. It was beneficial to John and Anne but more so to John. That was my view at the time. When I agreed to the shares being put in my name I was assisting him on what I believed to be a trick".

38. The judge's conclusions on the facts are summarised by him in paragraph 58 of his judgment as follows:-

> "I come finally to the decisions that I make. I find it absolutely clear that father wanted to wind up the 1971 trust and substitute a regime that would give him effective control of the Techne shares and business, that he was the driving force in achieving that November 1991 rearrangement. He persuaded his sister Anne Cecile by giving her and her son property and money. He persuaded Elma by improving her pension provisions. He persuaded Norman, as I find, by a promise to establish a trust for his five children. By these means he achieved the winding up of the 1971 trust. His five children, for whom he purported to act, lost at least the chance of benefits under the 1971 trust. There is no doubt that he obtained the winding up of the 1971 trust at least in part on the basis of a promise to settle those 257 shares on his five children. When the winding up was effected by the deed of November 1991 the husband was under an obligation to settle those 257 shares upon his children. Of course, this obligation could have been enforced by Norman or Elma, or for that matter Anne Cecile."

39. Although there was a difference between the evidence of the Husband and Wife in relation to whether the Husband's stated intention to put the shares in trust for his children was genuine or no more than a device designed to procure the transfer of the shares out of the trust for his own benefit, the judge was satisfied that the representation made in paragraph 1 of the September 1991 letter agreement and in family discussions was the operative cause of the transfer. He accepted in terms a submission by Mr Kynoch that the grandparents only agreed to the transfer on the basis that the Husband would put the shares into a trust for the children.

40. There is no appeal against these findings of fact. The grounds of the Wife's appeal have been formulated as a challenge to the judge's conclusion that, on the facts found, a constructive trust arose in favour of the grandchildren in respect of the Techne shares. Accordingly we have not been supplied with notes or a transcript of the evidence nor has it been suggested that the findings made by the judge were not open to him on the evidence.

41. The judge was asked by Mr Kynoch to concentrate on the principles set out by Lord Bridge in *Lloyds Bank plc v Rossett* [1991] 1 AC 107 where the House of Lords

returned to consider the perennial problem of how to determine the beneficial ownership of a property purchased for occupation as a family home. In that case the property had been purchased and registered in the husband's sole name but, prior to the completion of the purchase, had been improved through the efforts of the wife. The judge rejected the wife's allegation that it had been expressly agreed that the property should be jointly owned but inferred from the work that she had done prior to completion the existence of a common intention that she should have an interest in the property. At page 132E Lord Bridge set out the question to be answered in these terms:-

> "The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.
>
> In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do."

42. This view of the law was regarded as outmoded and too narrowly stated by the majority of the House of Lords in *Stack v Dowden* [2007] 2 AC 432. Baroness Hale stated in her speech (at paragraph 60) that the search was "to ascertain the parties' shared intentions, actual, inferred or imputed with respect to the property in the light of their whole course of conduct in relation to it" and in paragraph 69 she set out various factors which might be relevant to this process. This approach is not uncontroversial and has been said by some commentators and practitioners to be

unworkable. But it is not necessary to enter into that discussion in order to determine this appeal.

43. Mr Crawford submitted to him, and the judge recognised, that the principles applicable to determining the existence of a so-called common intention constructive trust are not easily accommodated to the facts of the present case. All the children were minors in 1991 and it is artificial in the extreme to attribute to them and their father an agreement or common intention that the shares should be held on trust for them once released from the earlier settlement. As the judge put it in paragraph 46 of his judgment, the present case is very different from that involving a matrimonial home or extra-matrimonial home where the party seeking to establish a beneficial interest is *sui iuris* and says that he or she entered into the arrangement and perhaps carried out work or expenditure on the property in the light of an agreement or understanding that they would have an interest in it.

44. The judge recognised that it was somewhat artificial to fix the children with the necessary intention or understanding but was prepared to accept that the Husband's stated intention to hold the shares in trust for the children could be attributed to them through his acting as their guardian in relation to the November appointment and that the children had suffered the necessary element of detriment by ceasing to be discretionary beneficiaries under the 1971 trust. He therefore held that the Husband took the shares under the appointment on a constructive trust for the children or (if wrong about that) that the court could remedy the situation by imposing what is commonly referred to as a remedial constructive trust in their favour over the remaining assets.

45. Mr Crawford challenges these conclusions on much the same grounds as he did before the judge. He submits that it was legally impermissible for the judge to attribute to children as young as two a common intention of the kind described in cases like *Lloyds Bank plc v Rossett* given that they were both actually and legally incapable of having any effective intention or understanding in relation to the ownership of the shares. If the father's intentions were sufficient then they should have led in cases like *Jones v Lock* (1865) 1 Ch App 25 to the court upholding what it recognised as an incomplete declaration of trust.

46. His second point was that on the test laid down in *Lloyds Bank plc v Rossett* the beneficiary must have acted to his detriment in reliance on the common intention. In the present case there was no such detrimental reliance by the children. They did nothing consciously in response to the September 1991 letter. Moreover they were only ever discretionary beneficiaries under the 1971 trust and therefore had no necessary expectation of benefit under it.

47. Thirdly he criticises the judge's reliance in the alternative on a remedial constructive trust which he submits is not yet permissible under English law.

48. Much of this argument I agree with. It is, I think, artificial and unrealistic to decide the question whether the Husband took the shares in 1991 free of or subject to any trust by reference to a set of principles designed to resolve issues of beneficial ownership between adult co-habitees in a property. The children cannot be regarded as privy to any common intention or understanding in a real way. I also accept that the judge was wrong to rely in the alternative on the imposition of a remedial

constructive trust in respect of the disputed assets given the remarks of Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669 at page 716 and the decision of this court in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. But, in my view, the judge was nonetheless right to conclude that a constructive trust did arise on the making of the November 1991 appointment.

49. The authorities dealing with common intention constructive trusts provide only one example of a situation in which equity will impose a trust upon the owner or transferee of property based on the circumstances in which the property is acquired or dealt with. For a trust to be created the court has to be satisfied that it would be unconscionable for the legal owner to assert his legal interest in the property to the exclusion of the alleged beneficiaries. The fiduciary obligation which that involves arises most obviously in an express trust where the property is held under the terms of a trust instrument in which the interests of the beneficiaries are clearly identified. In such cases the trustee either receives the property subject to the beneficial interests created by the instrument of transfer or, in the case of an express declaration of trust, subjects property already owned by him to those interests. In the case of a constructive trust, the obligation is imposed upon him as a result of his unconscionable conduct.

50. In common intention constructive trusts the equity arises because it would be unconscionable for the owner of the property to be allowed to deny the co-habitee the interest which it was agreed or understood that he or she would have and in reliance on which the co-habitee acted to his or her detriment. In a case like *Lloyds Bank plc v Rossett* where the husband purchased the house with money from his own family trust, and the wife made no financial contribution to its acquisition but relied instead on works of improvement which she carried out to the property, some causal link is necessary in order to connect the work done to the agreement or understanding that the ownership should be shared and so deprive the husband of absolute ownership of a property which he had paid for. This requirement of detrimental reliance is closely bound up with the question of unconscionability and in the analogous context of proprietary estoppel has come to be regarded as something which ought properly to be considered as part of a broader inquiry into whether the repudiation of the assurance given was or was not reasonable in all the circumstances: see *Gillett v Holt* [2001] Ch 210 at page 232D.

51. There are, however, a number of situations in which equity will hold the transferee of property to the terms upon which it was acquired by imposing a constructive trust to that effect. These cases do not depend on some form of detrimental reliance in order to re-balance the equities between competing claimants for the property. They concentrate instead on the circumstances in which the transferee came to acquire the property in order to provide the justification for the imposition of a trust. The most obvious examples are secret trusts and mutual wills in which property is transferred by will pursuant to an agreement that the transferee will hold the property on trust for a third party. In neither case does the intended beneficiary rely in any sense on the agreement (he may not even be aware of it) but, in both cases, equity will regard it as against conscience for the owner of the property to deny the terms upon which he received it. It is not necessary in such cases to show that the property was acquired by actual fraud (although the principle would apply equally in such cases). The concept

of fraud in equity is much wider and can extend to unconscionable or inequitable conduct in the form of a denial or refusal to carry out the agreement to hold the property for the benefit of the third party which was the only basis upon which the property was transferred. This is sufficient in itself to create the fiduciary obligation and to require the imposition of a constructive trust. The principle is a broad one and applies as much to inter vivos transactions as it does to wills: see *Rochefoucauld v Boustead* [1897] 1 Ch 196; *Bannister v Bannister* [1948] 2 AER 133.

52. On the facts found by the judge, the Husband procured the appointment in his favour of the 257 Techne shares by agreeing in the September 1991 letter that they would be held for the benefit of the grandchildren. The direct appointment in his favour was the result on the judge's findings of the legal advice from Mr Peters referred to earlier and was not intended to alter the basis upon which the shares would be held.

53. The grandparents agreed to the appointment on the footing that the shares would be placed in trust for their grandchildren and, in the case of Mrs Elma de Bruyne, her consent was a pre-requisite to the appointment. The trustee exercised his power of appointment against this background and to give effect to the September letter agreement. In these circumstances, it is impossible, in my view, to regard the Husband as having been free to deal with the shares as his own. The assurance given in the September letter was that the shares would belong to the children and would be appointed out of the trust for that purpose. It was not merely a statement of intention or best endeavours as to what might happen at some indeterminate point in the future. As a result, the children were deprived of their interests in the shares as discretionary beneficiaries under the 1971 trust and have no interest in the shares unless the court can impose a constructive trust to give effect to their intended interests. Conversely the Husband obtained a transfer of the shares to which he had no greater entitlement than any other discretionary beneficiary and which, on the judge's findings, he would not have received but for the September 1991 agreement which he signed.

54. I can see no answer to the judge's conclusion that, in these circumstances, he should be bound by the agreement which he made. The fact that the children were not in any real sense party to that agreement is, to my mind, irrelevant. Their interests were protected by the 1971 trust so long as that subsisted and the trustee appointed the shares out of that settlement solely with a view to the children becoming entitled beneficially to the trust property.

55. For these reasons, I would dismiss the Wife's appeal. In the circumstances, I do not propose to deal with the additional grounds relied on by the children which add nothing to the appeal and which include as one of the grounds reliance on the doctrine of proprietary estoppel, the factual basis for which was never explored at the trial.

Sir Paul Kennedy :

56. I agree.

Lord Justice Thorpe :

57. I also agree.