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Ali v Dinc: Conditional Property Transfers and Equity's remedial half-way houses

Ali v Dinc [2020] EWHC 3055 (Ch) is an important case on equitable proprietary remedies and priority disputes under the Land Registration Act 2002. It provides helpful guidance on the circumstances in and the bases upon which equitable proprietary rights might arise in an effort to unwind or to give effect to a transaction where, whilst no party intended or understood that transaction to be gratuitous, it falls short of amounting to a valid or enforceable contract.

The facts

The claims were made by Mr Huseyin Ali (“C”), the previous registered owner of two freehold properties, against Mr Ismet Dinc (“D1”) the current registered freeholder, and against Mr Selahi Dinc (“D2”), a subsequently registered lessee, and against Charter Court Financial Services Limited (“D3”), a subsequently registered chargee. Both D2 and D3 derived their interests in the two relevant

properties (No. 19 and No. 67, referred to collectively as the “**Properties**”) from D1.

Those interests were complicated. The following is a summary only.

The Properties were transferred by C to D1 via signed transfer forms indicating that the transfers were for nil consideration. D1 then became the registered proprietor in place of C. Later in 2016, D1 gifted his brother, D2, a 999-year lease of the first floor of No. 67 (the “**Lease**”). On 2 March 2017, D1 granted a charge to D3 over No. 19 (the “**Charge**”) as security for a loan in the sum of c.£460,000 (the “**Loan**”). Both the Lease and Charge were registered.

No. 19 was C's home and C continued to occupy that property rent-free after the transfer. No. 67 was a rental property split into two flats. Before the transfer to D1, C had granted a 999-year lease of the ground floor



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flat to Mr Thompson for a premium of £295,000 and the first floor flat was let to an assured shorthold tenant. After both the transfer to D1, and the grant of the Lease to D2, C remained named as the landlord of both flats in No. 67, continued to receive rent from the same, and continued to pay the relevant utilities bills, insurance premiums and Council tax for both Properties.

There was a significant dispute of fact between C and

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C claimed various personal and proprietary remedies which C submitted were available regardless of which version of the facts the court found proven. Any finding that C had an equitable proprietary interest would require the court to consider whether C's earlier equitable interest took priority over the subsequent registered proprietary interests of D2's Lease and D3's charge.

D1 as to the circumstances in which the Properties had been transferred to D1. C's case was that the Properties had been transferred under an oral contract of sale pursuant to which C was entitled to the purchase price of £750,000 for No. 19 and £600,000 for No. 67 (a total sum of £1.35 million) and D1 was required to discharge a charge to Santander Charge securing a debt of c.£67,500 over No. 19 (as D1 did). By contrast, D1's case was that the Properties were transferred pursuant to "the Claimant's Plan" by which, D1 said, C had gifted him the Properties for him to use in order to raise finance to give back to C.

Neither account quite stacked up. Neither could explain why C had continued to reside in No. 19 or continued to receive rent from the flats in No. 67 or had continued to pay the relevant utility bills and other expenses. Mr Choudhury, a conveyancing solicitor who

had acted for C at the time of the transfers, had been told that C was transferring the Properties to his nephew. The Judge commented that she "[could] not resist the resist the inference that there [were] further facts known to both parties that [were] simply not ... put before the court" (at [203]).

C's claims

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Both C and D1 contended that their respective versions of the arrangement were sufficiently certain to have contractual force. The Judge

held, however, that neither side succeeded in proving satisfactorily the terms of their arrangement and that absent any clear agreed terms there could be no contract. Of course, even assuming that the terms had been clear any oral contract (whether on C or D1's version of events) would have been void by s. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 for want of writing.

However, the finding that there was no contract and that any contract that could have existed would have been void in any event, was not the end of the matter. Whilst no remedies directed to enforcing a contract were available, both proprietary and personal remedies were available to unwind the transaction to put the parties back in the position they were in before the transaction had been entered into. Further, the Judge considered that enforcing an intended contract because it is binding or unravelling it because it is not were not exhaustive of all the remedial options open to the court; there was a middle ground between the two. As the Judge put it, equity provides for a "number of remedial halfway houses" (at [229]) designed to prevent a

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- (a) a constructive trust***
- (b) a Quistclose resulting trust***
- (c) a presumed resulting trust***

...the Properties had been transferred on the basis of an intended contract which was void; both parties were under a personal obligation to make counter-restitution as a result; and, as D1 was on notice that restitution was warranted (D1's own case being that he had understood from the very outset that the Properties were not his to treat as his own (see [226]), the Properties were subject to a constructive trust in C's favour.

transferee asserting absolute ownership of a transferred asset in circumstances where that party must be taken to appreciate that the asset is not hers to treat as her own.

The Judge considered that there were three possible routes by which C could have an equitable proprietary interest in the Properties:

- (a) a constructive trust arising to effect restitution of what each party had received under the void and non-existent contract in order to return the parties to the status-quo ante;
- (b) a *Quistclose* resulting trust arising on the basis of the parties' mutual understanding that the Properties were not at D1's free disposal but were to be used exclusively for a specific purpose; and
- (c) a presumed resulting trust arising on the basis that, whilst the precise nature of what the parties had intended was not clear, it was no part of either party's case that the Properties had been gifted to D1.

Each of these is considered below.

C's Equitable Proprietary Interest

(a) Constructive Trust

The availability of restitutionary proprietary relief is uncertain on the state of authorities. As Lord Sumption stated in *Angove's Pty Ltd v Bailey* [2016] 1 WLR 3179 (at [30]) "*The exact circumstances in which a restitutionary proprietary claim may exist is a controversial question which has given rise to a considerable body of judicial comment and academic literature.*"

The starting point in the Judge's analysis in *Ali* was the House of Lords decision in *Westdeutsche* [1996] AC 669, one of the cases in the litigation concerning void swaps contracts (at [220]-[227]). The House of Lords held that the recipient of monies under a void contract did not hold these monies on a resulting trust from the date of receipt and considered that it would be undesirable to develop the law in that direction since that would prejudice third parties (unsecured creditors), produce commercial uncertainty and render the defendant recipient liable as a fiduciary

for use of the funds during the period between their receipt and discovery of the true circumstances at a time when the defendant had no knowledge that the funds were not his own property to deal with as he wished. On the authority of *Westdeutsche*, D1 and D2 submitted that the 'unravelling' of the transfer attracted only personal remedies in unjust enrichment, rather than any proprietary consequences.

The Judge rejected this submission: the Properties had been transferred on the basis of an intended contract which was void; both parties were under a personal obligation to make counter-restitution as a result; and, as D1 was on notice that restitution was warranted (D1's own case being that he had understood from the very outset that the Properties were not his to treat as his own (see [226]), the Properties were subject to a constructive trust in C's favour. Accordingly, the Judge considered that, accounting for the criticism of Lord Browne-Wilkinson's analysis in *Westdeutsche* and, therefore, taking the strictest view of Lord Browne-Wilkinson's analysis of the

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non-availability of proprietary remedies, a constructive trust was available on the facts of *Ali*. This is perhaps a more liberal application of the principles than those as articulated by Lord Sumption in *Angove's Pty Ltd v Bailey* who had proposed that “*the least that must be shown in order to establish a constructive trust*” when it comes to restitutionary proprietary claims would be that (i) the transferee’s intention is vitiated (whether because the transfer is made on the basis of a mistake or pursuant to a transaction that is subsequently rescinded); or (ii) that irrespective of the transferee’s intentions “*in the eyes of equity*” the transferred property had “*come into the wrong hands*” such as “*where it represents the fruit of a fraud, theft or breach of trust or fiduciary duty against a third party*” (see [30]).

(b) Quistclose Trust

The second route the Judge in *Ali* relied on was to say that, notwithstanding the court’s findings that “*the evidence put before the court was not sufficient to prove to the civil standard the true arrangement between the parties*” (see [31]), the evidence that was available as to the circumstances in which the transfer had taken place, and the basis upon which

the parties had conducted themselves since that transfer, justified a finding that D1 held the Properties subject to a *Quistclose* trust in C’s favour (such trusts taking their name from *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 and having been rationalised and explained on the basis of a resulting trust analysis by Lord Millett in *Twinsectra v Yardley* [2002] 2 AC 164 at [100]). On this reasoning, the Properties were not at D1’s free disposal but rather D1 held the Properties on trust for C subject to a power to use those Properties only for the purpose of raising finance for C’s benefit.

Most cases that have found a *Quistclose* trust have concerned a written contract recording the parties’ intention that the property (normally money) is transferred (normally on the basis of a loan or as an advance payment) on a condition that it will be used only for a nominated purpose (normally to pay a particular debt or in consideration for particular goods or services). In *Ali*, there was no such written contract and the transferred property was real property, but nonetheless the court was satisfied that there was a “*mutual understanding*” sufficient to attract a *Quistclose* trust:

D1’s understanding was clear that the Properties had been transferred to him in order to raise finance for C’s benefit and that he did not regard the Property as his own to treat as at his free disposal. Sarah Worthington QC also observed that this reasoning was consistent with and – unlike either of C or D1’s versions – capable of explaining why C had continued to reside in No. 19 and collect rent from No. 67 following the transfer (see [224]).

In most *Quistclose* trust cases, the purpose for which the property has been transferred is no longer achievable most often because the defendant recipient is insolvent. Unusually, in *Ali* the nominated purpose had not failed in its entirety but theoretically its achievement was still possible. However, the Judge did not consider this to be a bar to C’s ability to terminate the *Quistclose* trust. The reality was that the arrangement was not proceeding to plan, D1 was in obvious breach of the restriction on his power to use the Properties, and had kept the funds raised from the Properties (the Loan) for his own benefit rather than transferring those funds to C as he was obliged (as C’s fiduciary) to do (see [252]–[253]).

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Further remedial consequences followed from the court's finding that C had an equitable proprietary interest in the Properties whether under a constructive trust or a Quistclose resulting trust. In respect of the Loan funds received by D1, C was entitled to elect between either (a) personal remedies for equitable compensation for D1's breach of fiduciary duty to hand over the Loan funds or (b) proprietary remedies entitling C to trace the Loan funds and to assert proprietary claims to their identifiable proceeds...

Further remedial consequences followed from the court's finding that C had an equitable proprietary interest in the Properties whether under a constructive trust or a *Quistclose* resulting trust. In respect of the Loan funds received by D1, C was entitled to elect between either (a) personal remedies for equitable compensation for D1's breach of fiduciary duty to hand over the Loan funds or (b) proprietary remedies entitling C to trace the Loan funds and to assert proprietary claims to their identifiable proceeds (see [255]-[264]) (with the Judge observing that the costs of such a tracing exercise were likely to be disproportionate and since there was no suggestion that D1 was on the brink of insolvency or that D1 had used the Loan Funds to acquire an asset that had appreciated in value it would be unlikely to secure C any advantage (see [262])).

(c) Presumed Resulting Trust

The third route by which C retained an equitable proprietary interest in the Properties was by a presumed resulting trust on the basis of the presumption that C had not intended to make a gift to D1. D1 advanced no evidence to rebut that presumption; rather D1's case and evidence was that the transfer was intended to benefit C by allowing finance to be raised. Instead, D3 suggested that s.60(3) of the Law of Property Act 1925 had abolished the presumption of a resulting trust in relation to land. The Judge followed Chief Master Marsh's decision in *The National Crime Agency v Dong* [2017] EWHC 3116 (Ch) (which had been supported by the leading commentaries) on this point holding that s.60(3) did not bar the presumption of a resulting trust operating in relation to land.

Personal Restitutionary Remedies

The Judge also held that C was entitled to personal restitutionary relief, not because C had never received the purchase price for the Properties or because C had effected the transfer whilst labouring under a mistake but because the intended contract was void for uncertainty or for want of writing or had otherwise failed to materialise. No valuation of the personal restitutionary relief that would have been available as a result was attempted but any award would have been conditional upon C making counter-restitution of c.£67,500 (the value of the Santander charge D1 paid off).

The Priority Dispute

As a result of the foregoing, it was then necessary for the court to resolve the priority disputes arising between C, D2 and D3. There is much that is important about the Judge's analysis on these points.

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First, s. 26 of the Land Registration Act 2002 (“**LRA 2002**”) (which protects the rights and powers of a donee) did not prevent C from challenging the title of D2 or D3 under the Lease or the Charge. The suggestion that it could be derived from Lewison LJ’s remarks in *Mortgage Express v Lambert* [2016] EWCA Civ 555 to the effect that s. 26 prevents a donee’s title from being called into question. The Judge, however, was not persuaded that s. 26 of the LRA 2002 prevented a party from asserting a potentially overriding interest as against a registered donee. Rather, s. 26 was best understood as being directed at protecting the donee’s legal title not its priority, and therefore it did not prevent C from asserting that his equitable proprietary interest took priority as against D2 and D3 (see [313]).

Second, in order to determine whether C’s equitable proprietary interest took priority as an overriding interest it was necessary to consider precisely what that interest was under the constructive trust, the *Quistclose* trust or the presumed resulting trust:

- The Judge held that if D1

held the Properties on a constructive trust or a *Quistclose* trust then D1 acted properly in using the Properties to secure finance from D3 and to that extent C’s interest was overreached (though, as above, C would have a claim against D1 for D1’s failure to pay the Loan funds over to C). The same could not be said for the lease to D2. This disposition was not authorised by the limited terms which defined the *Quistclose* arrangement pursuant to which D1 held the property and had an equitable power to use the same. Accordingly, D3’s charge was not subject to any overriding interest held by C, but D2’s Lease was subject to C’s overriding interest.

- Alternatively, if C had an interest under a presumed resulting trust instead the Judge reached the same result but by a different route. This presumed resulting trust was atypical. Normally, presumed resulting trusts arise where the only evidence is of a gratuitous transfer where the transferee was not intended to take the benefit. The presumed

resulting trust ensures that the transferor retains the benefit in its entirety. However, in *Ali*, the presumed resulting trust had to be “*moulded*” to the circumstances (see [329]). C had understood from the outset that the Properties would need to be mortgaged to third parties in order to secure finance for him and that is what happened (save that D1 breached his obligation to transfer the raised funds to C). Therefore, C’s beneficial interest had to be “*pared back in order to achieve*” the parties’ “*intended objective*” (at [347]). The nature of C’s right, even under the presumed resulting trust, was such that it was a “*proprietary interest conditional on D1 using the Properties to raise the necessary funds*” – just as it was under the constructive trust and the *Quistclose* resulting trust. D3 also advanced an argument that C was not entitled to assert an overriding interest if his actions had given rise to the situation in which D3 made the loan to D1 in consideration for the security interest without knowledge of C’s (potential) overriding interest (see [331]). The

The result was that C was entitled to an order requiring D1 to re-transfer the Properties, and D1 and D2 were required to surrender the Lease. C recovered No. 19 subject to the charge in favour of D3, as well as recovering the value of the Loan funds (via a personal or proprietary remedy from D1).

One point to take away is the relative ease with which the court did find that equitable proprietary rights existed notwithstanding the court's finding that neither party had "presented sufficient evidence to establish the truth of their own version of the arrangement between the parties" (at [193]) and the Judge's suspicion that the true story was not before the court (at [203]).

court considered that this proposition stated the position in the authorities too broadly which were better rationalised as concerning the agency context where an agent has ostensible authority by virtue of a principal's representation to third parties.

Conclusion

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There is much that is notable about the decision and that could provide grounds for distinguishing the case in the future given the controversies and uncertainties which plague much of the legal concepts raised by C's claims.

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Absent any writing or, in fact, any sufficient evidence of the parties' intentions or the agreement reached between the parties as to the circumstance of the transfer, the Judge focused on the "*economic benefit*" which C had retained in the Properties, and which by contrast D1 did not enjoy, to reason that the nature of the arrangement was one that the law "*typically protect[s] via a trust*" (see [244]). The Judge also went further and held that it did not matter that C may not have intended

that the parties' arrangement would give rise to a trust or that it would otherwise attract any proprietary consequences (see [245]); C's case here, of course, was that C had divested himself of any form of ownership in consideration for the sum of £1.35 million pursuant to a contract of sale. Rather, what was "*absolutely crucial*" was that D1 understood that his use of the Properties was specifically restricted and fell short of encompassing "*all the normal incidents of full ownership*" (see [245]). This approach, which does not depend on a positive intention by the transferor but rather focuses on the understanding of the transferee, marks a looser application of the principles and requirements that apply where the creation of equitable proprietary rights is at stake.

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